Nadia Maccabiani

The Effectiveness of Social Rights in the EU

Social Inclusion and European Governance. A Constitutional and Methodological Perspective

FrancoAngeli
OPEN ACCESS

STUDI DI DIRITTO PUBBLICO

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TABLE OF CONTENTS

FOREWORD

The subject of the current study is quite popular: in periods of spreading inequalities, increasing social exclusion and increasing poverty, the effectiveness of social rights for social inclusion chiefly comes into focus.

Indeed, despite citizens being more equal than in the past due to the many fundamental Charters at the national, European and international levels that enshrine their rights, they are in reality growing substantially more unequal because of the lack of effectiveness of these same rights[1]. Consequently, the current pivotal issue is not whether to enact a new catalogue of social rights[2] able to face new socioeconomic challenges. On the one hand, the broad meaning of fundamental principles and values along with the existing constitutional social rights already fit the purpose[3]; on the other hand, the effectiveness of social rights falls behind formal catalogues and entitlements. Moreover, their judicial enforceability does not necessarily correspond to their effectiveness due to the boundaries of the reasonableness scrutiny in respect of the scope of political discretion and the difficulty faced by the most vulnerable people when bringing their claims before courts.

This is a common feature of the EU Member States. The Union system also facilitates externalities and spill-overs across national boundaries (even more so within the EMU). Consequently, troubles with lack of effectiveness of social rights and flaws of social inclusion deliveries, could be better assessed, drawing on the EU and its governance as a whole.

[1] L. FERRAJOLI, *L'Uguaglianza e le sue garanzie*, in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza – Atti del VI Convegno della facoltà di giurisprudenza – Università degli Studi Milano – Bicocca 15-16 Maggio 2008*, Giuffré, Milan, 2009, p. 39.

[2] J.H.H. WEILER, *Diritti umani, costituzionalismo ed integrazione: Iconografia e feticismo*, in *Quaderni costituzionali*, No. 3/2002, p. 529, states that the Union needs neither further rights within its lists nor more lists of rights; rather, what it really needs is the programmes and administrative structure to effectuate the existing rights. On the dispute again new social rights linked to the socioeconomic evolution, see S. SCAGLIARINI, *«L'incessante dinamica della vita moderna»: i nuovi diritti sociali nella giurisprudenza costituzionale*, in *www.gruppodipisa.it*.

[3] A. D'ALOIA, *Introduzione: I diritti come immagini in movimento: tra norma e cultura costituzionale*, in A. D'ALOIA (Edited by), *Diritti e costituzione: Profili evolutivi e dimensioni inedite*, Giuffré, Milan, 2003, p. XIV.

In this respect, legal studies have usually dealt with social inclusion and the implied social rights following a double path. On the one hand, they have spoken about ''transnational social inclusion'' (see Chapter II) according to the analysis of European secondary legislation protecting freedom of movement of workers and services and the relevant ECJ case law, stressing when they have worked as an «engine of integration»[4] among citizens of different member states by means of the opening of national boundaries for «transnational solidarity»[5]. On the other hand, they have spoken about the Europeanization of a language and the institutionalisation of a process[6] dating back to the 2000's Lisbon Strategy (see Chapter III), they have also denounced its policy-driven approach which is compatible with different policy frames and claimed for a targeted and rights-driven approach[7].

Our endeavour is to take a further step in the direction of the effectiveness of social rights for social inclusion in reference to more recent developments at the European level. Consequently, the focus would shift to other experimental ways better able to cope with the current multifaceted implications of social exclusion, poverty and inequalities for the purpose of effective and improved social inclusion. Indeed, this is an issue relevant not only for policy-makers and social scientists but for legal scholars too. As «the constitutional operating system often hums silently in the background and it is not necessary for the actors fully to perceive or articulate its impact»[8], legal scholars are expected to pick up and underline the main aspects of constitutional relevance implied in the process and steer it towards being constitutionally consistent. This is the background of our claim for an interdisciplinary dialogue with social scientists in reference to the implications underlying the use of social indicators within the European governance system, which has become more necessary after the latest evolution within the economic governance framework (Chapter IV).

[4] E. SPAVENTA, *What is left of Union citizenship?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and exclusion in the European Union*, in Collected Papers, Amsterdam Law School Legal Studies, Research Paper No. 2016-34 and Amsterdam Centre for European Law and Governance, Research Paper No. 2016-05, p. 31.

[5] M. FERRERA, *Towards an 'open' social citizenship? The new boundaries of welfare in the European Union*, in G. DE BURCA (Edited by), *EU law and the welfare state,* Oxford University Press, Oxford, 2005, p. 34; C. BARNARD, *EU citizenship and the principle of solidarity*, in M. DOUGAN, E. SPAVENTA (Edited by), *Social welfare and EU law,* Hart Publishing, Oxford and Portland, 2005, p. 166.

[6] K. ARMSTRONG, *Governing social inclusion — Europeanization through policy coordination*, Oxford University Press, Oxford, 2010, p. 16 ff.

[7] *Ibid.*, p. 258.

[8] J.H.H.. WEILER *The constitution of Europe*, cit., p. 223.

I.
THEORETICAL AND FACTUAL PREMISES

1. Social rights: a few general features

Social rights, with their highly political features, stand at the crossroads between complicated philosophical questions of social justice and the similarly complex issues of economic theory[1]. For constitutionalists, the starting point focuses rather on the legal nature of the social rights[2], which is part and parcel of the post-World War II European Social Model[3].

According to most of the legal doctrine, the social rights enshrined by the Italian Constitution are fundamental constitutional rights[4], not different in

[1] This entanglement of philosophy and economic theory became even more clear after the development of the "capabilities approach": see A.K. SEN, *La diseguaglianza,* il Mulino, Bologna, 2010 and M.C. NUSSBAUM, *Giustizia sociale e dignità umana. Da individui a persone,* il Mulino, Bologna, 2002.

[2] For a first general assessment of the issues implied by the social rights, see A. BALDASSARRE, *Diritti sociali,* in *Enc. giur.,* XI, Treccani, Roma, 1989; M. BENVENUTI, *Diritti sociali,* in *Digesto Disc. Pubbl.,* agg. V, Utet, Turin, 2012.

[3] The literature on the European Social Model is broad; it is sufficient to recall the following: for a constitutional perspective, C. PINELLI, *Modello Sociale Europeo e costituzionalismo europeo,* in *Rivista del diritto della sicurezza sociale,* n. 2/2008, p. 251 ff.; for a sociological perspective, C. SARACENO, *Il welfare. Modelli e dilemmi della cittadinanza sociale,* il Mulino, Bologna, 2013, pp. 27 ss.; A.M. GUILLEMARD, *Social Rights and Welfare: Change and Continuity in Europe,* in T.P. BOJE, M. POTŮČEK (Edited by), *Social Rights, Active Citizenship, and Governance in the European Union,* Nomos, Baden-Baden, 2011, p. 35 ff.; for a political perspective, F.W.SCHARPF, *The European Social Model: Coping with the Challenges of Diversity,* in *MPIfG Working Paper,* No. 8/2002, in *www.mpi-fg-koeln.mpg.de/pu/workpap/wp02-8/wp02-8.html*; for an economic perspective, C. MATHIEU, H. STERDYNIAK, *Le modèle social européen et l'Europe sociale*, in *Revue de l'OFCE*, No. 104/2008, p. 46 ff.

[4] On the nature of social rights such as the fundamental and inviolable rights, see A. BALDASSARRE, *Diritti della persona e valori costituzionali,* Giappichelli, Turin, 1997, p. 151 ff.; D. BIFULCO , *L'inviolabilità dei diritti sociali*, Jovene, Naples, 2003, p. 6-7; A. SPADARO, *I diritti* sociali *di fronte alla crisi (Necessità di un nuovo* «*Modello Sociale Europeo*»*: più sobrio, solidale e sostenibile),* in *www.rivistaaic.it,* No. 4/2011, p. 7. According to L. FERRAJOLI, *L'Uguaglianza e le sue garanzie,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni*

structure from the liberties[5], even with reference to those social rights that part of the doctrine defines as being "conditioned"[6]. Thus, the original doubts about their nature as a mere "political programme"[7] and their judicial enforceability have been resolved[8], as has the 80's dispute about their conflict

dell'uguaglianza – Atti del VI Convegno della facoltà di giurisprudenza – Università degli Studi Milano – Bicocca 15-16 Maggio 2008, Giuffré, Milan, 2009, p. 27, the social rights (along with the liberties) are fundamental rights; consequently, they should also be universal rights.

[5] According to A. PIZZORUSSO, *Le «generazioni» dei diritti nel costituzionalismo moderno,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* il Mulino, Bologna, 2010, p. 60-61, the difference in terms of types of judicial protection does not bring about any difference in structure between the social rights and the liberties, as both of them belong to the category of constitutional fundamental rights. For a discussion on the different doctrinal opinions with reference to the constitutional structure of the social rights, see B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, Giuffré, Milan, 2001, p. 20 ff. It is also worthwhile to recall that even that part of the doctrine which deems the social rights to be different in structure from the liberties believes that this does not prevent them from being considered as fundamental rights, see A. PACE, *Problematica delle libertà costituzionali – Parte generale,* Cedam, Padua, 2003, p. 150.

[6] For the distinction between conditioned or unconditioned social rights, see A. BALDASSARRE, *Diritti della persona e valori costituzionali,* cit., 1997, p. 214. In this respect, see also F. GIUFFRÉ, *La solidarietà nell'ordinamento costituzionale,* Giuffré, Milan, 2002, p. 116 ff. For a more nuanced approach, see D. BIFULCO, *L'inviolabilità dei diritti sociali*, cit., p. 8; C. SALAZAR, *I diritti sociali alla prova della giurisprudenza costituzionale,* in P. COSTANZO, S. MORDEGLIA (Edited by), *Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria,* Giuffré, Milan, 2005, p. 168. For the perspective of substantial equality acting as a counter-limiting principle to the financial constraints on the social rights, see C. PINELLI, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario,* in A. RUGGERI (Edited by), *La motivazione delle decisioni della Corte Costituzionale,* Giappichelli, Turin, 1994, p. 548 ff.

[7] For the distinction between constitutional principles and mandatory constitutional rules, see V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio,* Giuffré, Milan, 1952, p. 26 ff. For the relation between the normative structure of constitutional principles and the rights of a second or third generation, see A. PIZZORUSSO, *Le «generazioni» dei diritti nel costituzionalismo moderno,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 54 ff. The Italian Constitutional Court, since its beginning, has supported the interpretation that programmatic rules are mandatory rules, see B.PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, cit., 2001, p. 41.

[8] The theory according to which the social rights are «principles», and as such, not mandatory programmes and orientations addressed to the discretionary power of the legislature could be overcome if the social rights are grounded on fundamental principles, such as the equality principle (both in formal and substantial terms) and the fundamental value of human dignity. In this respect, see A. BALDASSARRE, *Diritti della persona e valori costituzionali,* cit., p. 152.

with the liberties, which was instead reversed based on the perspective that the social rights are aimed at the better enjoyment of the liberties[9].

Moreover, they are based on the fundamental values of human dignity and substantial equality (pursuant to Art. 2 and Art. 3, para. 2 of the Italian Constitution)[10], which presuppose a duty of solidarity[11], along with a redistributive role for nation-states[12].

[9] The mutually reinforcing implications between the social rights, equality and the liberties have been stressed by the doctrine since the expression by M. MAZZIOTTI DI CELSO, *Diritti sociali*, in *Enc. Dir.,* Vol. XII, Giuffré, Milan, 1964. In this respect, G. SILVESTRI, *Dal potere ai principi. Libertà ed uguaglianza nel costituzionalismo contemporaneo,* Editori Laterza, Rome-Bari, 2009, p. 73, recalling the methodological contrast between the supporters of equality in the function of liberty or liberty in the function of equality, deemed that the modern democratic constitutions overcome this univocal relationship, as we need to be free to be equal and equal to be free; consequently, liberty and equality are mutually enhanced. In the same direction, D. BIFULCO, *L'inviolabilità dei diritti sociali*, cit., p. 36, observes that not only in the Italian Constitution, but also in the other European Constitutions, the social rights are both fundamental values of democracy and the means addressed to more fully enjoy the liberties and to realise substantial equality.

[10] A. BALDASSARRE, *Diritti della persona e valori costituzionali,* cit., p. 151 ff. places these values in reference to the transformation from the 80's Liberal State to the 90's Socio-democrat State; as stressed by A. RUGGERI, A. SPADARO, *Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni),* in *Politica del diritto,* No. 3/1991, p. 348 ff., human dignity is a «super-constitutional» value that is inextricably intertwined with substantial equality, and it has the double dimensions of a right and a duty. Human dignity is the legal basis for the rights and liberties, and as such, from a solidarity perspective, it is also a limit on the liberties, see A. BARBERA, *Costituzione della Repubblica italiana,* in *Enc. Dir.,* Annali VIII, Giuffré, Milan, 2015, p. 333. C. SALAZAR, *I diritti sociali alla prova della giurisprudenza costituzionale,* in P. COSTANZO, S. MORDEGLIA (Edited by), *Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria,* cit., p.172, underlines that when we deal with the real dimension of a person instead of abstract individuality, we can observe that the social rights were born to protect the equal dignity of citizens against every diversity stemming from their «being» or «belong[ing]», as such a diversity is not created by them, but is imposed on them by external conditions.

[11] On the value of solidarity within the political and cultural background of the Italian system, see F. GIUFFRÉ, *La solidarietà nell'ordinamento costituzionale,* cit., p. 16 ff.

[12] For the distinction, from a constitutional perspective, between the production, distribution and redistribution of (economic) wealth, see G.U. RESCIGNO, *La distribuzione della ricchezza nazionale,* in *www.costitutionalismo.it,* No. 2/2018. See S. CASSESE, *La nuova costituzione economica,* Laterza, Bari-Rome, 2015, p. 291, who distinguishes the external or social distributive functions of the State from the internal distribution of financial resources among the branches of the public administration. According to V. ANGIOLINI, *Sulle premesse culturali dell'inserimento dei 'diritti sociali' nella Costituzione*, in *www.costituzionalismo.it*, No. 2/2008, the duty to satisfy and give effectiveness to the social rights pertains not only to the public powers but also to the private ones; consequently, they are judicially enforceable rights such as the economic and civil liberties, which are directly protected by the Constitution.

Nevertheless, when the social rights come into contact with a multilevel system such as the European Union[13], their stance becomes complicated.

On the one hand, several ongoing theoretical disputes can be recalled: the dispute about EU social impairment, the asymmetry between social, economic and market values[14] and the connected dominance of the neo-liberal and ordo-liberal theories[15], as well as the presupposed dispute about whether the EU

[13] For a reconstruction of the components of this system of relations, either vertically or horizontally, between the EU and the Member States, and its constitutional implications, see I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action,* in *Columbia Journal of European Law,* vol. 15, No. 3/2009, p. 379 ff. As underlined by the Italian doctrine, the European constitution and the national constitution are both partial, and they supplement each other to deliver a complete protection of rights; for this perspective, see A. RUGGERI, *Una Costituzione e un diritto costituzionale per l'Europea unita,* in P. COSTANZO, L. MEZZETTI, A. RUGGERI, *Lineamenti di diritto costituzionale dell'Unione Europea,* Giappichelli, Turin, 2014, p. 20.

[14] Plenty of doctrine could be cited, but it is sufficient to remember, among others, R.BIN, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa. Relazione finale*, in *www.rivistaaic.it*, No. 3/2014, p. 1 ff.; B. CARAVITA, *Il* federalizing process *europeo*, in *www.federalismi.it*, No. 17/2014, p. 5-6; M. DANI, *Il diritto pubblico europeo nella prospettiva dei conflitti*, Padua, 2013, p. 200 ff.; M. LUCIANI, *Diritti sociali e integrazione europea*, in *Politica del diritto*, No. 3/2000, p. 372; S. GAMBINO, *Diritti sociali e libertà economiche nelle costituzioni nazionali e nel diritto europeo,* in *www.crdc.unige.it.* For a critical approach to this common perspective, see C. PINELLI, *I rapporti economico-sociali fra Costituzione e Trattati europei,* in C. PINELLI, T. TREU (Edited by), *La Costituzione economica: Italia, Europa*, il Mulino, Bologna, 2010, p. 34, who recalls that there are many causes of inequalities, and that they are not exclusively linked to European law, and addresses the need for a reading of the European integration process that is less conditioned by a comparison with the welfare State dynamics; P. COSTANZO, *Il sistema di protezione dei diritti sociali nell'ambito dell'Unione europea,* in *www.giurcost.it*, p. 1 ff., focuses on the positive social trend of the EU despite its lack of competences and powers. For the rebalancing attempts of the Charter of Fundamental Rights in respect of the social rights, see M. POIARES MADURO, *The Double Constitutional Life of the Charter of the European Union,* in T.K. HERVEY, J. KENNER (Edited by)*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, Oxford, 2003, p. 286. At the time of the adoption of the Maastricht Treaty, part of the doctrine raised doubt about its compatibility with the fundamental principles of the Italian Constitution, with particular respect to the social rights; in this light, see M. LUCIANI *La Costituzione Italiana e gli ostacoli all'integrazione europea,* in *Politica del diritto,* n. 4/1992, p. 557 ff. From a social science perspective, it is sufficient to recall the «structural asymmetry» within the EU underlined by F.W. SCHARPF, *The Asymmetry of European Integration or Why the EU Cannot Be a 'Social Market Economy',* in *Socio-Economic Review*, No. 8/2010, p. 211 ff. It is also worthwhile to remember that market values have always been considered by philosophers as an enemy of equality within both perspectives, i.e. the individual perspective of liberty (individual initiative) and its collective side (prosperity and efficiency), as recalled by R. DWORKIN, *Virtù sovrana. Teoria dell'uguaglianza,* la Feltrinelli, Milan, 2002, p. 125.

[15] For the distinction between ordo-liberal and neo-liberal theories, and the passage from the initial ordo-liberal (German) approach to the current neo-liberal (American) approach, see O. CHESSA, *La Costituzione della moneta – Concorrenza, indipendenza della banca centrale,*

level is (or is not) endowed with an institutional structure that is democratically legitimate to undertake social (and redistributive) competences and the consequent issue of the better model to eventually manage them[16]. On the other hand, the risk of portraying them as mere political programmes, resolved at the national level, again arose at the European level in reference to the Charter of Fundamental Rights[17] and the ambiguity it still involves[18].

pareggio di bilancio, Jovene, Naples, 2016, p. 172 ff. Regarding the dominant German influence on this European stance, see G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?,* in *Quaderni costituzionali,* No. 1/2012, p. 36; A. GUAZZAROTTI, *Crisi dell'Euro e conflitto sociale. L'illusione della giustizia attraverso il mercato,* FrancoAngeli, Milan, 2016, p. 36. Further, A. BARBERA, *Costituzione della Repubblica italiana,* in *Enc. Dir.,* Annali VIII, 2015, Giuffré, Milan, p. 298, observes that the EU system has threatened neither the social profile of the national constitution nor the social rights.

[16] Beyond the previously mentioned social deficits at the EU level, another classical and underlying deficit has been addressed by the doctrine, i.e. the democratic deficit of the EU. In this respect, as stressed by M. CARTABIA, *Introduction,* in M. CARTABIA, N. LUPO, A. SIMONCINI (Edited by), *Democracy and Subsidiarity in the EU - National Parliaments, Regions and Civil Society in the Decision-making Process,* il Mulino, Bologna, 2013, p. 20: «Over the decades, many steps have been done in order to mend the 'original sin', starting with the relevant move towards the direct election of the European Parliament in 1979. Nevertheless, the EU seems hardly recovered from this lack of democracy». A. MANZELLA, *Verso un governo parlamentare euro-nazionale?,* in A. MANZELLA, N. LUPO (Edited by), *Il sistema parlamentare euro-nazionale,* Giappichelli, Turin, 2014, p. 5-6, rests on the «genetic change of the democratic deficit of the Union» during the years of the «Great Crisis» through the involvement of national institutions. It is worth recalling that the classical question about the democratic deficit at the EU level has become even more complicated as a consequence of the current crisis of representative democracy at both levels, i.e. national and European; in this respect, see G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?,* in *Quaderni costituzionali,* No. 1/2012, p. 42-43; G. FERRARA, *La crisi del neoliberismo e della governabilità coatta,* in *www.costituzionalismo.it,* speaks about the replacement of parliamentary institutions by the economic system, capitalism and global finance; P. MASALA, *Crisi della democrazia parlamentare e regresso dello Stato sociale: note sul caso Italiano nel contesto europeo,* in *www.rivistaaic.it,* No. 4/2016, p. 27. Regarding the trap that captures the EU level in reference to the vicious circle formed by the need for a more social Europe, the lack of political will for more shared sovereignty at the EU level and the underlying issues of the deficit of democratic legitimacy, see M. FERRERA, *Rotta di collisione. Euro contro Welfare?,* Laterza, Rome-Bari, 2016, p. 47 ff.; C. OFFE, *L'Europa in trappola. Riuscirà l'UE a superare la crisi?,* il Mulino, Bologna, 2014, p. 38 ff. deals with the different implications of the European political standstill. For a recent proposal on overcoming the lack of democratic legitimacy, with particular reference to the Eurozone, by means of a parliament composed of members elected by the national parliaments, see S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de democratization de l'Europe,* Seuil, 2017, p. 29 ff.

[17] The dispute about the constitutional nature of the social rights has had a reflex at the European level in reference to the European Charter of Fundamental Rights and the connected different perspective on the distinction between rights and principles. The doctrine on the argument is immense, but regarding the debate within the Convention, it is sufficient to remember G. AZZARITI, *Il futuro dei diritti fondamentali nell'era della globalizzazione,* in *Politica del diritto,* No. 3/2003, p. 333-335; regarding a perspective that aims to overhaul the

Consequently, at the supranational level, the constitutional status of the social rights instead is that of a "poor relation" with respect to the civil and political rights, which is typical of international systems[19].

2. Human dignity, equality, solidarity

The philosophical disputes against these intertwined fundamental values (human dignity, equality and solidarity) are broad. They are first aimed at reconciling liberty with equality[20], and second, at supporting the concept of equality of opportunity within the different theories of social justice[21] against

legal values of the social rights, S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective*, Cambridge University Press, Cambridge, 2006, p. 140 ff.; J. KENNER , *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility,* in T.K. HERVEY, J. KENNER (Edited by)*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, Oxford, 2003, p. 16; regarding the ambiguity underlying this distinction, as not only principles, but also rights, need to be implemented by European or national legislation, see P. RODIÈRE, *Les droits sociaux fondamentaux face à la Constitution européenne,* in L .GAY, E. MAZUYER, D. NAZET-ALLOUCHE (Edited by), *Les droits sociaux fondamentaux – Entre les droits nationaux et droits européen,* Bruylant, Brussels, 2006, p. 243. The issue gained new interest in reference to the European Pillar of Social Rights as it – ambiguously – enshrines twenty principles and rights, see COM(2017) final, 26th April 2017, *Proposal for an Interinstitutional Proclamation of the Pillar of Social Rights.*

[18] «[T]he Charter of Fundamental Rights of the European Union represents a constitutional paradox», as «[i]t reflects an emerging trend to agree on the use of the language of constitutionalism in European integration without agreeing on the conception of constitutionalism underlying such language», as stressed by M. POIARES MADURO, *The Double Constitutional Life of the Charter of the European Union,* in T.K. HERVEY, J. KENNER (Edited by)*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, cit., p. 269.

[19] As stressed by L. GAY, E. MAZUYER, D. NAZET-ALLOUCHE (Edited by), *Les droits sociaux fondamentaux – Entre les droits nationaux et droits européen,* cit., p. 13, the issue of the social rights within the international law framework has played the role of «poor relation» with respect to the civil and political rights.

[20] According to R. DWORKIN, *Virtù sovrana. Teoria dell'uguaglianza,* cit., p. 124, equality is not conceived as the enemy of liberty; on the contrary, it facilitates the effective enjoyment of other liberties.

[21] It suffices to quote the theory of J. RAWLS, *A Theory of Justice. Revised Edition,* Oxford University Press, Oxford, 1999, p. 47 ff. who articulates two principles of justice; the first requires equality in the assignment of basic rights and duties, and the second deems socio-economic equality to be reasonable only if it results in compensating benefits for everyone; a step further is taken by the capabilities approach developed by A.K. SEN, *La diseguaglianza,* cit., p. 115 ff. For a reconstruction of the philosophical theories on social justice over time, see M. CLAYTON, A. WILLIAMS (Edited by), *Social Justice,* Wiley-Blackwell Publishing, Malden-Oxford-Victoria, 2004, p. 37 ff. Moreover, for a description of the different philosophical

the background of the awareness that every aspect of human diversity is social diversity, and consequently, every obstacle which creates diversity among people is deemed to originate in removable economic and social causes[22].

From a constitutional perspective, following the classical approach when addressing the social rights, they are deemed to rest on formal and substantial equality[23], which, in turn, has its axiological basis within the fundamental value of human dignity[24]. Moreover, the implied solidarity entails not only the relationship of citizens with public authorities, but also – in horizontal terms – the relationship within the social community in which they live[25]. As clearly stated, human dignity is «equal social dignity» which works as a «trait d'union» between a static and a dynamic approach to equality by means of the social rights[26].

At the national level, Article 3 of the Italian Constitution[27] enshrines both formal equality, which is equality of status, and substantial equality, which is

models of equality of opportunity, see L.A. JACOBS, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice,* Cambridge University Press, Cambridge, 2004, p. 15. The author proposes a new «three-dimensional model of equal opportunities [as] an innovative advance on how the concept of equality of opportunity has been viewed in treatments of egalitarian justice»; in particular, he articulates these three dimensions as procedural fairness, background fairness and stakes fairness.

[22] L.A. JACOBS, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice,* cit., p. 7.

[23] A. BALDASSARRE, *Diritti della persona e valori costituzionali,* cit., p. 152. But as pointed out by B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, cit., p. 193, the social rights stem chiefly from substantial equality, as they imply a public intervention to correct the unequal distribution of resources provided by the market with the aim of establishing equality (i.e. equality of opportunities).

[24] G. SILVESTRI, *Dal potere ai principi. Libertà ed uguaglianza nel costituzionalismo contemporaneo,* Editori Laterza, Rome-Bari, 2009, p. 85. It is worthwhile to recall that according to the theory developed by A. SOMEK, *The Cosmopolitan Constitution,* Oxford University Press, Oxford, 2014, p.9, constitutionalism 2.0 «cannot be adequately understood without reconstructing the shift from liberty» (proper for constitutionalism 1.0) to «dignity» and the connected universal values of freedom, equality and solidarity.

[25] F. GIUFFRÉ, *La solidarietà nell'ordinamento costituzionale,* cit., p. 111. E. ROSSI, *Agire per la tutela dei diritti oggi: alcune considerazioni,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 453-454, observes that the Italian Constitution enshrines not only the centrality of persons in their individual dimension, but also in their social dimension with the consequent solidarity implications within the community.

[26] G. SILVESTRI, *Uguaglianza, ragionevolezza e giustizia costituzionale,* in M. CARTABIA, T.VETTOR (Edited by), *Le ragioni dell'uguaglianza,* cit., p. 9 ff.

[27] G. SILVESTRI, *Uguaglianza, ragionevolezza e giustizia costituzionale,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza,* cit., p. 3, observes that equality is adopted by modern constitutions not only as an aim, but also as an essential feature of the form of the State. L. FERRAJOLI, *L'Uguaglianza e le sue garanzie,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza* cit., p. 25, makes a distinction between the first and second

equality chiefly through redistributive policies[28]. The first paragraph deals with the formal concept of equal treatment, and the second addresses the positive task charged on the Italian State[29]. In this respect, Art. 3, para. 2 of the Italian Constitution states that the Italian Republic has the duty «to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country»[30]. This provision, according to the common interpretation, stands for equality of opportunity, i.e. filling the initial gap of social impairment and providing each person with the starting tools to compete on an equal footing in the enjoyment of social, political and economic life[31]. Moreover, this dynamic and positive perspective implies not

paragraphs of Article 3 of the Italian Constitution, observing that the first addresses «diversities» of identity and the second «diversities» in material and social conditions; diversities of identity have equal value and – as such – must be valorised, and inequality in material and social life must be removed.

[28] L.A. JACOBS, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice,* cit., p. 9, observes that equal opportunities and the implied egalitarian justice encompass not only formal equality (a lack of discrimination) but also substantive equality by means of social policies with redistributive purposes in order to remedy class inequalities.

[29] There may be a contradiction between the positive duty of intervention that Article 3, para. 2 of the Italian Constitution places on the Italian Republic and the limitation of it enshrined by Article 118 by means of the subsidiarity principle, which aims at limiting public intervention to those cases in which private initiative is neither sufficient nor adequate; in this light, see G.U. RESCIGNO, *La distribuzione della ricchezza nazionale,* in w*ww.costituzionalismo.it,* No. 2/2018. Article 3, para. 2, is a groundnorm for human dignity and substantial equality, but it must also be harmonised with other constitutional values and principles; in this light, see A. D'ALOIA, *Eguaglianza sostanziale e diritto diseguale: contributo allo studio delle azioni positive nella prospettiva costituzionale,* Cedam, Padua, 2002, p. 7.

[30] For a reconstruction of the concept of substantial equality post-World War II and for the differences between commutative equality and distributive equality (encompassing both the regulation of private autonomy for the protection of the community and the right to social benefits and services), see A. GIORGIS, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale,* Jovene, Naples, 1999, p. 8 ff. The author observes that the constitutionalism of the 90s tried to protect rights from politics (the majority party) and from market forces (p. 49); consequently, the artificial nature of the interventions aimed at overcoming inequalities has incorrectly led to the description of the relevant rights as «social» (p. 51).

[31] On the constitutional incorporation of the principle of equality in the democratic Constitutions of the 90s, see M. FIORAVANTI, *Uguaglianza e Costituzione: un profilo storico,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza,* cit., p. 47. On the theoretical and constitutional features of the model of the State described as the "welfare state", such as a successor of the liberal State qualified by public policy intervention and fiscal levy aimed at redistributive purposes in favour of the complete well-being of people, irrespective of their ability to produce income, see P. CARROZZA, *Riforme istituzionali e sistemi di welfare,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 207. As stated by D. BIFULCO, *L'inviolabilità dei diritti*

only public intervention to support those who are in need (by means of redistributive policies), but also – and conversely – public intervention to limit the rights of the wealthy to avoid excessive inequality and abuse by the latter against the former[32].

At the European level, the European Charter of Fundamental Rights makes reference to formal equality (Article 20), but it does not contain any general provision for substantial equality[33]. However, in this last respect, as underlined by part of the doctrine, human dignity, which is enshrined in Chapter I and Article I of the Charter, has two dimensions. The first «is respect of human dignity, which impl[ies] an obligation not to interfere with the enjoyment of dignity and rights», as well as the prohibition of discrimination on any ground. The second is «the duty of dignity protection» which «entails positive action from the state and requires variable degrees of public engagement and support… the degree of dignity protection will therefore vary according to the political visions and priorities of the government protection», although this discretion is limited by the «absolute dignity core»[34]. Accordingly, when the Charter specifies the rights underlying redistributive policies, such as the right to social protection and assistance (Article 34), it makes a «renvoi» to the national welfare systems[35], while the

sociali, cit., p. 132, Article 3, para. 2 of the Italian Constitution does not stand for an ideologically strong distributive justice; it rather establishes a fairer compromise that takes into account the factual inequalities and charges the State with the duty to remove them through the social rights. On the criteria adopted by the Italian Constitution to choose the beneficiaries of the social rights, see S. CASSESE , *Teoria e pratica dell'eguaglianza,* in *Giornale di diritto amministrativo*, No. 11/2000, p. 1157 ff. On the traditional means of the welfare State, see S. CASSESE, *La nuova costituzione economica,* Laterza, Bari-Rome, 2015, p. 24. On the risk that equality of opportunity will reduce the concern to mere «sufficiency of opportunity», see M. DELLA MORTE, *Costituzione ed egemonia dell'eguaglianza,* in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale. Atti del convegno di Campobasso 19-20 giugno 2015,* Editoriale Scientifica, Naples, 2016, p. 3. On the meaning of the adjective «social» enshrined in several Articles of the Italian Constitution and its relationship with redistribution and equality purposes, see O. CHESSA, *La Costituzione della moneta – Concorrenza, indipendenza della banca centrale, pareggio di bilancio,* Jovene, Naples, 2016, p. 16 ff.

[32] In this sense, see F. SORRENTINO, *Eguaglianza formale,* in *www.costituzionalismo.it,* No. 3/2017, p. 4.

[33] A. CELOTTO, *Art. 20. Uguaglianza,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (Edited by), *L'Europa dei diritti – Commento alla Carta dei diritti fondamentali dell'Unione Europea*, il Mulino, Bologna, 2001, p. 169.

[34] C. DUPRÉ, *Human Dignity in Europe: A Foundational Constitutional Principle*, in *European Public Law*, No. 2/2013, p. 337-338.

[35] A. GIORGIS, *Art. 34. Sicurezza sociale e assistenza sociale,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (Edited by), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea,* cit., p. 241-242. Indeed, the European Charter has a compromising nature when it makes reference to the social rights, using the language of social policies rather than fundamental rights, in this respect, see P. BIANCHI, *I diritti sociali dopo Lisbona: prime risposte*

formal side of the equality principle (equal treatment) has experienced wide development by means of the European Court of Justice's case law[36].

Going further along the classical doctrinal stance in reference to the social rights, beyond human dignity and equality, we encounter the duty of solidarity, which is rooted – in turn – in these same values[37].

Historically, the boundaries of solidarity have been national[38]. Common traditions and sacrifices have intertwined the roots of the people[39] and have

della Corte di giustizia, M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 125.

[36] For the features of and developments in the ECJ's case law, see O. DE SCHUTTER, *Les progrès de l'égalité de traitement dans l'Union européenne: la lutte contre les discriminations au service du marché,* in *L'Année Sociale 2000,* 2000, p. 121 ff. For the evolution of the equality of treatment principle beyond its original boundaries (the free movement of goods, persons and capital), see K. LENAERTS, *The Principle of Equal Treatment and the European Court of Justice,* in *Европейски правен преглед*, Vol. 8, 2014, p. 8 ff.

[37] On social duties, see G. LOMBARDI, *Doveri pubblici (dir.cost.),* in *Enc. del diritto,* agg. VI, Giuffré, Milan, 2002. For solidarity as a common basis of the constitutional social rights, see B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, Giuffré, Milan, 2001, p. 85; F. GIUFFRÉ, *La solidarietà nell'ordinamento costituzionale,* cit., p. 103 ff. From a sociological perspective, solidarity makes reference to the goal of correcting social imbalances, see C. BARBIER, F. COLOMB, *EU Law as Janus Bifrons, a Sociological Approach to* «*Social Europe*», in *European Integration Online Papers,* vol. 16, No. 1/2012, Article 2, p. 1 ff.; from an economic perspective, it takes into account the means of achieving this target, which involve the intervention of the State through redistributive policies within the Keynesian framework. For the link between the viability of the social state, the correction of inequality and the progressive tax, see T. PIKETTY, *Capital in the Twenty-First Century,* The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2014, p. 493 ff.

[38] For a reconstruction of the historical evolution of the concept of solidarity, the beginning of its social features (beyond formal equality and for substantial equality), its relation to redistributive policies and the welfare system, as well as the social rights, see S. GIUBBONI, *Solidarietà*, in *Politica del diritto*, No. 4/2012, p. 525 ff. P. ROSANVALLON, *La società dell'uguaglianza,* Castelvecchi, Rome, 2013, p. 196, underlines the de-individualisation and the connected valorisation of equality and solidarity within the approach of the État Providence and its redistributive policies at the beginning of the XX. V.E. PARSI, *La fine dell'uguaglianza. Come la crisi economica sta distruggendo il primo valore della nostra democrazia,* Mondadori, Milan, 2012, p. 171, recalled that the original matrix of the term «fraternité» of the French revolution was dual: On the one hand, it was linked to national identity, and on the other hand, it was open to a universal dimension. M. FERRERA, *Trent'anni dopo. Il welfare state europeo tra crisi e trasformazione,* in *Stato e Mercato,* No. 81/2007, p. 344, underlines the difficulty for non-citizens in entering the space of solidarity of other States, above all, when the social rights are at stake. A. SOMMA, *Diritto comunitario e patrimonio costituzionale europeo: cronaca di un conflitto insanabile,* in P. COSTANZO, S. MORDEGLIA (Edited by), *Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria,* cit., p. 117, underlines the conflict between common European constitutional traditions and European law, as the former rest on solidarity in the two dimensions (vertical and horizontal), and the latter rests on a liberal matrix. On the universal nature of the welfare state as an implied corollary of the constitutional value

cultivated the acceptance of both the principle of majority – in political terms[40] – and the principle of solidarity through social justice – in philosophical and sociological terms. These two principles are constitutionally translated into democracy and equality, which are – respectively – the formal and social sides of legitimacy[41].

Consequently, many unresolved institutional questions emerge when we try to connect solidarity to the European level[42].

First, there is the issue of the institutional nature of the EU and the consequent question of the existence of a European demos; a substantial amount of doctrine has discussed this from philosophical, legal or political perspectives. The doctrinal positions could be grouped within two main visions: on the one hand, those preferring to preserve national sovereignty and national diversities, and on the other hand, those leaning towards a federalist solution[43].

Within this framework, it is evident that any discourse on European solidarity might be cut off at the outset if the idea of the complete absence of a

of solidarity, see F. PIZZOLATO, *Il minimo vitale. Profili costituzionali e processi attuativi,* Giuffré, Milan, p. 11.

[39] In this respect, it is sufficient to cite L. DUGUIT, *Solidarietà sociale e coscienza nazionale*, in *www.costituzionalismo.it*, No. 1/2016, p. 17 ff., translated by G. Montella.

[40] F.W. SCHARPF, *Governare l'Europa. Legittimità democratica ed efficacia delle politiche dell'Unione Europea,* Bologna, 1997, p. 13 ss.

[41] For this distinction, see J.H.H. WEILER, *The Transformation of Europe,* in J.H.H.WEILER (Edited by), *The Constitution of Europe,* Cambridge University Press, Cambridge, 1999, p. 84. As stressed by P. ROSANVALLON, *La società dell'uguaglianza,* cit., p. 17 ff., democracy cannot be reduced to its political form, as equality is its essential core, which features the social form of democracy.

[42] It is worthwhile to remember the innovative reading given to European solidarity by A. GUAZZAROTTI, *Unione Europea e conflitti tra solidarietà,* in *www.costituzionalismo.it,* No. 2/2016, p. 143 ff., in putting together the two sides of European solidarity: on the one hand, the classical transnational solidarity between migrant citizens, and on the other hand, the more recent normative and positive solidarity between the Member States within the mechanisms of financial assistance that complement the negative solidarity built on budgetary discipline. On the different positions regarding the concept of solidarity and its relation to the EU, see K. NICOLAIDIS, J. VIEHOFF, *The Choice for Sustainable Solidarity in Post-Crisis Europe,* in *Europe in Dialogue,* No. 01/2012, p. 23 ff. In particular (p.34), they stress that solidarity implies a theory of social justice in terms of redistributive justice and the related problem of a sustainable solidarity.

[43] For this distinction, see K. LENAERTS, *Democracy, Constitutional Pluralism and the Court of Justice of the European Union,* in L. VAN MIDDELAAR , P. VAN PARIJS (Edited by), *After the Storm. How to Save Democracy in Europe*, Lannoo Publishers, Tielt, 2015, p. 125-127. For a reconstruction of the difficulties in creating a suitable nomenclature to classify the European polity, see J.H.H. WEILER, *European Democracy and its Critics: Polity and System,* in J.H.H. WEILER (Edited by), *The Constitution of Europe,* Cambridge University Press, Cambridge, 1999, p. 270.

European people is accepted and is replaced by the concept of consumers of Europe[44]. Conversely, another part of the doctrine has preferred the more elaborate notion of multiple demoi, refusing to reduce the European people to the *homo oeconomicus* and stressing the civilising pathos of the integration process[45].

Second, although the deficit in input legitimacy might be positively resolved (by part of the doctrine), the different question of the feasibility of a shift of the social and redistributive policies to the European level has been left unaddressed[46]. From this point of view, a lack of output legitimacy makes this solution difficult, as highly conflicting interests would block the decision-making process at the European level for most of the more significant social topics[47]. At any rate, before a shift of social competences to the European level, the different social models[48], i.e. the different mix of measures adopted to address social inequities by the Member States (which increased after the Easter enlargement), are overwhelmingly difficult to address in terms of real social convergence within the EU. However, they are only a few of the many (theoretical, legal, political, sociological and economic) problems that have

[44] U. HALTERN, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination,* in *European Law Journal,* vol. 9, No. 1/2003, p. 41.

[45] J.H.H. WEILER, *To be a European Citizen: Eros and Civilization,* in J.H.H. WEILER (Edited by), *The Constitution of Europe,* cit., p. 344 ff. Another part of the doctrine believes that «the evolving political institutions of the European Union can help to create a political demos for the European Union, a demos which could both demand and make possible a genuinely democratic life for the Union. We believe, in particular, that European elections with clear political choices could help to facilitate the emergence of such a demos»; consistently, the Westminister model was suggested, and in this light, see V. BOGDANOR, *Legitimacy, Accountability and Democracy in the European Union,* in *A Federal Trust Report,* 2007, p. 19.

[46] This is a core and very difficult question to address. As underlined by S. SCIARRA, *Ci sarà una solidarietà europea*?, in *Rivista di diritto della sicurezza sociale*, No. 1/2016, p. 8, when inequalities increase, solidarity should be reinforced; the problem is determining who must act for that purpose.

[47] See F.W. SCHARPF, *Governare l'Europa. Legittimità democratica ed efficacia delle politiche dell'Unione Europea,* cit., p. 113 ff. Consistently, G.D. MAJONE, *Europe's 'Democratic Deficit': The Question of Standards,* in *European Law Journal,* vol. 4, No.1/1998, p. 27-28, observes that redistributive policies cannot work efficiently at the EU level, as they are founded on a political process steered by majoritarian means.

[48] In reference to the different types of Social Models, it is sufficient to recall the volume of G. ESPING-ANDERSEN, *The Three Worlds of Welfare Capitalism,* Princeton University Press, Princeton, 1990, p. 26 ff., which adopted a comparative approach, as «only comparative empirical research will adequately disclose the fundamental properties that unite or divide modern welfare states» and determines the different welfare state regimes (liberal, corporatist, social-democratic) in relation to the different arrangements of the State, the market and the family .

emerged within the discourse aimed at elevating social competences to the European level[49].

Against this background, the initial choice of the Founding Fathers to leave the welfare state at the national level and to shift the market boundaries to the European level is understandable. In this sense, the choice was neither blind nor ideological; rather, it was in line with the issues discussed above: the trust in functionalism (Europe *pas à pas*) and the implied trust in the virtue of the Single Market to improve and promote the overall well-being of the European people[50].

Nowadays, *vis à vis* the emergency affecting the effectiveness of social rights, it would not be proficient to become immobilised by discussion about a future possible scenario shifting social competences to the European level which – in the current political deadlock – seems far from being realised; conversely, this emergency demands more concrete and close suggestions.

3. The effectiveness of social rights

The effectiveness of the social rights implies that there are different steps and layers that must be addressed for them to be adequately accomplished[51]; moreover, this happens with respect to the social right to social inclusion.

First, the question of their sufficient and appropriate implementation arises[52], with the consequent need to safeguard – over time – their essential

[49] Other troubles arise, for instance, from the need not only for input and output, but also «throughput legitimacy», which «builds upon yet another term from systems theory, and is judged in terms of the efficacy, accountability and transparency of the EU's governance process along with their inclusiveness and openness to consultation *with* the people… the quality of governance processes, and not only the effectiveness of the outcomes and the participation of the citizenry, is an important criterion for the evaluation of a polity's overall democratic legitimacy»; in these terms, see V.A. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput',* in *Political Studies,* Vol. 61, No.1/2013, p. 2-3.

[50] S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective*, cit., p.90 ff.

[51] B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, cit., 2001, p.195 ff. treats widely the «complex dimension» of the social rights.

[52] P. CARROZZA, *Riforme istituzionali e sistemi di welfare,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 214, stresses that a public system of production and distribution of the welfare services financed by general taxation is a first essential step to assure the effective and concrete take-up of the relevant social rights.

core[53] from any eventual diminished or reduced protection[54] in striking the balance with other conflicting values, primarily those of a financial and economic nature[55]. Moreover, not only is the question of their enforcement – at the administrative and judiciary level –at stake[56], but also that of their effective take-up *vis à vis* the multifaceted features of the needs they address[57].

For many reasons, there may be a gap between their constitutional entitlement, their statutory implementation, the means concretely built to realise them, and their effective ability to reach the addressed persons. That is to say, a hiatus can be tracked between the constitutional entitlement of the social rights, together with their legislative and administrative implementation, and their ability to effectively deliver equality and social dignity[58]. Thus, regardless of

[53] U. BECK, *Security from a Legal Perspective,* in *Rivista del Diritto della Sicurezza Sociale,* No. 3/2015, p. 518, states that security against economic and social risks «can only be achieved if there have been constitutional provisions which can either prohibit the alteration of an already granted individual position or which would imply a State's obligation to maintain, or establish respectively, a certain level of social protection. Such obligations do… actually exist although they follow from different legal mechanisms: social state principles, social rights, human dignity». In reference to the Italian constitutional framework, and in more concrete terms, the doctrinal distinction between a sufficient or adequate mixture of measures to deliver equity and the improvement of well-being is described by L. TRUCCO, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, in *www.gruppodipisa.it,* p. 12.

[54] For the problem of the «irreversible» protection of the social rights and their minimum content, see, A. GIORGIS, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale,* Jovene, Naples, 1999, p. 128.

[55] C. SALAZAR, *La Costituzione, i diritti fondamentali, la crisi: «Qualcosa di nuova, anzi d'antico»?,* in B. CARUSO, G. FONTANA (Edited by), *Lavoro e diritti sociali nella crisi europea – Un confronto tra costituzionalisti e giuslavoristi*, il Mulino, Bologna, 2015, p. 112 ff.; L. CARLASSARE, *Diritti di prestazione e vincoli di bilancio*, in *www.costituzionalismo.it*, No. 3/2015, p. 149; A. MANGIA, *I diritti sociali tra esigibilità e provvista finanziaria,* in *www.gruppodipisa.it,* p. 7 ff.

[56] For the distinction between the entitlement of rights and their enforcement (which is the concrete "quantity" of rights that receives effective protection), see E. ROSSI, *Agire per la tutela dei diritti oggi: alcune considerazioni,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* cit., p. 451.

[57] From a different perspective, A. SPADARO, *I diritti* sociali *di fronte alla crisi (Necessità di un nuovo «Modello Sociale Europeo»: più sobrio, solidale e sostenibile),* in *www.rivistaaic.it,* No. 4/2011, p. 7, points out the factual side of the social rights, although in relation to the need to ascertain their «feasibility» in terms of effective present and future economic sustainability.

[58] On the need for legal studies to address the consequences rather than the mere entitlement of the social rights, see C. PINELLI, *I rapporti economico-sociali fra Costituzione e Trattati europei,* in C. PINELLI, T. TREU (Edited by), *La Costituzione economica,* cit., p. 32. On the failure of the social rights to reach their beneficiaries in reference to the organs competent to choose or select these beneficiaries, see S. CASSESE, *Teoria e pratica dell'eguaglianza,* in *Giornale di diritto amministrativo*, No. 11/2000, p. 1158.

the abundance of constitutional, legal and administrative provisions for the fundamental social rights, their capacity to meet real social needs may fall behind[59]. Similar failures may stem not only from flaws within the structure of their judicial review, which implies a reasonableness scrutiny and encounters the boundaries of political discretion[60], but may also arise beyond them: As correctly stressed, the justiciability of the social rights does not necessarily entail their effectiveness[61].

In this last respect, the current spread of social exclusion and poverty requires more attention to these layers of effectiveness of the social rights. This is a question that goes beyond their judicial enforceability, and although it is more factual in nature as it entails the proper take-up of the social rights, it still occupies a pivotal stance for constitutional studies because of its deliveries regarding the fundamental principles of substantial equality and dignity.

As highlighted in the 2017 Report of the Social Protection Committee of the EU, «nearly half of Member States have substantial room for improvement of the effectiveness» of social inclusion and social protection[62]. Moreover, as shown by a 2015 Report of Eurofound, even in some European Member States where the social rights are well implemented, there is a disconnection that can be tracked between the benefits provided and the entitled people, wherein the former do not reach the people for whom they are intended, and thus, fail to fulfill their specific aim. It showed that although benefit systems differ considerably among the EU Member States, non-take-up is a common issue across the Member States, i.e. there are groups of people entitled to benefits but not receiving them[63]. This makes several points

[59] S. GAMBINO, *Diritti sociali e libertà economiche nelle costituzioni nazionali e nel diritto europeo,* in *www.crdc.unige.it*, p. 5, stresses the current gap between the constitutional entitlement of the social rights and their effectiveness within the European Social Model.

[60] In reference to the peculiar nature of the judicial review delivered by the Italian Constitutional Court *vis à vis* the social rights, see B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, cit., p. 201 ff. For the different roles of the legislature, the Constitutional Court and the Common Judges with respect to the social rights, see A. GIORGIS, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale,* Jovene, Naples, 1999, p. 57 ff.

[61] D. ROMAN, *La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social*, in *La Revue des droits de l'homme,* No. 1/2012, p. 19.

[62] See Social Protection Committee – Annual Report 2017, p. 9 ff.

[63] Eurofound (2015), *Access to Social Benefits: Reducing Non-take-up,* Publications Office of the European Union, Luxembourg, p. 1 of the English version, introduces the research in these terms: «This study identifies recent estimates of non-take-up in 16 Member States that vary considerably in terms of welfare state design. The study argues that it is likely that non-take-up is also an issue in the other 12 Member States. Estimates suggest that in each of the Member States identified, there is at least one type of benefit for which over one-third of people

clear: On the one hand, «[n]on-take-up is an issue for a broad range of benefits and is not restricted to those that are means-tested»; on the other, «benefit systems typically aim to reduce poverty, to stabilize the economy or to activate and include people socially and economically. Benefits miss their aim if they do not reach the people who are entitled to them. Furthermore, non-take-up implies that people are failing to realize their rights, leading to inequality and injustice»[64]. Lastly, after recalling that the EU strategy for growth, Europe 2020, set the objective of lifting at least 20 million people out of poverty by 2020, the aforementioned Report observed that «[i]t is unlikely that this objective will be reached... However, if social benefits were to effectively reach the people who are entitled to them, poverty targets would be closer to those set by the EU»[65].

In this respect, what the «European Social Model» does and does not actually require is also clear. Thus, it is not a question of formally enshrining new catalogues of constitutional social rights, either at the national or supranational levels, but rather a question of making them work effectively[66]. Consequently, the call is to deal more effectively with the other levels of their multifold structure, with the aim of delivering effective protection, and consequently, effective social inclusion. This claim is chiefly of constitutional concern, as it involves the core question of substantial equality and dignity. Nonetheless, the legal studies have usually neglected to deepen the question beyond their judicial enforceability. Outside of this aspect, the legal studies have restricted their perspective on effectiveness to negative terms (with the aim of denouncing inequalities) and have left its positive side to social

who are entitled to it do not receive it. Non-take-up is an issue for a broad range of benefits and is not restricted to those that are means tested»; consequently, even countries with historical and broad welfare traditions show shortcomings. The 16 Member States monitored are Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Luxembourg, the Netherlands, Portugal, Slovakia, Spain, and the United Kingdom.

[64] *Ivi*, see *Introduction*. The study analyses the situation in 16 Member States and shows that «the vast majority of even the most conservative estimates of non-take-up in Table 1 are above 40%, suggesting that the phenomenon is far from marginal. All countries included in Table 1 have at least one benefit for which the estimate is 40% or higher» (p. 15).

[65] *Ivi,* p. 17 of the English version.

[66] J.H.H. WEILER, *Diritti umani, costituzionalismo ed integrazione: iconografia e feticismo,* in *Quaderni costituzionali,* No. 3/2002, p. 529, states that the Union needs neither further rights within its lists nor additional lists of rights; rather, what it really needs is the programmes and administrative structure to effectuate the existing rights. Accordingly, as admitted by L. FERRAJOLI, *L'Uguaglianza e le sue garanzie,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza,* cit., p. 39, while, from a legal perspective, citizens are more equal than in the past due to the many Charters, Constitutions and Declarations that enshrine their rights, from a factual perspective, they are conversely more and more unequal in concrete terms because of the lack of effectiveness of their protection and the consequent spread of poverty.

sciences and policy-makers. Our endeavour is to support the legal studies by addressing this disregarded part, i.e. the effectiveness side of social rights for social inclusion, moving beyond their judicial enforceability.

4. National social rights and European economic governance

At this point, the high political and ideological implications of social rights are clear. Accordingly, distributive and re-distributive policies have changed over time and among the States, ranging from more social to more liberal approaches[67]. Thus, behind the social principles, values and rights, there could be as many different means and methods as there are different forms of social interventions[68]. Indeed, the original «État Providence» has evolved from a more passive to a more active approach, from welfare to workfare, from universal social rights to means- and needs-tested social advantages[69], from unconditional to conditional social rights, from social protection to social competition and activation[70]. Indeed, because of the multidimensional features of social exclusion and poverty, there is not a principle of social justice that suits all sectors of public policy[71].

If the welfare State is and remains essentially nationally rooted, it is conversely true that many European infiltrations into national welfare have occurred. The ECJ has sometimes limited and sometimes protected national welfare, with different nuances based on the rules involved (those on competition

[67] This issue encompasses the broader issue about the – vertical and horizontal – constitutional homogeneity of the values, principles and rights within the EU; for a recent contribution with wide doctrinal references, see G. DELLEDONNE, *Homogénéité constitutionnelle et protection des droits fondamentaux et de l'État de droit dans l'ordre juridique européen*, in *Politique européenne, No.* 3/2016 , p. 86 ff.

[68] F.W. SCHARPF, *Governare l'Europa. Legittimità democratica ed efficacia delle politiche dell'Unione Europea,* cit., p. 55. Furthermore, because of the multidimensional features of social exclusion, there is not a principle of social justice that suits the entire sector of social policy, see L.A. JACOBS, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice,* cit., p. 201.

[69] On the distinction between «as of rights benefits» and «means tested» benefits, see F. TWINE, *Citizenship and Social Rights. The Interdependence of Self and Society,* Sage, London, 1994, p. 93 ff.

[70] On this shift in approach, from a «social rights regime» for the protection against some risks such as age, illness, and unemployment based on Marshall's vision, to a «social investment regime» to the further activation of citizens according to Gidden's vision, see T.P. BOJE, M. POTŮČEK (Edited by), *Social Rights, Active Citizenship, and Governance in the European Union,* cit., p. 10-11.

[71] L.A. JACOBS, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice,* cit., p. 201.

and the correct functioning of the internal market or those on the fundamental economic freedoms)[72]. With reference to the access of migrant citizens to a form of transnational solidarity, it has tried to preserve the equilibrium of national welfare by asking them to provide evidence of some elements of integration (and contribution) to the host society. European legislation has, in turn, infiltrated the national welfare chiefly when it has laid down rules on competition and the functioning of the internal market, the privatisation of public services, the protection of workers and cross-border healthcare, to mention a few examples[73]. More recently (since the 2008 crisis), the EU has (strengthened) economic governance procedures, and the implied austerity measures have threatened the national welfare[74]. Accordingly, the original neo-liberal approach has been amplified by the ordo-liberal perspective, with its fiscal consolidation stance narrowing the national possibilities to provide the cushioning effects related to redistributive policies[75].

In accordance with this EU approach over time, the legal studies have followed and insulated the different steps of the infiltration of the national welfare stemming from the EU system. Indeed, De Burca observed that in spite of the common opinion on the division of work between the Union and the Member States, which leaves sovereignty over welfare to the latter, it is time «to revisit and to question this perception by investigating the various ways in which the EU, and EU law in particular, is having a significant impact on the laws and practices of the Member States in the area of welfare more broadly conceived»[76].

First, the main concern was chiefly in the labour law research with reference to the challenges stemming from the internal market logic and the

[72] In this respect, see K. ARMSTRONG, *Governing Social Inclusion – Europeanization through Policy Coordination,* Oxford University Press, Oxford, 2010, p. 190: «[T]his asymmetry within EU economic law, between competition and free movement rules, is simply not captured in much of the literature which either treats EU economic law as a monolith».

[73] Regarding EU (negative and positive) social integration, it is sufficient to cite S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective,* cit., p. 151 ff.; S. SCIARRA (Edited by), *Solidarietà, mercato e concorrenza nel welfare italiano – Profili di diritto interno e comunitario,* il Mulino, Bologna, 2007, p. 13 ff.

[74] M. FERRERA, *Modest Beginnings, Timid Progresses: What's Next for Social Europe?,* in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy,* Intersentia Ltd., Cambridge-Antwerp-Portland, 2012, p. 28, describes the «new nested architecture» of the nation-based welfare State, placing it at the crossroads between the EMU and the European social space.

[75] For the theory of the transition from the Tax State to the Debt State, and lastly, to the Consolidation State, see W. STREECK, *Tempo guadagnato – La crisi rinviata del capitalismo democratico*, la Feltrinelli, Milan, 2013, p. 68 ff.

[76] G. DE BURCA (Edited by), *EU Law and the Welfare State,* Oxford University Press, Oxford, 2005, p. 1.

competition rules[77]. In this respect, the protection of the welfare state from the 'dismantling' penetration of EU law (and case law), and the risk of deregulatory competition and a race to the bottom have been in focus[78]. Second, in a period of economic crisis as well as populism, the condemnation of 'benefit tourism' has challenged the ECJ's reasoning and the consequent deliveries in terms of 'transnational solidarity', 'transnational social inclusion' or 'closure vs. opening' (according to the different expressions used by Verschueren, Spaventa and Ferrera, see Chapter II). In this respect, the internal equilibrium of the welfare system and the underlying solidarity values against the European citizens' rights and the principle of equality have been in the focus, not only of the legal studies, but also of social scholars[79]. Along this path of EU evolution, a step further needs to be taken *vis à vis* the «big crisis» and the consequent enhancement of the European economic governance mechanisms shifting the connected constraints on welfare expenditures to a level that has become a topic of interest to the constitutionalists. In this respect, as stressed by De Witte and Kilpatrick: «Although often neglected by legal and policy analysis of the Eurozone crisis, an increasingly central dimension of that crisis and its management is important, sometimes dramatic, changes to social rights and entitlements»[80].

Accordingly, more recent legal studies which deal with the European economic governance framework have usually addressed its austerity measures, its constraints on the social rights[81] and the consequent

[77] See, among others, S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective*, Cambridge University Press, Cambridge, 2006; S.SCIARRA (Edited by), *Solidarietà, mercato e concorrenza nel welfare italiano – Profili di diritto interno e comunitario,* il Mulino, Bologna, 2007.

[78] As mentioned in the foreword, these sorts of 'infringements' have not been examined in the research.

[79] See C. BARNARD, *EU Citizenship and the Principle of Solidarity,* cit., p. 157 ff.; M. DOUGAN, E. SPAVENTA, *'Wish You Weren't Here…' New Models of Social Solidarity in the European Union,* in M.DOUGAN, E.SPAVENTA (Edited by), *Social Welfare and EU Law,* cit., p. 181 ff.; H.VERSCHUEREN, *Preventing «Benefit Tourism» in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in* Dano?, in *Common Market Law Review,* No. 52/2015, p. 363 ff.

[80] C. KILPATRICK, B. DE WITTE (Edited by), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI – Working papers, Law* - 2014/05, p. 1.

[81] C. KILPATRICK, B. DE WITTE (Edited by), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI – Working papers, Law* - 2014/05 divided the social rights into two categories, works rights and welfare rights (such as income, housing, health, education), and as a result, treated the consequences of the austerity measures in each category of social rights separately. But also C. KILPATRICK, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional*

infringement of the fundamental value of solidarity[82]. However, this focus on the effects of the economic governance system, tellingly critiqued by V. Schmidt with the expression «governing by the rules» and «ruling by the number»[83], risks overshadowing other current dangers involving the effectiveness of the existing social rights. Consistently, another body of constitutional studies has started to reverse this view, adopting a less static perspective and introducing the issue of their sustainability over time[84].

However, and beyond this dispute, our approach to the effectiveness side of the social rights (and more specifically, the rights to social inclusion) aims to give attention to a more comprehensive view, taking into account all aspects of the multifaceted challenges currently being experienced by the social rights, leading to the multidimensionality of social exclusion and poverty, which indeed are not rooted exclusively in economic causes.

In effect, in these times of rapid evolution and change, it is also sometimes necessary for the usual perspective of scholars to evolve. T. Piketty, in reference to the discipline of economics, denounced its traditional passion «for mathematics and for purely theoretical and often highly ideological speculation at the expense of historical research and collaboration with other social sciences». Piketty further concluded that «economics should never have sought to divorce itself from the other social sciences and can advance only in conjunction with them»[85]. A similar suggestion could be extended to constitutional studies with respect to the intertwined reality within the EU[86].

Inquiry, in *EUI – Working papers, Law*-2015/34 focuses on the EU Member States under sovereign debt loan assistance (bailouts).

[82] S. GIUBBONI, *Solidarietà*, in *Politica del diritto*, cit., p. 549; S. RODOTA', *Solidarietà. Un'utopia necessaria*, Laterza, Roma-Bari, 2014; L. CARLASSARE, *Solidarietà: un progetto politico*, in *www.costituzionalismo.it*, No. 1/2016, p. 45 ff.; A. APOSTOLI, *Il consolidamento della democrazia attraverso la promozione della solidarietà sociale all'interno della comunità*, in *www.costituzionalismo.it*, No. 1/2016.

[83] V.A. SCHMIDT, *Forgotten Democratic Legitimacy:* «*Governing by the Rules*» *and* «*Ruling by the Numbers*», in M. BLYTH, M. MATTHIJS (Edited by), *The Future of the Euro*, Oxford University Press, New York, 2015.

[84] A. D'ALOIA, *I diritti sociali nell'attuale momento costituzionale,* in *www.gruppodipisa.it,* p. 5-6; T. GROPPI, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro,* in *Diritto Pubblico Comparato ed Europeo,* No. 1/2016, p. 43 ff..; A. SPADARO, *I diritti* sociali *di fronte alla crisi (Necessità di un nuovo* «*Modello Sociale Europeo*»*: più sobrio, solidale e sostenibile),* in *www.rivistaaic.it,* No. 4/2011, p. 5 ff.; financial sustainability for transnational solidarity towards migrant citizens is deepened by C. BARNARD, *EU Citizenship and the Principle of Solidarity,* in M. DOUGAN, E. SPAVENTA (Edited by), *Social Welfare and EU Law,* cit., p. 174 ff.

[85] T. PIKETTY, *Capital in the Twenty-First Century,* The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2014, p. 32.

[86] As observed by A. GUAZZAROTTI, *Crisi dell'Euro e conflitto sociale. L'illusione della giustizia attraverso il mercato,* cit., p. 11, the simple enhancement of national constitutional

The legitimate bad blood against the economic and social (dis)equilibrium within the «consolidation State» produced by the EU's neo-liberal and ordo-liberal theory risks overshadowing the wide complexity of the question of the effectiveness of the social rights, along with the steps undertaken by the EU system, albeit slowly, towards a better balance between conflicting social and economic values and aimed at the development of tools suited for a better understanding of the multiple facets of social exclusion and inequality.

In this respect, the seed planted by many legal scholars regarding the re-conceptualisation of the social rights through the EU integration process beyond the exclusive reference to their traditional «individualised», «negative», «retrospective» and «judicially enforceable» perspectives, while avoiding the risk of their «dilution»[87], should be harvested. Further, this should not occur for the aim of underpinning a new OMC on social rights, or other proposals for new scenarios shifting the social competences to the EU level, but for the aim of following the evolutionary path systematically undertaken over time by the European governance framework and picking up the seeds (i.e. the tools) that have tried to deal more proficiently with the effectiveness layer of the social rights.

Obviously, this purpose entails a complete perspective, "free of constitutional prejudice", admitting that not every threat to the effectiveness of the social rights comes from the "original sin" due to the EU's unbalance. Indeed, on the one hand, a recent study has shown that, contrary to what is usually assumed, the European economic governance has not placed such high constraints on the Member States' discretionary power to decide if and how to intervene in their welfare. In this respect, this study pointed out that the Member States comply with the EU's fiscal and budgetary recommendations only when they are put under pressure by the financial market or when they are receiving

patriotism is not enough to underpin the enforcement of social rights *vis à vis* the conditions and limitations deriving from the interdependence of the European and worldwide economy that infringe every national project for the overhaul of social justice.

[87] These "words" are borrowed from the publication of S. FREDMAN, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, in *European Law Journal,* Vol. 12, No. 1/2006, p. 48; but on the same path, other scholars could be quoted, K. ARMSTRONG, *Governing Social Inclusion – Europeanization through Policy Coordination,* cit., p. 255 ff.; N. BERNARD, *A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU,* in T.K. HERVEY, J. KENNER (Edited by)*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, cit., p. 262; G. DE BURCA, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the EU,* in O. DE SCHUTTER, S. DEAKIN (Edited by), *Social Rights and Market Forces: is the Open Coordination of Employment and Social Polices the Future of Social Europe?,* Bruylant, Brussels, 2006, p. 265 ff.; O. DE SCHUTTER, *Fundamental Rights and the Transformation of Governance in the European Union*, in C. BARNARD (Edited by), *The Cambridge Yearbook of European Legal Studies,* Hart Publishing, Oxford and Portland, Vol. 9, 2006-2007, p. 153 ff.

financial assistance from the EU. Otherwise, the ratio of the accomplishment of these European recommendations is very low. Thus, the States' entrenchment programmes are mostly linked to each State's political will to satisfy its market orientation, rather than to satisfy European austerity imperatives[88]. On the other hand, and consequently, the OMC on social inclusion has given evidence of the uneven and scant social engagements by the EU Member States since the launching of the Lisbon Strategy[89].

5. The multidimensionality of poverty and social exclusion

In spite of the divergences in policy among the European Member States, a negative convergence (although at a different scale between States) can be tracked: an increase in poverty, social exclusion and inequality which has been described as a crisis second only to that engendered by the Industrial Revolution[90].

As stressed by the 2017 Report of the Social Protection Committee, «The EU continues to be far off-track in reaching its Europe 2020 poverty and social exclusion target, even when the most recent and more encouraging data is taken into account. The latest data shows around 1.7 million more people at risk of poverty or social exclusion in the EU28 compared to 2008, and a total of 118.8 million or close to 1 in 4 Europeans…There are still over 25 million children in the EU28 living at risk of poverty or social exclusion in 2015, some 0.7 million fewer than the previous year and accounting for around 1/5 of all people living in poverty or social exclusion»[91].

Similarly, in 2016, an ILO study declared: «the overall trend over the past 15 years suggests there has been a convergence towards higher levels of poverty and inequality for the EU as a whole»[92]. In particular, it highlighted

[88] In this sense, see PE 542.680, a study provided at the request of the Economic and Monetary Affairs Committee of the European Parliament in November 2015, para. 2 for the EU and 3 for the Eurozone.

[89] R. PENA CASAS*, Les indicateurs des plans d'actions nationaux de lutte contre la pauvreté et l'exclusion sociale: approche comparative européenne*, in *Observatoire Sociale Européen,* September 2001, p. 9 ff.

[90] P. ROSANVALLON, *La società dell'uguaglianza,* cit., p. 22.

[91] See the Report p. 8-9.

[92] Executive Summary of the 2016 ILO study on a Social Pillar for European Convergence. As confirmed by the European Commission in the Reflection Paper on Deepening the European Monetary Union – COM(2017) final, p. 12, English version – «The convergence trends of the single currency's first years have proven partly illusory. Before the crisis, the euro area was the symbol of continuously increasing prosperity», but after the crisis, a social and economic divergence trend within the EMU started «which is only slowly being corrected»; as a

«the fact that large disparities in economic, labour market and social outcomes exist across EU countries and that, with a few exceptions, the financial and economic crisis has widened these gaps. More worrisome is that an examination of the trends over time indicates that there has been either considerable divergence between countries (e.g. unemployment) or, worse, convergence towards undesirable outcomes (e.g. higher income inequality)»[93]. In more detailed terms, between 2010 and 2014, the long-term unemployment rate, as a percentage of the active population in the EU28, increased from 3.9 % to 5.1 %, affecting chiefly young people (6.9 % of 15-29 aged people in 2014) and low-skilled workers. Moreover, «the young population is characterized by low participation in employment, education and training, the share of young NEETs (15-24) remaining very high (12.4 % for EU28 in 2014), together with the early school leaving rate (11.1 % of the population aged 18-24 leave education early)», but there has also been an increase in the working poor. Thus, «with the crisis, the risk of poverty and social exclusion increased for children and the working-age population, while it declined only for the elderly population»[94].

Moreover, the convergence of national schemes of social protection among the Member States is scant and uneven[95]. In this respect, Italy has a social policy approach which prefers passive measures rather than integrated, holistic and active inclusion policies[96], and the ineffectiveness of social expenditures is mostly linked to the fragmentation and rigidity of the welfare

consequence, inequalities, which are common to the different Member States, differ substantially across them.

[93] *Ivi*, see under Section A.

[94] *Ivi*, para. 4.1. But on the impact of the crisis, see also the European Commission's SWD(2016) 51 final, *Key economic, employment and social trends behind a European Pillar of Social Rights*, para. 4. As stressed by the 2016 ILO study on a Social Pillar for European Convergence: «Yet a thorough analysis of key indicators shows that EU Member States are either diverging in terms of socio-economic performance or converging towards deteriorating outcomes, such as worsening inequality and widening structural imbalances» (Executive Summary, see figures 1-8 reporting data on inequalities and poverty issues).

[95] See the *Executive Summary* in IP/A/EMPL/ST/2009-07, a study for the European Parliament's Committee on Employment and Social Affairs on *The Role of Social Protection as Economic Stabilizer: Lessons from the Current Crisis*.

[96] See Table 2 in IP/A/EMPL/2015-05, a study for the European Parliament's Committee on Employment and Social Affairs on *Active Inclusion: Stocktaking of the Council Recommendation (2008*). But tracks of a change towards a more comprehensive and active approach can be found in Law No. 328/2000 on the integrated system of intervention and service to people, Legislative Decree No. 150/2015 on the subject of service for employment and active policies and Legislative Decree No. 147/2017 on the introduction of a measure for the fight against poverty.

system[97]. On the contrary, the Netherlands is a good example of an integrated welfare system that is capable of uniting all the strands for all the targets and combining economic support with activation measures[98]. Further, across the EU, the target of active inclusion for those who can work and those who cannot work has not been implemented in the same way, as most of the measures focus on the first group rather than on the second, for whom active inclusion presupposes participation in society instead of entry into the labour market[99].

On the contrary, as tellingly expressed by the 2004 Joint Report on Social Inclusion of the European Commission, the aim of the fight against poverty and social exclusion should involve «a process which ensures that those at risk of poverty and social exclusion gain the opportunities and resources necessary to participate fully in economic, social and cultural life and to enjoy a standard of living and well-being that is considered normal in the society in which they live»[100].

Consistently, European social inclusion should follow a holistic and dynamic approach (see Chapter III) suitable for the present challenges of the multiple dimensions of inequality and social exclusion, which involve not only a lack of the income and sufficient material resources needed to live in dignity, but also other «modern» forms of social impairment, such as the absence of regular, adequate, equal, capillary and affordable access to basic services of general interest, i.e. education, training, healthcare, housing, network services (transport, energy, e-connection, banking accounts) and in-work quality[101].

On the one hand, labour market participation remains an important means of social integration but not all works offer scope for personal development, consequently the extent to which employment is a solution for social exclusion depends critically on the quality of jobs (wage, job stability, atypical work)[102]. Consequently, a movement has been tracked, from employment-focused social

[97] *Ivi*, Box 6, includes the following critique: «One of the main problems of the Italian welfare system is related to its fragmentation in very different regional and local subsystems, the rigidity of a system with a multiplicity of sectoral and category interventions with inadequate selectivity, the use of economic benefits instead of provision of services. These are among the main reasons accounting for the ineffectiveness of Italian social expenditure and the core of the reform of measures to fight poverty under experimentation».

[98] *Ivi*, Box 8.

[99] *Ivi*, para. 3.1.

[100] See the *Joint Report by the Commission and the Council on social inclusion as adopted by the Council (EPSCO)* on 4 March 2004, p. 8.

[101] In this respect, the need «to bring different disciplines together for social policy research» is evident, as stated by U. BECK, *Security from a Legal Perspective,* cit., p. 516.

[102] In this sense, see T.ATKINSON, B.CANTILLON , E.MARLIER , B.NOLAN (Edited by), *Social Indicators. The EU and Social Inclusion,* Oxford University Press, Oxford, 2002, p. 137 ff.

policy to social policy that has broader objectives and redistributive implications in the context of labour markets characterized by increasing level of poor-quality atypical work that impact on poverty and social exclusion[103].

On the other hand, social exclusion, poverty and inequality is to a large extent the result of circumstances and developments beyond the reach of social policies[104], depending on change within the demographic and family social structure or stemming from globalization and technological evolution[105]. Consequently, the need «to bring different disciplines together for social policy research» has become evident[106].

Bearing this in mind, it is not our intention here to revisit the sociological origin of the concept of social inclusion (or, conversely, social exclusion and poverty)[107] rather to insulate some steps of constitutional relevance that, at this point in time, could be taken for granted. On the one hand, social inclusion involves the effectiveness side of social rights. Admittedly, real social inclusion is realised only if social rights are adequately implemented and effectively exploited by the addressed people. Along this path, social inclusion implies both formal and substantial equality, what is to say, the removal of inequality of status and redistributive policies[108], consistently it involves most of the constitutional issues already addressed within the previous paragraphs. On the other hand, social inclusion presupposes a multidimensional and multidisciplinary intervention[109] vis à vis the

[103] J.S. O'CONNOR, *Policy coordination, social indicators and the social-policy agenda in the European Union,* in *Journal of European Social Policy,* Vol. 15, No. 4/2005, p. 354

[104] T. ATKINSON, B. CANTILLON , E. MARLIER , B. NOLAN (Edited by), *Social Indicators. The EU and Social Inclusion,* Oxford University Press, Oxford, 2002, p. 183.

[105] C. MATHIEU, H. STERDYNIAK, *Le modèle social européen et l'Europe sociale*, cit., p. 77, recall the overall set of challenges *vis à vis* the European society either in respect to the change within the demographic and family social structure, or in reference to the labour market, globalisation, technological evolution.

[106] As stated by U. BECK, *Security from a Legal Perspective,*cit., p. 516

[107] For the reconstruction of the concept of social inclusion within sociology and its transfer to legal studies, see A. GRAGNANI, *Inclusione e solidarietà,* in *www.gruppodipisa.it,* p. 5 ff.

[108] In this respect, see C. PINELLI, *Il discorso sui diritti sociali tra Costituzione e diritto europeo,* in *www.gruppodipisa.it*, p. 6.

[109] As highlighted by C. TRIPODINA, *Il diritto a un'esistenza libera e dignitosa – Sui fondamenti costituzionali del reddito di cittadinanza,* Giappichelli, Turin, 2013, p. 175, European Member States have developed the common awareness of the need to overhaul their social protection system vis à vis new changes and challenges within labour market and society for a multilayer public intervention made of not only economic support but also different services to support people towards their inclusion in labour market (when possible) and their full participation in social and political life. In similar direction, see G. BRONZINI, *Il reddito di cittadinanza – Una proposta per l'Italia e per l'Europa,* EGA-Edizioni Gruppo Abele, Turin, 2011, p. 53. It is also worth to recall the address undertaken by the 2012 ILO's recommendation on the «Social Protection Floor» which rest on both, social transfers and

multifaceted aspects of social exclusion and poverty which implies – in juridical terms – a fair balance between ongoing new-comer and multiple needs moreover vis à vis budgetary constraints and limited financial resources[110].

access to services, in this respect, see B. DEACON, *Global social policy in the making. The foundations of the social protection floor,* Policy Press, Bristol-Chicago, 2013, p. 37.

[110] In this respect, see the considerations about the quantitative and qualitative increase of new social needs developed by G. FONTANA, *Dis-equaglianza e promozione sociale: bisogno e merito (diverse letture del principio di eguaglianza nel Sistema costituzionale),* in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale. Atti del convegno di Campobasso 19-20 giugno 2015,* Editoriale Scientifica, Naples, 2016, p. 40 ff. See also the way suggested by G. SILVESTRI, *Dal potere ai principi. Libertà ed uguaglianza nel costituzionalismo contemporaneo,* cit., p. 91 ff., to join a constitutional balance between equality and liberty involving the concept of inclusive and exclusive goods and services. In this respect, see also A. MORELLI, *Il carattere inclusive dei diritti sociali ed i paradossi della solidarietà orizzontale,* in *www.gruppodipisa.it*

II.
TESTING TRANSNATIONAL SOCIAL INCLUSION

This Chapter deals with (part of) the case law on cross-border access to the social rights, tailoring the reconstruction to those rights usually deemed to be relevant for social inclusion, and as such, consistent with the purpose of tracking the features of a "transnational social inclusion space". In this light, the focus will be on the consistent ECJ case law, in which not only is the access of workers, students and non-economically active people in the host Member States to social advantages taken into account, but also the access to healthcare, as this kind of service covers an important level within the multidimensionality of social inclusion[1]. In the last instance, and within the limited purpose of striking a balance between two different means for the application of the reasonableness scrutiny, reference will be made to the case law of the Italian Constitutional Court dealing with similar questions of transnational social inclusion. Indeed, the structure of the judicial scrutiny of the application of the equality of treatment principle by the legislature is chiefly the same for the two Courts: first, the reasonableness (i.e. the legitimate objective for the ECJ) of any differentiation is tested; next, it is the proportionality of the adopted treatment that is at stake. However, the distinction between the modus procedendi of the two Courts is the set of values against which they strike the equity of the balance chosen by the legislature. For this purpose, many paragraphs of this Chapter will be reconstructive in order to reveal the dynamic implied in this sort of scrutiny more effectively[2].

[1] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *The EU and Social Inclusion. Facing the challenges,* The Policy Press – University of Bristol, Bristol, 2007, p. 172.

[2] In reference to the difficulty implied in the judicial scrutiny when the social rights are involved, and the consequent use by the national, sovranational and international Courts of concepts that aim at limiting the scope and depth of their review (the marge of manoevre, the reserve of the possible), see D. ROMAN, *La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social*, in *La Revue des droits de l'homme,* No. 1/2012, p. 5 ff.

Part I
The European Court of Justice's case law

The "history" of the ECJ's case law with reference to cross-border access to the social rights is something separate from the whole "history" of the ECJ's case law on the fundamental rights[3]. The parabola it has followed has been influenced by a twofold intertwined limit which has prevented European citizenship from becoming a full social citizenship according to the well-known definition of Marshall[4]. First, there is the distinction between «constitutionally prohibited forms of discrimination and other sets of circumstances calling for legislative intervention»; as for the latter, «the general principle of equal treatment cannot be relied upon to replace legislative choices. Otherwise, the Court of Justice would risk being dragged into policy-making based on its own conception of redistributive justice»[5]. Second, and consequently, the lack of competence at the European level with reference to social policies and the ambiguity in terms of the constitutional status of the social rights have prevented the European Court of Justice from comprehensively applying the principle of non-discrimination between European citizens. Indeed, this has confirmed the difficulty, within the multi-level system, of dealing with the principle of equality and the test of proportionality in a consistent manner for all the sets of social rights involved (in particular, for those not related to migrant workers), thereby freeing the social rights from restraints that are inconsistent with their very purpose and delivering them in terms of effective transnational inclusion.

1. General features

When the ECJ deals with social rights, it does not usually base them on common constitutional traditions or international law (such as the European Social Charter), but prefers to predicate them within the limits enshrined by specific European law provisions, in line with the aim of the better functioning of the internal market[6]. Indeed, as has been observed, «the Court

[3] For the ECJ's case law dealing with fundamental rights, see M. CARTABIA, *L'ora dei diritti fondamentali nell'Unione Europea,* in M. CARTABIA (Edited by), *Diritti in azione,* il Mulino, Bologna, 2007, p. 18 ff.

[4] T.H. MARSHALL, *Cittadinanza e classe sociale,* Laterza, Rome, 2002, p. 48 ff.

[5] K. LENAERTS, *The Principle of Equal Treatment and the European Court of Justice,* in Vol. 8, 2014, p. 23.

[6] D. NAZET-ALLOUCHE, *La Cour de Justice des Communautés Européennes et les droits sociaux fondamentaux,* in L. GAY, E. MAZUYER, D. NAZET-ALLOUCHE (Edited by), *Les droits*

is unwilling to draw consequences for Community norms from fundamental rights standards when competence falls primarily in the hands of the Member States. This is potentially of great relevance for socio-economic rights, where formal competence also falls primarily in the hands of the Member States»[7]. Consequently, it is chiefly with reference to the social rights of migrant workers that the issue has been treated. Here, the ECJ's perspective has often opened up national welfare boundaries and delivered evidence of transnational solidarity[8]. Conversely, the equality principle has not been able to work effectively when this inherent logic has not been applicable. This is particularly true for migrant inactive citizens, which clearly shows one of the multiple dimensions that social exclusion currently occupies[9]. Consequently, the transnational social inclusion delivered by the ECJ's judgements is part and parcel of the bigger question of the European social inclusion approach.

In this last respect, when dealing with the principle of equal treatment[10] in reference to social rights the result in terms of transnational social inclusion is uneven and partial[11]. It is partial, because it is limited to European citizens who move within the Union's territory. It is uneven because of the lack of

sociaux fondamentaux – Entre les droits nationaux et droits européen, Bruylant, Brussels, 2006, p. 223.

[7] N. BERNARD, *A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU,* in T.K. HERVEY, J. KENNER*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Portland, 2003, p 262.

[8] «Closure vs. opening» is the telling expression forged by M. FERRERA, *Modest Beginnings, Timid Progresses: What's Next for social Europe?,* in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy,* Intersentia Ltd., Cambridge-Antwerp-Portland, 2012, p. 17, in reference to the «new nested architecture» between the national welfare state, the EMU and the European social space.

[9] As stressed by F. IPPOLITO, *Cittadinanza e cittadinanze. Tra inclusione ed esclusione,* in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali,* il Mulino, Bologna, 2010, p. 111, Union citizens end to be entitled out of their national and the European citisenship with as many citizenship as the number of the Member States («fragmented citizeship»), according to which he enjoys of different rights (and social rights as well), .

[10] In refernce to the principle of non discrimination between nationals of different Member States and the ECJ's case law, see F. GHERA, *Il principio di eguaglianza nella costituzione italiana e nel diritto comunitario,* Cedam, Padua, 2003, p. 97 ff.

[11] For a reconstruction of the ECJ's case law on social rights, see D. TEGA, *I diritti sociali nella dimensione multilivello tra tutele giuridiche e crisi economica*, in *www.gruppodipisa.it.* A. GUAZZAROTTI, *Unione Europea e conflitti tra solidarietà,* in *www.costituzionalismo.it,* No. 2/2016, p. 139, discusses a failure within the self-inductive mechanism of European citizenship, which is not able to deliver any effective transnational solidarity; while R. BIN, P. CARETTI, G. PITRUZZELLA, *Profili costituzionali dell'Unione Europea,* il Mulino, Bologna, 2015, p. 356, warn about the need for confidence with prudence in the evolution of the multilevel protection of rights.

effectiveness of the ECJ's reasoning when it deals with social rights as not really intertwined with the fundamental economic freedoms (of workers or providers and the recipients of services).

Consequently, not only real European social inclusion cannot be reached through case law[12], but this latter has recently added other challenges to those currently faced by social rights when it fails to deliver effective social inclusion for those most in need.

More specifically, while in some cases, the Court has enlarged the scope of application of the equality principle, enforcing both the subjective entitlement and the objective scope of social rights, and thus, delivering them more effectively and comprehensively for real inclusion within the host society[13], in other cases, the Court has not expanded its reasoning to reach the level of an effective equality of treatment (i.e. real social inclusion), halting it at the door of the proportionality test in order to preserve the presupposed discretion of

[12] A. MORRONE, *Crisi economica e diritti. Appunti per lo stato costituzionale in Europa,* in *Quaderni costituzionali,* n. 1/2014, p. 97, observes that the multilevel protection of rights is not as such an instrument of social inclusion, because it is not able to grant a real process of political integration at the European level. Consequently, he holds that from this point of view, multilevel constitutionalism promises something that it cannot realise: the possibility of finding rights in a multilevel constitutional system. Consequently, as stated by E. SPAVENTA, *What is Left of Union Citizenship?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, in *Collected Papers, Amsterdam Law School Legal Studies*, Research Paper No. 2016-34 and *Amsterdam Centre for European Law and Governance*, Research Paper No. 2016-05, p. 31, the highly political features of social rights have led to «a retreat in relation to the fundamental rights jurisprudence of the Court… but also might hint a different balance of power/responsibilities between Court and legislature that might go beyond rights of non-economically active migrants… This might well signal a Union more sensitive to national and political issues; it might also signal though a considerable reduction in the capacity of the Court to act as an engine of integration». Accordingly, when the principle of solidarity, which is presupposed by social rights, is at stake, the role of the judiciary is put under discussion, as it encompasses ethical and ideological visions, desiderata and axiological lacks that would be better managed by politics than judges; for this perspective, see I. MASSA PINTO, *Principio di solidarietà, abuso del diritto e indefettibile necessità di un ordinamento coercitivo: appunti per una riconsiderazione della dottrina pura del diritto al tempo dell'anomia,* in *www.costituzionalismo.it,* No. 1/2016, p. 72-73.

[13] As pointed out by D. BIFULCO , *L'inviolabilità dei diritti sociali*, Jovene, Naples, 2003, p. 391, the ECJ has worked as a spinner of social rights within the EU social space. But the enlarged application of the principle of equality at the European level could also be perceived as a threat by the champions of the application of the national Constitutions and the connected role of the national Constitution Courts; in this light, see S. BARTOLE, *Interpretazioni e trasformazioni della Costituzione Repubblicana,* il Mulino, Bologna, 2009, p. 441. On this «second equality» stemming from European citizenship and the European law system, see M. FIORAVANTI, *Uguaglianza e Costituzione: un profilo storico,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza – Atti del VI Convegno della facoltà di giurisprudenza – Università degli Studi Milano – Bicocca 15-16 Maggio 2008,* Giuffré, Milan, 2009, p. 70-71.

the national legislatures[14]. In this manner, it has rested on the first level of the multi-tier structure of social rights, i.e. their constitutional and legal formal entitlement, without addressing the substantial question of the adequacy and appropriateness of their implementation provisions in light of the purposes of the social rights for effective transnational inclusion needs.

As a result, and as usual in the European framework, the equality principle and the proportionality test have been shown to work well at the European level only when the economic rationale can buttress the intertwined social rationale[15]. In this respect, the ECJ repeats the same political trap of other European institutions: the effectiveness of transnational social rights is improved for real transnational social inclusion only when some European economic competences can play a role. Otherwise, the issue is too highly political to be resolved by a judicial proportionality test managed at the European level, and thus, the Court has preferred to leave the balancing to the national welfare States[16].

Consequently, while in past years, the ECJ's case law has represented one of the main challenges to a State's sovereignty in deciding who to include or exclude from its national social boundaries, over the last few years, it has instead reduced its «capacity… to act as an engine of integration»[17]. Admittedly, this has further undermined the effectiveness of social rights for social inclusion within transnational boundaries and has added further threats to those stemming from modern societies.

[14] This shift in the ECJ's case law «seems to go against the Court's well established way of interpreting EU citizenship rights and the usual emphasis on proportionality and the need for individual assessment»; for this perspective, see P. MINDERHOUD, S. MANTU, *Solidarity (Still) in the Making or a Bridge Too Far?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, in *Collected Papers, Amsterdam Law School Legal Studies*, Research Paper No. 2016-34 and *Amsterdam Centre for European Law and Governance*, Research Paper No. 2016-05, p. 41. While K.ARMSTRONG, *Governing Social Inclusion – Europeanization through Policy Coordination,* Oxford University Press, Oxford, 2010, p. 215, observes that «it is the proportionality principle that mediates the relationship between the interests of the EU – in supporting free movement – and the interests of the State in preserving the integrity of its social assistance mechanisms».

[15] For the evolution of the ECJ's scrutiny of the equality of treatment, see P. CARETTI, *Uguaglianza e diritto comunitario,* in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza*, cit., pp. 209 ff.

[16] As pointed out by H. VERSCHUEREN, *Preventing «Benefit Tourism» in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?,* in *Common Market Law Review,* n. 52/2015, p. 364.

[17] E. SPAVENTA, *What is Left of Union Citizenship?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, in *Collected Papers, Amsterdam Law School Legal Studies*, Research Paper No. 2016-34 and *Amsterdam Centre for European Law and Governance*, Research Paper No. 2016-05, p. 31.

2. European evidence of fragmented transnational social inclusion

In compliance with the subject of the present work, the case law of the ECJ taken into consideration here does not focus on the protection of migrant workers in the work environment, access to work and work conditions; rather, the focus is on rights involving social inclusion, chiefly in terms of the welfare state and the connected redistributive policies[18]. Consistently, the case law has addressed the national mechanisms of solidarity when they are unfolded to the advantage of "foreigners", i.e. other European citizens. These cases, «where the solidarity principle is used positively»[19], imply the opening up of state redistributive interventions across national boundaries and entail a sharing of the burdens and benefits among the citizens of different Member States when they move across the EU. Thus, only a deepened reasonableness test could protect the relevant social rights from the obstacles that prevent the effective social inclusion of all European citizens.

2.1. Right of workers to social advantages

a) Normative background

Some legislative premises aim at a better understanding of the "privileged" status of workers (and their families) in respect of social protection and social assistance until the outset of the Communities.

Regulation 1612/68/EEC on the freedom of movement of workers within the Community enshrined a prohibition of discrimination based on workers' nationalities which encompasses not only equality of treatment in their access to the workplace and any conditions of employment and work (Art. 7, para.

[18] M. FERRERA, *Towards an 'Open' Social Citizenship? The New Boundaries of Welfare in the European Union,* in G. DE BURCA (Edited by), *Eu Law and the Welfare State,* Oxford University Press, Oxford, 2005, p. 34, «the redrawing of the boundaries for social citizenship, induced by European integration, works as a destructuring factor in respect of traditional redistributive arrangements at the national level. At the same time it tends however to create incentives for forms of 'restructuring' at the supranational level», so that it stems a transnational solidarity « i.e. the formation of redistributive collectivities that cut across traditional state borders», as shown by the schema at p. 27 of this book. For a different focus on EU citizens' rights, beyond cross-border link and beyond their economic status as well as their claiming for social rights, see – among others –, K. LENAERTS, *The concept of EU citizenship in the case law of the European Court of Justice,* in *ERA Forum,* 2013, p. 569 ff.

[19] C. BARNARD, *EU citizenship and the principle of solidarity*, in M. DOUGAN, E. SPAVENTA (Edited by), *Social Welfare and EU Law,* Hart Publishing, Oxford and Portland, 2005, p. 165, who also uses the term «transnational solidarity» in reference to solidarity between nationals and migrants (p. 166).

1), but also equality of treatment in their access to social and tax advantages (Art. 7, para. 2) and housing benefits (Art. 9, para. 1).

Beyond the social advantages, the EU has regulated social security. Regulation No. 1408/71/EEC, on the application of social security schemes to employed persons and their families moving within the Community, was the first evidence of Community hard law intervention in matters of national social protection[20]. Although its declared scope is the mere coordination of the national social security systems, some of its provisions enter these systems, and consequently, the balance between sharing the burdens and the benefits of their national community[21].

Its declared aim is to support the improvement of the workers' standard of living and the conditions of employment within the Community by guaranteeing first, equality of treatment for all nationals of the Member States under the various national legislations, and secondly, social security benefits for workers and their dependents, regardless of their place of employment or residence. Consequently, it has enshrined two main principles of transnational solidarity: on the one hand, aggregation of all the periods taken into account under the various national legislations for the purpose of acquiring and retaining the right to benefits and calculating the amount of benefits; on the other hand, the waiving of residence clauses through the provision of benefits for the various categories of persons covered by the Regulation, regardless of their place of residence within the Community.

Regulation 883/2004/EC (on the coordination of social security systems) replaced the rules envisaged by Regulation 1408/71/EEC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (and has been amended and updated on numerous occasions)[22], modernising and simplifying them. In contrast to the latter, Regulation 883/2004 provides for a broader

[20] On this privileged status of workers within EU, see S. GIUBBONI, G. ORLANDINI, *La libera circolazione dei lavoratori nell'Unione Europea,* il Mulino, Bologna, 2007, p. 221.

[21] F. PENNINGS, *Inclusion and exclusion of persons and benefits in the new co-ordination regulation,* in M. DOUGAN, E. SPAVENTA, (Edited by), *Social Welfare and EU Law,* cit., p. 242, remembers that the Member States are aware of possible extra expenses for their country as a result of the Regulation; this is the reason why they have always tried to avoid or limit the costs resulting from changes to the Regulation.

[22] For an analysis of these two Regulations, see D. SINDBJERG MARTINSEN, *Social security regulation in the EU: the de-territorialization of welfare?,* in G. DE BURCA (Edited by), *Eu Law and the Welfare State,* cit., p. 89 ff.; M. FUCHS, R. CORNELLISSEN, *EU Social Security Law – A commentary on EU Regulations 883/2004 and 987/2009,* Hart Publishing, Oxford, 2015, p. 21 ff.; E. SABATAKAKIS, *Le droit à la sécurité sociale dans l'Union Européenne. À propos de la nouvelle réforme des règlements de la coordination,* in *Revue de l'Union Européenne,* No. 549/2011, p. 368 ff.

concept of a «covered person», which is beyond employed and self-employed, and includes all persons «who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and to their survivors» (para. 3, see also Art. 2, Regulation 883/2004).

It enshrines some important principles, such as equal treatment (Art. 4), the aggregation of periods, and the assimilation of facts or events that have occurred in a Member State that is different from the competent one[23]. These principles are accompanied by the principle of waiving the residence rules to deem that a person may enjoy the social rights acquired or being acquired within a Member State even if he resides elsewhere within the EU territory (Art. 7)[24]. They entail transnational solidarity in the sense that a Member State affords social advantages, irrespective of the accomplishment of all the relevant conditions in its territory. On the contrary, the residence clause is maintained for social benefits linked to the economic and social features of the context in which a person is integrated, but the derogation of the principle of the exportability of social security benefits must be interpreted strictly and must be applied only to benefits which are both special and non-contributory, and are listed in Annex X to Regulation 883/2004.

This Regulation, which affords protection irrespective of residence and applies the equal treatment principle, also enacts rules of coordination to avoid the overlapping of benefits (Art. 10).

Even if the choices regarding social policies are matters that concern each Member State, this Regulation is the best example of EU social choices that have affected its internal social equilibrium. In this regard, it suffices to remember not only the aggregation of the period and the assimilation of facts principles, but also Art. 64, which specifies the conditions and the limits under which an unemployed person retains his right to benefits in cash from

[23] Within this framework, the principle of assimilation (treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable: Art. 5) is envisaged, and the principle of aggregation of insured periods (which guarantees that persons moving within the Community and their dependents and survivors can retain the rights and the advantages that have been acquired or are in the course of being acquired, in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits: Art. 6).

[24] This Article states: «Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated».

the competent Member State while going to another Member State in order to seek work there[25].

[25] In particular, Art. 64 states: «1. A wholly unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits, and who goes to another Member State in order to seek work there, shall retain his entitlement to unemployment benefits in cash under the following conditions and within the following limits: (a) before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorize his departure before such time has expired; (b) the unemployed person must register as a person seeking work with the employment services of the Member State to which he has gone, be subject to the control procedure organized there and adhere to the conditions laid down under the legislation of that Member State. This condition shall be considered satisfied for the period before registration if the person concerned registers within seven days of the date on which he ceased to be available to the employment services of the Member State which he left. In exceptional cases, the competent services or institutions may extend this period; (c) entitlement to benefits shall be retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he left, provided that the total duration for which the benefits are provided does not exceed the total duration of the period of his entitlement to benefits under the legislation of that Member State; the competent services or institutions may extend the period of three months up to a maximum of six months; (d) the benefits shall be provided by the competent institution in accordance with the legislation it applies and at its own expense. 2. If the person concerned returns to the competent Member State on or before the expiry of the period during which he is entitled to benefits under paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that Member State. He shall lose all entitlement to benefits under the legislation of the competent Member State if he does not return there on or before the expiry of the said period, unless the provisions of that legislation are more favourable. In exceptional cases the competent services or institutions may allow the person concerned to return at a later date without loss of his entitlement. 3. Unless the legislation of the competent Member State is more favourable, between two periods of employment the maximum total period for which entitlement to benefits shall be retained under paragraph 1 shall be three months; the competent services or institutions may extend that period up to a maximum of six months. 4. The arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation». Accordingly, Art. 65 states: «1. A person who is partially or intermittently unemployed and who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself available to his employer or to the employment services in the competent Member State. He shall receive benefits in accordance with the legislation of the competent Member State as if he were residing in that Member State. These benefits shall be provided by the institution of the competent Member State. 2. A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in

b) ECJ case law.

Some evidence of transnational solidarity stems from the broad and well-developed ECJ case law on the equal treatment of workers and their families. In this respect, it could be objected that the legal provisions, along with the consistent case law, are chiefly driven by the economic need to guarantee the better establishment and functioning of the internal market, that is to say, the abolition, as between Member States, of obstacles to the freedom of movement of persons, with the purpose *inter alia* of promoting the harmonious development of economic activities and the improvement of the standard of living throughout the Community. Consequently, in the balance between the economic and social rationales, the former will prevail. In this

which he pursued his last activity as an employed or self-employed person. An unemployed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject. 3. The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he resides, shall be subject to the control procedure organized there and shall adhere to the conditions laid down under the legislation of that Member State. If he chooses also to register as a person seeking work in the Member State in which he pursued his last activity as an employed or self-employed person, he shall comply with the obligations applicable in that State… 5. (a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence. (b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he was last subject shall firstly receive, on his return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he receives benefits under the legislation to which he was last subject. 6. The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. However, subject to paragraph 7, the competent institution of the Member State to whose legislation he was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. In the case referred to in paragraph 5(b), the period during which benefits are provided under Article 64 shall be deducted from the period referred to in the second sentence of this paragraph. The arrangements for reimbursement shall be laid down in the Implementing Regulation. 7. However, the period of reimbursement referred to in paragraph 6 shall be extended to five months when the person concerned has, during the preceding 24 months, completed periods of employment or self-employment of at least 12 months in the Member State to whose legislation he was last subject, where such periods would qualify for the purposes of establishing entitlement to unemployment benefits. 8. For the purposes of paragraphs 6 and 7, two or more Member States, or their competent authorities, may provide for other methods of reimbursement or waive all reimbursement between the institutions falling under their jurisdiction».

light, the guarantee of the equal treatment of workers in their access to social protection and social assistance is deemed to be market-oriented, rather than solidarity-oriented[26]. This is probably the case, but it is worthwhile to stress that in some cases, the linkage to the establishment and functioning of the internal market is weaker[27]. These are the cases in which the worker is considered first and foremost «from a human point of view»[28], with the aim of his highest social integration: «the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country»[29].

In paving this way, the ECJ, since the '80s, has broadened both *ratione personae*, the concept of the workers and the members of their families, and *ratione materiae*, the concept of the social advantages to which the equality principle is applied.

As for the status of worker, since Levin (C-53/81), the Court has enshrined a community concept of the worker that should not be restrictively interpreted because of its status as a fundamental freedom (para. 13). Accordingly, it does not matter whether the person concerned is not in full-time employment (but rather part-time) or his income is lower than that which, in the host State, is considered the minimum required for subsistence, provided that he pursues an activity as an employed person which is effective and genuine (para. 18)[30]. Consequently, the non-discrimination principle in the access to social advantages has been applied – on an equal footing – to permanent, seasonal and frontier workers, irrespective of their status as non-resident workers

[26] S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective*, Cambridge University Press, Cambridge, 2006, p. 224 ff.

[27] D. THYM, *The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens,* in *Common Market Law Review,* No. 52/2015, p. 19, "it should be highlighted that the generous reading of the free movement rights for workers, self-employed and service recipients has always transcended purely economic rationales".

[28] C-249/86, Commission v. Federal Republic of Germany, para. 11.

[29] C-152/82, Forchieri, para. 12.

[30] In conformity with this view, many other cases could be mentioned, among them: Lawrie-Blum, C-66/85, para. 16-17; Martínez Sala, C-95/96, para. 32, Meeusen, C-337/97, para. 13. An example of ancillary employment that excludes the status of the worker can be found in C-197/86, Brown, para. 24-28 (a case involving a person who entered into an employment relationship for a period of eight months with a view to subsequently undertaking studies in the host State in the same field of activity and who would not have been employed by his employer if he had not already been accepted for admission to the university).

within the territory of the Member State that supplies the benefits[31]. On the contrary, a condition of residency is legitimate, appropriate and proportionate to evaluate a sufficient and close connection with the society of the Member State of the work if the frontier worker is occupied in the latter in minor activities which are not enough, per se, to establish a genuine link with the host society[32].

Furthermore, a person retains the status of a worker in reference to certain social advantages even if he is no longer in an employment relationship[33] and irrespective of the period he was engaged in the previous occupational activity[34].

As for members of the worker's family, since Forchieri (C-152/82), they could benefit from their parents or spouse's status in their access on an equal footing to social advantages. While Forchieri is applicable to the worker's spouse, Baumbast and Ibrahim are pertinent to his descendants[35], even if they were adopted or a divorce has been declared and the descendent no longer lives with the worker, and even if the descendant's working parent has ceased to be a worker in the host Member State. All these cases deal with the right to education, and as such, they will be addressed in more depth below.

By the same token, since Liar (C-38/86), the ECJ has broadened the material scope of the social advantages to which the principle of equality is applicable for the workers and their families. It has included all the advantages (beyond the sole conditions of work and employment) through which the migrant worker is guaranteed an improvement in his living and working conditions and the promotion of his social advancement: «a worker

[31] See, inter alia, C-57/96, Meints, para. 50-51.

[32] C-213/05, Geven, para. 28-30: «[T]he aim of the German legislature is, in a situation such as that at issue in the main proceedings, to grant a child-raising allowance to persons who have a sufficiently close connection with German society, without reserving that allowance exclusively to persons who reside in Germany. In exercising its powers, that legislature could reasonably consider that the exclusion from the allowance in question of non-resident workers who carry on an occupation in the Member State concerned that does not exceed the threshold of minor employment as defined in national law constitutes a measure that is appropriate and proportionate, having regard to the objective mentioned in the preceding paragraph».

[33] Among others, see C-39/86, Lair, para. 36; C-35/97, Commission v. French Republic, para. 41.

[34] C-39/86, Lair, para. 44; C-197/86, Brown, para. 23. As specified in C-3/90, Bernini, para. 17, «a national of a Member State who has worked in another Member State in the context of occupational training must be regarded as a worker within the meaning of Article 48 of the EEC Treaty and of Regulation No 1612/68 if he has performed services in return for which he has received remuneration, provided that his activities are genuine and effective»; to this end, it is necessary to assess, in all the circumstances, whether the person concerned has completed a sufficient number of hours in order to familiarise himself with the work.

[35] See, respectively, C-413/99; C-310/08.

who is a national of another Member State and has exercised his right as such to freedom of movement is entitled in the same way as national workers to all the advantages available to such workers for improving their professional qualifications and promoting their social advancement»[36]. Following this premise, the ECJ has stated: «According to settled case-law, social advantages are to be understood as all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate their mobility within the European Community»[37].

Consistently, and nonetheless the economic crisis and the enhanced economic governance mechanisms, in 2012 the ECJ deemed that the amplitude of the access to social advantages on an equal footing cannot be subjected to exceptions for budgetary constraints because «[t]o accept that budgetary considerations may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of European Union law as fundamental as the principle of non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of the Member States»[38].

Moreover, the ECJ has enshrined the complete protection of workers by stating that non-discrimination is not only applicable to overt but also to covert discrimination: «Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage»[39].

This synoptic excursus of case law dealing with migrant workers' access to social advantages in the host Member State shows the depth of the scrutiny undertaken by the ECJ when assessing the application of the equality of treatment principle, as such delivering an effective transnational social inclusion for them since the '80s whitout any revirement during the European economic and financial downturn.

[36] C-38/86, Lair, para. 22.

[37] See, inter alia, C-213/05, Geven, para. 12.

[38] C-20/12, Giersch, para. 52.

[39] C-152/73, Sotgiu, para. 11; C-57/96, Meints, para. 44; C-35/97, Commission v. French Republic, para. 38.

2.2. Rights to education and training and study grants

a) The «long wave» of the status of the worker

The «long wave» of the status of the worker in assuring treatment on an equal footing when the access to social advantages is at issue also involves the right to training and vocational education[40]. For this purpose, with the exception of the case of involuntary employment, the ECJ stated that a person could retain the status of a worker to claim the social advantages pursuant to Art. 7, para. 2, Regulation 1612/68 if he voluntarily leaves his employment in the host Member State in order to study full time at a university only when a relationship of a certain degree can be ascertained between the previous working activity and the studies undertaken. In particular, for a person to retain such a status for the purpose of access to maintenance grants for a university education (according to Art. 7, para. 2 of Regulation 1612/68), there must be «some continuity between the previous occupational activity and the course of study; there must be a relationship between the purpose of the studies and the previous occupational activity. Such continuity may not, however, be required where a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field of activity»[41]. Consequently, «[i]t is for the national court to assess whether all the occupational activities pursued previously in the host country, whether or not interrupted by periods of training, re-training or readaptation, disclose a relationship with the subject-matter of the studies in question. In that connection it is for that court to take into account the various factors which are useful in making that assessment, such as the nature and the diversity of the activities pursued and the duration of the period between the end of those activities and the commencement of the studies»[42].

Moreover, according to the ECJ's reasoning, and with respect to a claim of the application of equal treatment on the basis of Art. 7, Regulation 1612/68, such as for the admission fees for university studies, the fact that the worker does not pay a tax on his salary to the national treasury is not a valid reason for differentiating his case from that of the migrant worker whose income is liable to taxation by the State in which he resides; this equality principle also extends to his spouse[43].

[40] Not only access to grant for studies covers the status of a social right, but the right to education is – per se – a fundamental social right, in this respect see A. D'ANDREA, *Diritto all'istruzione e ruolo della Repubblica*, in *Scritti in onore di A.Pace*, Tomo II, Jovene, Naples, 2012, p. 1296.

[41] C-39/86, Lair, para. 37.

[42] C-3/90, Bernini, para. 19.

[43] C-152/82, Forchieri, para. 19.

Furthermore, on the basis of Article 7, para. 3 of Regulation No. 1612/68 that enshrines the right of workers to training in vocational schools and retraining centres, the ECJ, in 1974, specified the scope of the concept of training. It extended this provision and the relevant right to the worker's spouse, and it specified the conditions under which a person could be considered in training.

In particular, «[a]lthough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions… the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training»[44]. Consistently, and for the purpose of the better integration of workers and their families, the ECJ took a step further, extending the scope of application of Community law to both general education and vocational training: «although it is true that educational and vocational training policy is not as such part of the areas which the Treaty has allotted to the competence of the Community institutions, the opportunity for such kinds of instruction falls within the scope of the Treaty»[45].

Moreover, the ECJ clarified that most university courses can be covered by the concept of vocational training, defining it as «any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment…, whatever the age and level of training of the pupils or students, and even if the training programme includes an element of general education»[46].

[44] C-9/74, Casagrande, para. 12.

[45] C-152/82, Forchieri, para. 17. As stressed in C-263/86, Belgian State v. Humbel, para. 12-13, relating to a course in a technical institute which formed part of the secondary education provided under the national education system, «the various years of a study programme cannot be assessed individually but must be considered within the framework of the programme as a whole, particularly in the light of the programme's purpose — provided, however, that the programme forms a coherent single entity and cannot be divided into two parts, one of which does not constitute vocational training while the other does», that is to say, «that a year of study which is part of a programme forming an indivisible body of instruction preparing for a qualification for a particular profession, trade or employment or providing the necessary training and skills for such a profession, trade or employment constitutes vocational training for the purposes of the EEC Treaty».

[46] C-24/86, Blaizot, para. 15 also pointed out that «[i]n general, university studies fulfil these criteria. The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation» (para. 20). That is to say, in general, university studies not only prepare for a qualification for a particular profession, trade or employment but

Admittedly, as training offers to every person, according to his inclinations and capabilities, working knowledge and experience, the opportunity to gain a promotion or to receive education for a new and higher level of activity, it surely helps to facilitate freedom of movement for workers. Thus, since the outset, this has been the main reason the opportunity for this kind of instruction has been deemed to fall within the scope of Community law[47]. Subsequently, the scope of the involvement of EU law in guaranteeing access to training has broadened.

Thus, if the premise rests on the ECJ's statement that «[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired»[48], the consistent conclusion has encompassed equality of treatment not only in the right to access but also in the right to maintenance grants.

According to this evolutionary perspective, at the very beginning, the conditions of access encompassed assistance only in so far as it was intended to cover registration and other fees, particularly tuition fees, with the exception of assistance given to students for maintenance and for training that, in principle, falls outside the scope of the EEC Treaty as a matter of educational policy and social policy, pertaining to the Member States' competence[49]. Subsequently, this conclusion by the ECJ was reversed pursuant to the development of Community law. This evolution entailed two main strands: first, the introduction in the Treaty of provisions regarding the equality of treatment in all situations which fall within the scope *ratione materiae* of Community law, which includes the exercise of the fundamental freedoms guaranteed by the Treaty and the exercise of the right to move and reside within the territory of the Member States conferred by the provisions on European citizenship; secondly, the introduction in the Treaty of provisions regarding education and vocational training (current Title XII, Part

also provide the necessary training and skills for such a profession, trade or employment. In the same direction, see C-39/86, Lair, para. 12; C-197/86, Brown, para. 13.

[47] See C-152/82, Forchieri, para. 17.

[48] C-293/83, Gravier, para. 24.

[49] See C-39/86, Lair, para. 15; C-197/86, Brown, para. 18. See also C-42/87, Commission v. Kingdom of Belgium, para. 12, regarding the incompatibility with European law (in the case, Article 7 of the EEC Treaty and Article 12 of Regulation No 1612/68) of the category of students «ineligible for finance» by the State when students who are nationals of Member States other than Belgium and the Grand Duchy of Luxembourg apply for registration for and admission to courses provided by a higher education establishment, not at the university level, and thereby create a situation restricting the free access of such students to vocational training.

Three, TFEU)[50]. Consistently, «[i]n view of those developments since the judgments in *Lair* and *Brown,* it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs»[51].

Moreover, any financial constraints could allow a Member State to adopt measures resulting in discrimination[52].

b) Worker's children

Article 12 of Regulation 1618/68 is the legislative background for the integration of the worker's children in the educational system of the host Member State along with their enjoyment of any relevant social grants. For this purpose, not only are the worker's children residing in the Member State's territory entitled to enter the State's general education, apprenticeship and vocational training courses on an equal footing to that of nationals (Art. 12, para. 1), but also the «Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions» (Art. 12, para. 2).

Since Casagrande, the ECJ has enshrined that the principle of non-discrimination between the children of national workers and those of workers who are nationals of another Member State who reside in the territory (Art. 12 of Regulation No. 1612/68), which is aimed at removing the obstacles to the mobility of workers, including their right to be joined by their family, must be interpreted as referring not only to rules relating to admission, but also to general measures intended to facilitate educational attendance, such as educational grants: «Such integration presupposes that, in the case of the child of a foreign worker who wishes to have secondary education, this child can take advantage of benefits provided by the laws of the host country relating to educational grants, under the same conditions as nationals who are in a similar position»[53]. Accordingly, «it should be borne in mind that assistance granted

[50] The Community has the task of contributing to the development of quality education by encouraging cooperation between the Member States, and if necessary, by supporting and supplementing their actions, while fully respecting the responsibility of those States for the content of teaching and the organisation of the education systems and their cultural and linguistic diversity. The Council may adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, and recommendations aimed in particular at encouraging the mobility of students and teachers (present Art. 165, para. 1-2-3, TFEU).

[51] C-209/03, Bidar, para. 42.

[52] C-24/86, Blaizot, para. 23; C-293/83, Gravier, para. 14-15, C-152/82, Forchieri, para. 18.

[53] C-9/74, Casagrande, para. 7.

for maintenance and education …constitutes for the student who benefits therefrom a social advantage within the meaning of Article 7(2) of Regulation No 1612/68… Consequently, where the grant of financing to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may itself rely on Article 7(2) in order to obtain that financing if under national law it is granted directly to the student»[54].

From a subjective point of view, children could benefit from the «long wave of their parent's status as a worker even if the link with the latter has faded. As first step, in Moritz (C-389-390/87) the ECJ has stated «that a child of a worker of a Member State who has been in employment in another Member State retains the status of member of a worker's family within the meaning of Regulation No 1612/68 when that child's family returns to the Member State of origin and the child remains in the host State, even after a certain period of absence, in order to continue his studies, which he could not pursue in the State of origin»[55]. Consequently, his right to access to education under the same conditions of nationals of the host Member State (pursuant to Art. 12 of Regulation No. 1612/68) refers to any form of education, including university and advanced vocational training, and includes assistance granted to cover the costs of the student's education and maintenance[56].

However, two other remarkable cases have taken a step further in 1999 and 2008 respectively. Pursuant to these cases, despite the short period of their parents' status as workers in the host Member States, the children retain – under Art. 12 of Regulation 1612/18 – their right to carry on education in these States, irrespective of the fact that their parents, as former migrant workers, no longer reside with them in the host States, and eventually, irrespective of the fact that the parent who is their primary caregiver is not a European citizen, and does not have sufficient means of subsistence, and as such, depends completely on the social assistance system of the host Member State.

Mr. Baumbast (German nationality) and his wife (Colombian nationality) resided in the United Kingdom with their children (who had a dual German and Colombian nationality), who attended school there. Mr. Baumbast worked in the UK for three years and later in Germany. Mrs. Baumbast applied for indefinite leave to remain in the United Kingdom for herself and for the other members of her family, but the Secretary of State refused to renew Mr. Baumbast's residence permit and the residence documents of Mrs. Baumbast and her children, although they did not receive any social benefits,

[54] C-3/90, Bernini, para. 23 and 26.
[55] C-389-390/87, Moritz, para. 23.
[56] C-389-390/87, Moritz, para. 30, 36.

and having comprehensive medical insurance in Germany, they travelled there, when necessary, for medical treatment. The Case of R is slightly different because of her first husband's permanent status as a migrant worker in the United Kingdom while she was a United States citizen who moved to the United Kingdom in her capacity as the spouse of a Community national, exercising the rights conferred by the Treaty. Nonetheless, the two cases were treated jointly.

In its pronouncement, the ECJ went a step further than Moritz, observing that «[i]n fact, to permit children of a citizen of the Union who are in a situation such as that of Mr Baumbast's children to continue their education in the host Member State only where they cannot do so in their Member State of origin would offend not only the letter of Article 12 of Regulation No 1612/68, which provides a right of access to educational courses for the children of a national of a Member State 'who is or has been employed' in the territory of another Member State, but also its spirit»[57]. The ECJ also broadened, *ratione personae*, the notion of the children of a migrant worker who enjoy as such the right to education on an equal footing to that of the nationals of the host Member State. To this end, it included the children of the migrant worker's spouse in the concept (para. 57), irrespective of their nationality, and it furthermore observed that it does not matter if the two parents have meanwhile divorced (para. 60), or if the children still reside with the migrant worker (para. 62)[58]. It also broadened the implications of the children's right to education to include the right of residence of the parent who is their primary caregiver, irrespective of the parent's European citizenship. Regarding this question, the ECJ stated: «In circumstances such as those of the main proceedings, where the children enjoy under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence as a result, in one case, of a divorce from the migrant worker and, in the other case, of the fact that the parent who pursued the activity of an employed person in the host Member State as a migrant worker has ceased to work there, it is clear that if those parents were refused the right

[57] C-413/99, Baumbast and R, para. 54.

[58] In this regard, the ECJ concluded (C-413/99, Baumbast, para. 63): «In the light of the foregoing, the answer to the first question must be that children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard».

to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature» (para. 71). Consequently, «[t]he right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right» (para. 73). Accordingly, the conclusion is the following: «In the light of the foregoing, the answer to the second question must be that where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State» (para. 75).

In Baumbast and R, the existence of sufficient means of subsistence was not at stake. However, in Ibrahim, which also addressed the right to education of the child of a previous migrant worker in the United Kingdom (where his parent no longer resides), the mother, who is the caregiver of the child, lacked sufficient means of subsistence and was completely dependent on the social assistance system of the UK. In this case, the ECJ underlined that the right to education of the children of a migrant worker (or an ex-migrant worker) implies an independent right to reside in the host Member State with the aim of attending and completing their education there, even if the migrant worker no longer resides and works in the State[59]. In particular, to quote the Court: «To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12 [of Regulation 1612/68]… A contrary conclusion would be liable to compromise the aim of integrating the migrant worker's family into the host Member State, as stated in the fifth recital in the preamble to Regulation No 1612/68. According to settled case-law, for such integration to come about, the children of a worker who is a national of a Member State must have the possibility of

[59] C-310/08, Ibrahim, para. 35.

undertaking and, where appropriate, successfully completing their education in the host Member State… On this point, there is nothing to suggest that, when adopting Directive 2004/38, the European Union legislature intended to alter the scope of Article 12 of that regulation, as interpreted by the Court, so as to limit its normative content from then on to a mere right of access to education» (para. 41, 43 and 45). In this regard, the right to education and the connected right to reside conferred on the children of an ex-migrant worker derived from the sole basis of Art. 12 of Regulation No. 1612/68, and the conditions enshrined by Directive 2004/38/CE do not infringe such right: «the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38» (para. 50); thus, it follows that the right to education and the presupposed right of residence «in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance» (para. 57). Consequently, on this settled basis, the right to education of these children also includes the right to access to the pertinent social advantages (i.e. assistance granted for maintenance and education), as such delivering an effective social inclusion on equal basis of nationals.

c) Students but not workers

When a student applies for a grant of assistance to cover his maintenance costs, some conditions occur if he cannot claim the application of the provisions on the equality of treatment for workers. On the one hand, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden with consequences on the overall level of assistance granted by that State. On the other hand, it is legitimate for the State to limit such a grant to students who have demonstrated a certain degree of integration into the society of that State, and the existence of this degree of integration may be regarded as satisfied by the student's stay within the host Member State for a certain length of time[60]. Consequently, in Bidar (C-209/03), the scrutiny of the Court was strict and the considearation of the fundamental status of the principle of equal treatement broad. On the one hand, it has assessed the prior requisite of three years of residence in the host Member State as legitimate, and on the other, has stated that the principle of equal treatment «must be interpreted as precluding national legislation which grants

[60] C-209/03, Bidar, para. 57-58-59.

students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that State»[61].

Within this framework, when a student applies for financial assistance, the principle of equal treatment can be derogated in respect of an objective purpose and a proportionate intervention. Thus, the balance could change according to the relevance given to this fundamental principle against the interest of the Member States to protect their public finances. While in Bidar the Court leans towards the first, in the aftermath it has started to turn its point of view.

In this last respect, in Förster (C-158/07), the ECJ deepened the scar of the "genuine link" and conversely narrowed the strength of the light by which European citizenship and the principle of non-discrimination are brightened. Although this judgement insists on depicting itself as in line with Bidar's settlement, it reveals a difference in placing the emphasis on the conditions which legitimate the actions of a Member State to restrict the equality of treatment of European citizens in the exercise of their freedom to move and reside within the EU's territory. In this context, on the one hand, it directly stresses the permission «for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State» (para. 48); on the other hand, it also stresses the necessity of «a certain degree of integration into the society of that State» (para. 49). After these considerations, the Court, contrary to Bidar, did not activate any strict test of proportionality for the conditions laid down by the Member State; rather, it quickly concluded that «such a condition of five years' uninterrupted residence is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State» (para. 52). It also deemed that «[a] condition of five years' continuous residence cannot be held to be excessive having regard, inter alia, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State» (para. 54). Thus, once again contrary to Bidar, the ECJ did not verify whether a covert discrimination had occurred. Rather, after stating the right of the host Member State to make access to maintenance grants conditional upon clear criteria that is known in advance,

[61] *Ivi*, para. 63.

the Court did not carry out an in-depth review of the appropriateness of the length of the period to attain this aim.

Along the same path as Förster, in Giersch, in order to avoid «study grant forum shopping» that might put an unreasonable burden on a State's finances, and in order to assure a genuine link with the host society, the ECJ stated that a certain degree of integration could be requested to frontier workers. In this way, it – perhaps –intended to reduce the «long wave» of workers' beneficial status to more effectively save public finances. Starting from the premise that «the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State»[62], it admitted the proportionality of a condition which subordinates access to grants for higher education in favour of children of non-resident frontier workers to a certain minimum period of time worked in that State. Furthermore, the conditions of integration are satisfied if the parent of the non-resident children requesting educational grants pays taxes in the Member State where he is a frontier worker, irrespective of the State where he resides.

2.3. Right to social assistance for inactive citizens

The approach followed by the ECJ *vis-à-vis* cases involving citizens' requests for access to the social assistance system of the host Member States has evolved, starting from pronouncements attesting a valorisation of European citizenship and the connected principle of non-discrimination as, respectively, the fundamental status and the principles of primary law, to judgements in which the possibility of derogation and the linked discretion of the Member States came first. According to this framework, the case law can be divided into two main blocks: the first, which seems to pave the way towards an effective transnational social inclusion, and the second, which reverses this perspective. On the grounds of this distinction, the following statement the ECJ can be recalled: «The existence of a distinction between migrant workers and the members of their families, on the one hand, and EU citizens who apply for assistance without being economically active, on the other hand, arises from Article 24 of Directive 2004/38/EC … Although Article 24(1) of Directive 2004/38 provides that all EU citizens residing on the basis of that directive in the territory of the host Member State are to enjoy equal treatment 'within the scope of the Treaty', Article 24(2) provides that a Member State may, in relation to persons other than workers, self-employed persons, persons who retain such status and members of their families, limit

[62] C-20/12, Giersch, para. 65.

the grant of maintenance aid»[63]. In this light, although the entry into force of this Directive did not change the scale of the reasoning in respect to the priority guaranteed to the fundamental freedom of workers to move within the EU, as well as the connected right to access to social protection and social assistance, the same result has not occurred for inactive persons. This proves, once again, that the Court does not deem to reinforce the fundamental principle of equal treatement when access to social rights for social inclusion are at stake and prefers to leave the definition of the features of social inclusion within national boundaries to the full discretion of Member States, except for those cases which involve fundamental economic freedom (i.e. the dynamic of the internal market).

2.3.1. Towards transnational inclusion

In Martinez-Sala (C-85/96)[64], the ECJ did not ascertain the status of the worker, but left the question open; nonetheless, it applied the general equal treatment principle to prevent discrimination on the ground of nationality in order to assure a child-raising allowance (a special non-contributory cash benefit). It limited its observations to the fact that the person was lawfully resident in the host Member State: although there was no formal residence permit, the person was entitled to stay on the basis of an application for it. In particular, the Court deemed the fact that the person «has already been authorized to reside there, although she has been refused issue of a residence permit» sufficient for equal treatment (para. 60). Here, the prohibition of discrimination on the ground of nationality enshrined by the primary law prevails over any conditions that might be called into question.

In Grzelczyk (C-184/99), the Court adopted a point of view valorising the innovative purview of the European citizens' provisions[65]. As ascertained in the main proceedings, Mr. Grzelczyk was not a worker and – during his university studies – he had applied for the minimex (minimum subsistence allowance = non-contributory social benefit). Most of the national governments

[63] C-542/09, Commission v. Netherlands, para. 64.

[64] As stated by S. GIUBBONI, *EU internal migration law and social assistance in time of crisis,* in *Rivista del Diritto della Sicurezza Sociale,* No. 2/2016, p. 247, this case was a «path-breaking case» as it established that «a new universal status for transnational access to social rights on an equal footing with the nationals of the host country was progressively attached to the freedom of the European citizen to move and establish residence in another Member State, irrespectively of his status of economic activity».

[65] P. COSTANZO, *Il riconoscimento e la tutela dei diritti fondamentali,* in P. COSTANZO, L. MEZZETTI, A. RUGGERI, *Lineamenti di diritto costituzionale dell'Unione Europea,* Giappichelli, Turin, 2014, p. 436, obvserves that in this case, the principle of equality of treatment was disconnected from a tight link with any economic situation.

(Belgian, Danish, French, the United Kingdom) submitted that the entry into force of the Treaty's citizenship provisions did not entail more extensive rights than those laid down in secondary legislation; in other words, they are without direct effect. Conversely, the Court has made two significant statements: first, «Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for», (para. 31)[66]; second, «Directive 93/96, like Directives 90/364 and 90/365… accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary» (para. 40). To this end, it is sufficient to be lawfully resident in the host Member State, but the Court did not engage in any review of this requisite; in particular, it did not make any reference to the condition of sufficient resources.

By the same token, in Trojani (C-456/02), a person lacking sufficient resources and applying for the minimex (minimum subsistence allowance = non-contributory social benefit), the Court did not base its ruling on the status of worker, but rather on the ground of the direct effect of the Treaty provision on equal treatment. «It must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources» (para. 40), Mr. Trojani could not claim a right to reside on this basis «for want of sufficient resources within the meaning of Directive 90/364» (para. 36). However, as he was lawfully resident based on a formal resident permit, he «benefits from the fundamental principle of equal treatment… laid down in Article 12 EC» and could be granted a social assistance benefit such as the minimex (para. 40 and 46).

Accordingly, when Mr. Collins (C-138/02) claimed a jobseeker's allowance (a social security benefit whose entitlement was income-based = non-contributory means-tested benefit), the Court extended the principle of equal treatment to this social advantage. In particular, it made use of the proportionality test to examine the condition of being "habitually resident", because if it is legitimate for a State to submit the application for an allowance

[66] This statement should be applied within the scope *ratione materiae* of the Treaty, which has been extended by the ECJ in various directions. In particular, it has been extended to the nationals of Member States whose provisions might endanger their freedom to move in other Member States (see D'Hoop, C-224/98; Garcia Avello, C-48/02). Further, it has been extended to different forms of State social intervention (for the distinction between social security and social advantage, see C-57/96, Meints;), including, among others, education allowances (C-86/96, Martinez Sala; C-184/99, Grzelczyk; C-209/03, Bidar) and unemployment allowances (C-184/99, Grzelczyk; C-138/02, Collins; C.456/02, Trojani).

to the requirement of a «genuine link» between the applicant and the host society, this condition does not have to cause indirect discrimination. Rather, it must be «justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions» (para. 73)[67].

In the illustrated case law, the ECJ, which provided evidence of the equal treatment principle, placed the conditions to which European citizenship is submitted into brackets. It follows a crystal-clear structure: on the one hand, citizenship right to equal treatement; on the other, the conditions to which they are subjected: the former stem directly from the primary law, the latter stem from secondary law, as a consequence, they must be in compliance with the primary law.

This finding is stressed by the following reasoning by the ECJ: «since Union citizenship has been introduced into the EC Treaty… Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States… Moreover, the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union… As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union», a person has the right to rely on Article 18, para. 1, of the TEC. In the second instance, the ECJ's reasoning pointed out «that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect. However, the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently,

[67] Regarding the «genuine link» with the geographic employment market, it is telling that in C-224/98, wherein Ms. D'Hoop, a Belgian national claiming a tide-over allowance (allowance for unemployed young people who have just completed their studies and are seeking their first employment), the provisions on the freedom of movement of citizens were applied, and it was stressed that «a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature. It unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements» (para. 39).

any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect». Furthermore, «those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued»[68].

In other words, two main features mark the differences with the case law addressed in the next paragraph. On the one hand, there is the previously explained juridical structure of the Court's reasoning according to which European citizens' fundamental right to free movement and the relevant equal treatment principle are in the forefront, and any limits and conditions must be narrowly interpreted. On the other hand, there is the ascertainment of the facts and their logical link with the legal provisions. In this regard, not only did the Court not deepen the question of the residence permit and the conditions that must be fulfilled for its delivery, but it also failed to make any connection between three types of conditional data: the lack of sufficient resources, the right to legally reside in the territory of the host Member State and the right to claim social assistance in the form of non-contributory cash benefits which rest on general taxation with underlying implications of solidarity. This is what was reversed by its subsequent jurisprudence.

2.3.2. Reverse transnational inclusion

Following the evolution of the ECJ's case law, a revirement stemmed from it. At the outset, it was slight, but it subsequently became more evident.

There is no unanimity in doctrine about the starting point of this revirement. Part of the doctrine prefers to identify it with the Brey ruling[69], and the other part with the Alimanovic judgement. In any case, it is

[68] C-413/99, Baumbast, para. 81-91.

[69] S. GIUBBONI, *EU internal migration law and social assistance in time of crisis,* cit., p. 257: «[T]he Brey judgement marks in our opinion the first essential separation from the expansive logic of Union citizenship as a fundamental status of Member States nationals, since it marks a paradigmatic retreat to a sort of interpretative legalistic-minimalism, according to which secondary law rules – strictly – determine the applicative limits of the Treaty, and not conversely». Accordingly, H. VERSCHUEREN, *Free movement or benefit tourism: the unreasonable burden of* Brey, in *European Journal of Migration and Law,* No. 16/2014, p. 163, observes that the ECJ has added another condition to Art. 70, of Regulation 883/2004, in particular legal residence within the meaning of Directive 34/2004.

undisputable that over a given period of time, the ECJ's perspective has changed[70].

The causes of this change are surely many and intertwined: not only the entry into force of Directive 2004/38/EC, but also the economic crisis and the enforcement of the European Economic Governance's rules, along with a certain right-wing political influence within some Member States and the connected mistrust and scepticism among European citizens towards EU institutions.

It is our opinion that «the smell» that something was going to change in the ECJ's reasoning and findings could already be sensed in the Förster ruling (C-158/07), although Directive 2004/38/EC was not applicable to the facts of its main proceeding.

In particular, along this path, the ECJ's case law has progressively increased the importance of the conditions to which the principle of equality of treatment is subject, lowering – in parallel – the scope of the tests of proportionality and appropriateness to which they are submitted by settled case law[71]. To this end, some of its judgements are enlightening.

Mr. Brey and his spouse (C-140/12), who were German nationals and retired people, moved to Austria and had a certificate of residence; thus, their right to stay was not at issue in the main proceedings, but rather the refusal of a compensatory supplement to their pension (a non-contributory cash benefit). Because Austrian law makes this social benefit conditional upon being lawfully resident and links this finding to the claimant having sufficient resources to support himself and the members of his family, in order to avoid being obliged to make recourse to social assistance benefits or to a compensatory supplement during his period of residence, the Court affirmed the validity of the link between the conditions for obtaining the benefits and those for obtaining the legal right to reside in Austria for a period in excess of three months. In addition, in this case, the ECJ preferred to follow the

[70] S. GIUBBONI, *EU internal migration law and social assistance in time of crisis,* cit., p. 250, speaks about a «rapid rise and equally sudden decline of the normative ideal of European citizenship as a status of transnational social integration. The Court's case law – especially with the much discussed *Brey, Dano* and *Alimanovic* judgements – has shown a clear retreat, or maybe a retrenchment, in the discourse on EU citizenship as a source for transnational social solidarity, with an indisputable step back to a strict functional interpretation of the Treaty provisions in their relationship with secondary law (Directive 2004/38/EC and Regulation No. 883/2004)».

[71] This stance of the ECJ entailed what the doctrine has described as «a shift from constituent to regressive phase in the citizenship case law»; in this sense, see E. SPAVENTA, *What is left of Union citizenship?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, in *Collected Papers, Amsterdam Law School Legal Studies*, cit., p. 27.

«conditionality way», that is to say, to legitimate the increasing number of conditions to which the equality of treatment has progressively been subjected and the broadest interpretation of the concept of «social assistance»[72]. Accordingly, in contrast to the Commission's position, it accepted the interpretation pursuant to which the principle of equal treatment in access to social assistance (non-contributory cash benefits within the meaning of art. 70, para. 4, of Regulation 883/2004) is conditional upon being lawfully resident in the host Member State within the meaning of Art. 7, para. 1, b) of Directive 2004/38.

Nonetheless, in Brey, the ECJ still showed a certain degree of prudence in the definition of the boundaries of a Member State's discretion *vis à vis* a fundamental principle such as the equality of treatment (see, para. 64 to 72)[73]. In this context, it stated the necessity for an individual and overall assessment of the burden on the social assistance system[74] stemming from a citizen's claim by the competent State authorities and precluded any automatic threshold of exclusion[75].

[72] The ECJ, contrary to the Commission's assertions, interpreted the concept of social assistance «as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State» (para. 61).

[73] In particular, the ECJ requested the respect for some limits placed on the evaluation powers of a Member States, such as the reference to the personal circumstances characterising the individual situation of the person concerned (para. 64) and the various restraints stemming from the interpretation of Directive 2004/38 (para. 65 to para. 72).

[74] Some «indicators» were suggested by the Court: «the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State» (para. 78).

[75] In this way, the ECJ declared: «In the light of all of the foregoing, the answer to the question referred is that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer

In the following judgements, the ECJ made two further logical steps. On the one hand, it widened the boundaries of the concept of «social assistance» within the meaning of Directive 2004/38; consequently, it strengthened the margin for manoevering by the Member States according to a certain interpretation of Directive 2004/38 and the relevant possibility of the derogation of the equal treatment principle.

Dano (C-333/13)[76], Alimanovic (C-67/14)[77] and Garcia Nieto (C-299/14)[78] are cases in which European citizens entered Germany, were delivered a certificate of residence and made claims for subsistence benefits according to Book II of the German Social Code.

First, the ECJ qualified these subsistence benefits as non-contributory cash benefits under Art. 70, para. 2, of Regulation 883/2004; secondly, it concluded that they do fall within the concept of "social assistance" within the meaning of Article 24, para. 2, of Directive 2004/38 (see, C-333/13, para. 63).

Admittedly, according to the provisions of Book II of the German Social Code, doubt might have arisen about their true nature because of their mixed function aimed at both maintaining a life in line with human dignity and facilitating access to the labour market. However, the ECJ preferred to follow the Advocate General's Opinion rather than the contrasting Commission's Opinion, considering them as "social assistance" within the meaning of Article 24(2) of Directive 2004/38 (see, C-67/14, para. 44 to 46; C-299/14, para. 37): «That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that

than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit» (para. 80).

[76] Ms. Dano was a Romanian national who entered Germany with her son and was delivered a residence certificate. She was not economically active, lived with her sister, who provided for them, and claimed a subsistence benefit according to the basic provisions for job-seekers enshrined in Book II of the Social Code (a non-contributory cash benefit under Art. 70, para. 2, of Regulation 883/2004).

[77] Ms. Alimanovic and her children entered Germany; they were issued a certificate attesting the right of permanent residence and claimed subsistence allowances for long-term unemployed people under the basic provisions for job-seekers provided in Book II of the Social Code (a non-contributory cash benefit under Art. 70, para. 2, of Regulation 883/2004, as ascertained by the main proceedings). They could no longer claim the status of workers (as the relevant period had expired); consequently, they grounded their right to reside on Art. 14, para. 4, b) of Directive 2004/38.

[78] The Peña-García family were Spanish nationals who entered Germany and applied to the Employment Centre for subsistence benefits under Book II of the Social Code during their first three months of residence (Art. 6, of Directive 2004/38).

fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State» (C-333/13, para. 63).

In light of the foregoing, the broadening of the meaning of "social assistance" under Directive 2004/38 was accompanied by the strengthening of the Member States' power to derogate the fundamental principle of the equal treatment of European citizens enshrined in the Treaty, as only those (economically inactive) citizens who have sufficient economic resources «not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State» (Art. 7, para. 1, b) of Directive 2004/38) could claim this fundamental principle (either under Art. 24, para. 1, of Directive 2004/38; or under Art. 4, of Regulation 883/2004).

Conversely, this case law dismissed the postulates of the ECJ in Vatsouras and Koupatantze (C-22/08 and C-23/08), thus leaving open the possibility that the basic provisions for job-seekers enshrined in Book II of the German Social Code do not entail social assistance within the meaning of Art. 24, para. 2, of Directive 2004/38, but rather pursue the aim of facilitating access to the labour market. Therefore, although in Vatsouras and Koupatantze, they might have fallen within the provision for the equal treatment of workers in Art. 48 of TFEU (except for the assessment of a real link with the labour market of the host Member State, para. 36 to 46), a similar solution was no longer possible after the Alimanovic, Dano and Garcia Nieto rulings.

Accordingly, the ECJ's reasoning has intensified the consideration of the conditions to which the principle of non-discrimination is subject (see, C-333/13, para. 60 to para.84): «To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State» (para. 74). This is the reason «[a] Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence. To deny the Member State concerned that possibility would… thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them

automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs» (para. 78-79).

On the one hand, by way of this reasoning, the ECJ opened the boundaries of the Member States' discretion to limit the application of the equal treatment principle: «[S]o far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38» (C-333/13, para. 69). On the other hand, it also makes it more difficult for exceptions to this principle to be stricken down by the application of the proportionality test or other primary law principles[79]. Therefore, it declares that «when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law» (para. 91), and thus, a violation of the European Charter of Fundamental Rights might not be claimed.

Consequently, because the ECJ pointed out the overall approach to the derogation of the non-discrimination principle in the access to social benefits pursuant to Directive 2004/38[80], the margin of manoevre for the Member States has increased, but judicial review has been proportionally reduced.

Recently, the scope of application of the non-discrimination principle to the access to social benefits for economically inactive European citizens was further narrowed. In European Commission v. United Kingdom of Great Britain and Northern Ireland (C-308/14), the ECJ went beyond the application

[79] As stressed by D. THYM, *The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens,* in *Common Market Law Review,* No. 52/2015, p. 25, "the *Dano* judgment presents us with a noteworthy shift of emphasis, which accentuates Member State interests, while side-lining countervailing constitutional arguments that could have justified a different outcome".

[80] In Alimanovic (C-67/14), the ECJ stated: «It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision. It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in *Brey*, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings» (para. 58-59). In Garcia-Nieto (C-299/14), the ECJ declared: «In those circumstances, Article 24(2) of Directive 2004/38 does not preclude national legislation, such as that at issue in the main proceedings, in so far as it excludes nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004» (para. 51).

of the condition of legal residence, according to Art. 7, para. 1, b) of Directive 2004/38 to social benefits such those at issue in Brey, Alimanovic, Dano and Garcia Nieto (non-contributory cash benefits within the meaning of Art. 70, of Regulation 883/2004). In particular, it admitted the subordination of some social security benefits (including the child tax credit aimed at providing support for families for some of the costs borne by the person responsible for one or more children) to the right to reside test, because, in principle, the legislation of each Member State should lay down the conditions creating the right to social security benefits (para. 65). However, contrary to the previous case law (Brey, Alimanovic, Dano and Garcia Nieto), it resurrected the proportionality test to avoid indirect discrimination, because the residence requirement might «affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage» (para. 77); consequently, «[i]n order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective» (para. 79). In this regard, «the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active» (para. 80). Moreover, the ECJ stated that it is also proportionate because «the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive» (para. 84).

2.4. Right to healthcare

«The impact of ill-health is one concern in a social inclusion perspective … As well as inequalities in health, inequalities in access to healthcare and in particular failure to access to healthcare due to financial constraints are particularly salient from a social inclusion perpsecitve»[81]. Consistently, our overview of the ECJ's case law encompasses this issue.

Although the Court's reasoning places the right to access to cross-border healthcare within the framework of the fundamental economic freedoms (namely the freedom to provide – and receive – services under Art. 56, TFEU), its solidarity background and its social rationale is highlighted by its very nature as a fundamental social right. In this regard, it is worthwhile to

[81] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *The EU and Social Inclusion. Facing the challenges,* The Policy Press – University of Bristol, Bristol, 2007, p. 172

underline that the solution provided by the Court for healthcare services might be mentioned as a real discretionary compromise between the social and economic rationales, although a different compromise has been adopted for educational services. In particular, in C-263/86 (Humbel), which concerned a dispute relating to the payment of a fee (the minerval) charged to the nationals of other Member States for access to the Belgian State educational establishment, the Court, when asked whether a person attending a course of general education can be considered a recipient of services within the purposes of the Treaty's provision, dismissed this point of view. Rather, it emphasised two essential elements for the qualifications of services: remuneration and the normally recognised nature of the intervention of the providers and recipients of the service in question. «That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system» (para. 18-19). Accordingly, in Peerbooms and Smits (C-157/99)[82], a number of the governments submitted written observations to the Court arguing that hospital services cannot constitute an economic activity within the meaning of Article 60 of the Treaty, particularly when they are provided in kind and free of charge under the relevant sickness insurance scheme. Consequently, they observed that there is no remuneration within the meaning of Article 60 of the Treaty whereby the patient receives care in a hospital infrastructure without having to pay for it himself or whereby all or part of the amount he pays is reimbursed to him; however, the Court did not uphold this argument. Following its reasoning, which was upheld in Luisi and Carbone (C-286/82 and 23/86), the freedom to provide services not only permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, but also, as a necessary corollary, it permits a person to go to the State in which the person providing the service is established when this movement is not covered by the free movement of goods, persons and capital provisions: «It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another

[82] The case of a Dutch person who fell into a coma following a road accident and was transferred from the Netherlands hospital to the University Clinic in Innsbruck in Austria, where he was treated by special intensive therapy using neurostimulation, a technique not available in the Netherlands for patients of his age.

Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services» (para. 16). Based on this background, the Court stated in Peerbooms and Smits «that medical activities fall within the scope of Article 60 of the Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment» (para. 53). This conclusion cannot be dismissed based on the fact that the benefits at stake were provided for by the Member State of affiliation in kind or were reimbursed to the patient: «There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly»[83]. Consequently, «it should be borne in mind that Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed … [rather it] states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question ... In the present cases, the payments made by the sickness insurance funds …, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character» (para. 57, 58).

2.4.1. Hospital healthcare

Because of the nature of its service within the meaning of the Treaty, any restriction on cross-border healthcare is justified if it is not essential for the public interest (pursuant to the current Art. 52, TFEU). This condition might emerge above all in reference to hospital treatment or highly specialised and cost-intensive medical infrastructure or medical equipment. In this regard, the ECJ included either «the objective of maintaining a balanced medical and hospital service open to all, that… even if intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health» (para. 73) or «the maintenance of treatment capacity or medical competence on national territory [when it] is essential for the public health, and even the survival of the population» (para. 74) based on the concept of overwhelming public interest. In other words, in the States' need to

[83] C-386/99, Müller-Fauré, para. 103.

plan healthcare, placing restrictions on cross-border patients, such as prior authorisation to obtain reimbursements, stems from the aim of ensuring that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned and addresses the need to control costs and to prevent, as far as possible, any waste of financial, technical and human resources[84]. In principle, «aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services …. However, in so far as, in particular, it could have consequences for the overall level of public-health protection, the risk of seriously undermining the financial balance of the social security system may also constitute *per se* an overriding general-interest reason capable of justifying a barrier of that kind»[85]. To this end, «[i]t is self-evident that assuming the cost of one isolated case of treatment, carried out in a Member State other than that in which a particular person is insured with a sickness fund, can never make any significant impact on the financing of the social security system. Thus an overall approach must necessarily be adopted in relation to the consequences of freedom to provide health-related services»[86].

Once the legitimate aim according to which cross-border healthcare could, in principle, be limited is settled, the relevant means to attain this aim must be appropriate and proportionate. Therefore, if, on the one hand, «it is for the legislation of each Member State to organize its national social security system and in particular to determine the conditions governing entitlement to benefits» (para. 85), on the other hand, some guarantees must be granted to patients. In this respect, «in order for a prior administrative authorization scheme to be justified …, it must… be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily» (para. 90). Accordingly, an objective condition may be represented by the necessity of the treatment, particularly, the «authorization to receive treatment in another Member State may be refused on that ground only if the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements» (para. 103). To this end, the

[84] For example, the statement at para. 79-80: «Such wastage is all the more damaging because it is generally recognized that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding applied. From both those perspectives, a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorization appears to be a measure which is both necessary and reasonable».

[85] See, inter alia, C-386/99, Müller-Fauré, para. 72.

[86] C-386/99, Müller-Fauré, para. 74.

competent authorities must strike a case-by-case balance, taking into account all the relevant circumstances: «[I]n order to determine whether equally effective treatment can be obtained without undue delay from an establishment having contractual arrangements with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorization is sought but also of his past record» (para. 104). Moreover, the patient's condition must be taken into serious consideration, and it is not sufficient – in that regard – to make reference to the existence of a waiting list in the competent Member State for the medical treatment requested: «[I]n order to determine whether treatment which is equally effective for the patient can be obtained without undue delay in an establishment having an agreement with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorization is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history»[87].

Therefore, the «conditionality test» for cross-border healthcare limits must be implemented through a specific evaluation either of an objective (public interest) or a subjective (patient's conditions) nature.

2.4.2. Medical healthcare

In contrast to hospital healthcare, when a person benefits from cross-border medical care, any prior authorisation can be justified by an objective consideration of a financial nature if the reimbursement is within the limits of the tariffs applied to national treatment: «[W]hen the insureds go without prior authorization to a Member State other than that in which their sickness fund is established to receive treatment there, they can claim reimbursement of the cost of the treatment given to them only within the limits of the cover provided by the sickness insurance scheme in the Member State of affiliation»[88]. In the same direction, in Kohll (C-158/96, para. 54), the ECJ stated «that Articles 59 and 60 of the Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's

[87] C-386/99, Müller-Fauré, para. 90.
[88] C-386/99, Müller-Fauré, para. 98.

social security institution». In both Kohll and – to an even greater extent – Müller-Fauré, the ECJ conducted an in-depth review of the government and assurance fund's claim to refuse reimbursement for financial reasons because «no specific evidence has been produced to the Court… to support the assertion that, were insured persons at liberty to go without prior authorization to Member States other than those in which their sickness funds are established in order to obtain those services from a non-contracted provider, that would be likely seriously to undermine the financial balance of the …[national] social security system» (para. 93). In this way, any discrimination can be justified on the ground of the cross-border nature of the healthcare service received.

2.4.3. Directive 2011/24/EU

This Directive makes the difficulty of finding a legal basis within the functioning of the internal market perspective clear because of the sensitivity of the matters involved, as «public health protection is a decisive factor in the choices made» (para. 2). Because of its mixed nature, it is not by chance that this Directive makes an interchangeable reference either to the principle usually described as the citizens' right of free movement (i.e. the principle of non-discrimination) or to the guarantee usually referred to as economic freedom (i.e. the prohibition of unjustified obstacles to the free movement of goods or services)[89].

This Directive applies without prejudice to Regulation 883/2004/EC and adopts the same perspective as the ECJ's settled case law, as it «is intended to achieve a more general, and also effective, application of principles developed by the Court of Justice on a case-by-case basis» (para. 8). In this light, the criteria attached to the grant of prior authorisation should be justified accordingly to override reasons of general interest that are capable of validating obstacles to the free movement of patients, such as planning requirements that relate to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or the wish to control costs and to avoid, as far as possible, any waste of financial, technical and human resources (see para. 43). Furthermore, the obligation to reimburse the costs of cross-border healthcare should be limited to healthcare to which the insured person is entitled according to the legislation of the Member State of affiliation (para. 13 and Art. 7, para. 1), and «the Member State of affiliation may not refuse to grant prior authorization when the patient is entitled to the healthcare in question in

[89] See Art. 7, para. 11; Art. 8, para. 1.

accordance with Article 7, and when this healthcare cannot be provided on its territory within a time limit which is medically justifiable, based on an objective medical assessment of the patient's medical condition, the history and probable course of the patient's illness, the degree of the patient's pain and/or the nature of the patient's disability at the time when the request for authorization was made or renewed» (Art. 8, para. 5).

Cases in which healthcare may be subject to prior authorisation are envisaged in Art. 8, para. 2; both these cases and their criteria of application shall be restricted to what is necessary and proportionate to the objective to be achieved and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients (Art. 8, para. 1). The conclusion is the same for any other condition that might be objectively justifiable in order to obtain reimbursement for cross-border healthcare: «However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources» (Art. 7, para. 7).

As stated in the premise, this Directive does not affect the application of Regulation 883/2004, with particular reference to the benefits in kind which become necessary on medical grounds during the stay of an insured person and the members of his family in a Member State other than the competent Member State[90]. Beyond necessity, and according to Art. 20 of this Regulation, when travel has been planned with the purpose of receiving benefits in kind (medical or hospital healthcare) in another Member State, the person involved shall seek authorisation from the competent institution[91].

[90] Art. 19 of Regulation 883/2004/CE mandates: «1. Unless otherwise provided for by paragraph 2, an insured person and the members of his family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation. 2. The Administrative Commission shall establish a list of benefits in kind which, in order to be provided during a stay in another Member State, require for practical reasons a prior agreement between the person concerned and the institution providing the care».

[91] On this issue see, E. SABATAKAKIS, *Le droit à la sécurité sociale dans l'Union Européenne. À propos de la nouvelle réforme des règlements de la coordination,* in *Revue de l'Union Européenne,* No. 549/2011, p. 375 ff.

Within this latter provision, coordination with the provision of the Directive on the criteria to be followed for prior authorisation is necessary. In particular, although Art. 20, para. 2, of Regulation 883/2004 requires that «[t]he authorization shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness», by the same token, Art. 8 of Directive 2011/24 specifies the conditions to which prior authorisation is subject, and Art. 7 details the conditions and criteria according to which reimbursement could be limited.

Lastly, after this excursus about the ECJ's case law on trasnational access to social rights and before entering more specific conclusion on its reasonableness scrutiny, some cases brought before the Italian Constitutional Court and endowed with similar features will be taken into consideration in the following Part II.

Part II
The Italian Constitutional Court's case law and the reasonableness scrutiny

1. Italian evidence of transnational social inclusion

The following rapid excursus of some relevant judgements of the Italian Constitutional Court which deal with trasnantional access to social rights and the conditions limiting it fits with our purpose to make a comparison with the ECJ's modus procedendi[92] and strike the consequent balance.

In this regard, it is worthwhile to remember that Article 41 of the Legislative Decree No. 286/1998 provides for equal treatment in the access to social assistance for foreign citizens who have had a residence permit for one year, without making it conditional on the possession of other formal requisites such as the attainment of a certain level of revenues (which is rather relevant for the delivery of a residence permit for long-standing residence).

[92] M. CINELLI, *L'"effettività" delle tutele sociali tra utopia e prassi*, in *Rivista del Diritto e della Sicurezza Sociale*, No. 1/2016, p. 35, points out the openness and the universal vocation implied by the Italian Constitutional Court's case law on the access of non-citizens to social assistance, while S. CASSESE, *I diritti sociali degli "altri",* in *Rivista del diritto della sicurezza sociale*, No. 4/2015, p. 676, underlines the trouble resulting from this approach by the Court in finding a constitutional foundation for it.

Nonetheless, most of the regional laws at stake in the proceedings before the Italian Constitutional Court have added other census and temporary limits, although other laws have simply introduced a minimum period of residence in the regional territory (usually three or five years). Consequently, the Italian Constitutional Court has rejected these legal provisions, deeming them as not in line with Article 3 of the Italian Constitution, which enshrines the principle of equality and the principle of reasonableness[93].

Judgement No. 306/08 is about a regional law limiting access to social assistance (in particular, an attendance allowance), making it conditional on the possession of a residence permit, which would have been delivered only to people with sufficient means of subsistence. The Italian Constitutional Court declared that the condition was not a reasonable discrimination, because it was not founded on subjective requisites that were relevant to the invalidity status for which the allowance had been introduced, but rather on revenue requisites, which are arbitrary in reference to the specific needs that the allowance meets. In reaching this conclusion, the Italian Court applied Articles 3, 32 and 38 of the Italian Constitution (see para. 9).

In Judgement No. 187/2010, the Court's scrutiny was even stricter, as the social assistance scheme at issue was deemed to satisfy the fundamental need of a minimum level of subsistence and dignity, and thus, any restriction not founded on the subjective status of the person could not be allowed[94].

As attested by another judgement, when the legislature provides for services or benefits linked to subjective impairments, disadvantages or needs, any limit that is not justified under these subjective features, but rather on citizenship or the duration of the residence in the territory of a region, does not comply with Article 3 of the Italian Constitution on the basis that it is not reasonably linked to the social function assumed by the relevant legal provisions[95]. In this case, the regional law challenged before the Court excluded from the integrated system of social services not only those who were not European citizens, but also European citizens who had been residing in the territory of the region for less than 36 months. Along this path, the Court confirmed that if, in principle, a regional law could place a residential requisite on social allowances, it could not place access to social assistance

[93] For the description of the scrutiny of reasonableness by the Italian Constitutional Court and its differences with the equality scrutiny, see S. BARTOLE, *Giustizia costituzionale (linee evolutive),* in *Enc. Dir.,* Annali VII, Giuffré, Milan, 2014, p. 495 ff.; G. SILVESTRI, *Dal potere ai principi. Libertà ed eguaglianza nel costituzionalismo contemporaneo,* Editori Laterza, Rome-Bari, 2009, p. 57 ff.; F. SORRENTINO, *Eguaglianza formale,* in *www.costituzionalismo.it,* No. 3/2017, p. 2 ff.

[94] See the Italian Constitutional Court's Judgement No. 187/2010, para. 2.

[95] See the Italian Constitutional Court's Judgement No. 40/2011, para. 4.1.

under further unreasonable limits, such as the requirement of a long-lasting residence (i.e. five years) in its territory, deeming that such a requirement was not allowed under Article 3 of the Italian Constitution (the principle of equality and reasonableness).

Within the reasoning of the Court, fundamental values such as solidarity, dignity and health could not be undermined *ratione temporis* or *ratione census* through conditional access to social benefits for those who are not residing for a reasonable time in the Italian territory[96]. In particular, the Court admitted the possibility of different treatment for access to social assistance (in this case, regional family allowances were at stake) justified by the need to strike a balance with limited financial resources; however, this derogation of the principle of equality must be reasonable and not arbitrary, and must be in line with the aim (the rationale) of the provision. Consequently, it is settled case law that a derogation connecting the beneficiaries with a different scale in the duration of residence in the territory is not reasonable according to Article 3 of the Italian Constitution. This is because the duration of the residence does not comply with the target of a provision aimed at the offset of subjective social impairment, which does not change in relation to different periods of residence in the regional territory[97]. Accordingly, the Court, in a case concerning regional health allowances, declared the condition of a minimum period of residence of three years to be unreasonable because it was not in line with the aim of the provision, which was to promote the permanence of the disabled person within a familiar environment; conversely, any condition limiting access to the benefit that was in line with the provision's rationale of protecting a person in need may be justified[98].

It is interesting to note that the Italian Constitutional Court applies these principles even if the social benefits at issue offer protection above the essential needs and above the core of the fundamental inviolable rights, because their objective is nonetheless linked to vulnerable and disadvantaged people whose well-being the Italian Republic has the duty to protect and promote[99]. The Court also underlined that it is arbitrary to limit access to allowances that cover disadvantaged situations by conditioning them on the possession of a certain level of wealth because the real need for social assistance is in those who live under financial constraints[100].

In judgement No. 230/15, the Court – summarising its previous stance on access to social assistance by those who are not citizens – made clear that

[96] See the Italian Constitutional Court's Judgement No. 40/2013, para. 5.
[97] See the Italian Constitutional Court's Judgement No. 133/2013, para. 2.2.
[98] See the Italian Constitutional Court's Judgement No. 172/2013, para. 3.
[99] See Judgements No. 432/2005, para. 5.2 and No. 172/2013, para. 4.1.
[100] See Judgement No. 172/2013, para. 4.

social benefits are deemed not only to be within Article 3 of the Italian Constitution, but also within Article 2, which enshrines solidarity as a binding duty, Article 32, according to which the right to healthcare underscores the right to the sufficient means to access it, and Article 38, which specifies the right to the widest sustainable social assistance[101]. In a nutshell, every condition to access to social assistance must comply with the fundamental rationale of these provisions, which ensures the most appropriate minimum level of life and health to all people[102]. Admittedly, these types of financial aid are provided to promote the social inclusion of people who are more disadvantaged, and thus, most of them contribute to the better enjoyment of other fundamental rights, such as the right to education, work and health[103]. This is the reason the Italian Constitutional Court eventually asked the legislature to eliminate this sort of discrimination[104].

2. The reasonableness test for effective social inclusion

In principle, the aim of protecting the balance of the national welfare system, is admitted by the reasoning of both the ECJ and the Italian Constitutional Court, although they are sometimes characterized by a different scale and depth.

When the ECJ scrutinises the legitimate objective and the proportionality and appropriateness of the means of attaining it, this Court always in principle equips itself with tools similar to those used by the Italian Constitutional Court to assess the reasonableness of the legislature's choice[105].

As seen in the previous paragraph, the Italian Constitutional Court conducts a very in-depth review of any limits placed by the legislature on foreigners' right to enter social assistance on a footing equal to that of national citizens[106]. In particular, it has dismissed any conditions based on census or long-term residence because of their lack of reasonableness with

[101] Italian Constitutional Court's Judgement No. 230/2015, para. 2.2.

[102] See the Italian Constitutional Court's Judgement, No. 22/2015, para. 4.

[103] See the Italian Constitutional Court's Judgement, No. 329/2011, para. 5.

[104] Judgement No. 230/2015, para. 5.

[105] For the connection between the constitutional structure of social rights and the reasonableness check by judges, particularly by Constitutional Courts, see B. PEZZINI, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali*, Giuffré, Milan, 2001, p. 201 ff..

[106] As stressed by C. SALAZAR,*Crisi economica e diritti fondamentali. Relazione al XXVIII Convegno annuale dell'AIC,* in *Rivista AIC,* No.4/2013, p. 12 ff., the Italian Constitutional Court increases the in-depth review in terms of reasonableness when equality of treatment with foreigner citizens comes at stake.

respect to the subjective aim of the social provisions, i.e. the offset of social impairment.

The ECJ has adopted a similar position on the need for an in-depth review[107], not only when migrant workers and the provision (and receipt) of services are at stake, but also in more borderline situations in which the link with the exercise of a fundamental economic freedom and the degree of integration in the host society are more problematic[108].

Among numerous relevant rulings, the focus might, on the one hand, be on cases dealing with students or non-resident migrant workers, such as Collins (C-138/02), Bidar (C-209/03), Förster (C-158/07), Meints (C-57/96), Geven (C-213/05), Commission v. Netherlands (C-542/09), and Giersch (C-20/12); on the other hand, attention could be given to those addressing access to social advantages by nationals who wish to exert their right of free movement, such as Tas Hagen (C-192/05), Morgan and Bucher (C-11/06, C-12/06), and Stewart (C-503/09). Both these groups of cases are relevant for our purposes because they deal with assessments of the ECJ that are comparable to those of the Italian Constitutional Court in determining reasonableness.

In these rulings, the Court verifies whether the condition to which access to social advantages is subjected (usually the length of residence) is «necessary», «reasonable», «proportionate», «consistent», «appropriate», and «not too exclusive in nature» to attain the aim pursed[109]. It also charges the Member States with the burden of proving the consistency of the limit with the legitimate purpose pursued: «[T]he reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments»[110]. In particular, the State is required «at least to show why it opted for… [that] rule, to the exclusion of all other representative elements». If the State does not provide this proof, the Court must state and scrutinise the question.

[107] The three different stages of the ECJ's scrutiny in relation to the conditions and limits placed by the Member States on access to social assistance are described by A. SCHRAUWEN, *Citizenship: a balancing exercise?,* in A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, in *Collected Papers, Amsterdam Law School Legal Studies*, cit., p. 45.

[108] For an in-depth analysis of the structure of the ECJ's reasoning when dealing with the principle of equality of treatment for EU citizens in cases in which economic freedom is not at stake, see C. FAVILLI, *La non discriminazione nell'Unione europea,* il Mulino, Bologna, 2008, p. 42 ff.

[109] C-57/96, Meints, para. 48; C-213/05, Geven, para. 29; C-542/09, Commission v. Netherlands, para. 79 ff.; C-20/12, Giersch, para. 71 ff.; C-11/06 and 12/06, Morgan and Bucher, para. 36 ff.; C-192/05, Tas Hagen, para. 35; C-503/09, Stewart, para. 95 ff.

[110] C-542/09, Commission v. Netherlands, para. 81.

Consequently, the Court has sometimes considered a residence condition to be «neither necessary nor appropriate… [as] the applicant's place of residence is irrelevant» to attaining the aim pursued[111]. Further, with respect to other conditions (such as a time period of one year's study within the Member States), the Court has ruled that it «is too general and exclusive … [as] it unduly favours an element which is not necessarily representative of the degree of integration into the society of that Member State at the time the application for assistance is made. It thus goes beyond what is necessary to attain the objective pursued and cannot therefore be regarded as proportionate»[112]. Likewise, the Court has deemed «that the rule is too exclusive. By requiring specific periods of residence in the territory of the Member State concerned, the 'three out of six years' rule prioritizes an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State»[113].

Against this background, it is clear that the ECJ conducts a real reasonableness scrutiny that is comparable to that of the Italian Constitutional Court, even in cases in which the national social system's interest is at stake, and the link with a fundamental economic freedom is weaker (or absent). In this manner, it infringes on national competences and national sovereignty in delivering an effective transnational social inclusion.

Nevertheless, this conclusion is not applicable to all its cases. Over the last few years, the Court has followed a different approach in dealing with the most sensitive cases, in which inactive European citizens apply for social assistance in the host Member State, and the connected issue of effective social inclusion is at stake[114].

In cases such as Brey, Alimanovic, Dano, and Garcia Nieto, the Court, starting from the premise that each Member State is entitled to establish limits and conditions on access to its social system, has included the requisite of legal residence pursuant to the meaning of Directive 2004/38, which, in turn, presupposes sufficient economic resources[115]. In making this logical and normative systematic connection, it has eliminated any possibility for a reasonableness scrutiny in relation to the consistency of the requisites laid down by each welfare state's provisions with their specific aim of protecting the most vulnerable people.

[111] C-57/96, Meints, para. 48.

[112] C-11/06 and 12/06, Morgan and Bucher, para. 46.

[113] C-542/09, Commission v. Netherlands, para. 86.

[114] S. GIUBBONI, *EU internal migration law and social assistance in time of crisis,* cit., p. 263, discusses "the embarrassing disappearance from the scene of the contextual proportionality test".

[115] See in particular, C-140/12, Brey, para. 41 ff.

Thus, these cases reveal an emerging reversal of effective social inclusion among European citizens and the Member States. Further, they are the reason why European transnational social inclusion delivers fragmentary and uneven results that are caught in the trap of the multi-tier structure of social rights, their multilevel system of protection, the multidimensionality of social inclusion and the connected scope of political discretion.

3. Striking a first assessment

As the analysed case law shows, the cases of migrant students asserting claims for maintenance and study grants or economically inactive citizens asserting claims for cross-border access to social assistance (non-contributory cash benefits in the words of Article 70, para. 4, of Regulation 883/2004) address the core of the sovereign national decisions about how to arrange the burdens and benefits within a national community, in which the links of solidarity are obviously deeper than those with other European citizens[116], and the presupposed constitutional status of these sorts of social rights, which are narrowly linked with redistributive policies. Consequently, the ECJ has substantially exposed itself in dealing with cases in which any specific economic rationale could underpin the extension of national social rights to the citizens of other Member States for social inclusion aims. It has preferred, in the last instance (see, among others, Alimanovic and Dano), to preserve national sovereignty in striking a balance between conflicting (social and economic) rationales[117]. On the one hand, «the need to protect the finance of the host Member State»[118] is considered a legitimate aim for the different treatment of migrant citizens; on the other hand, «when Member states lay down the conditions for the grant of special non-contributory cash benefits

[116] In this light, A. SCHRAUWEN, C. ECKES, M. WEIMER (Edited by), *Inclusion and Exclusion in the European Union*, cit., p. 6, state that the «Member States are reluctant to give up control over areas and issues that they perceive as lying at the core of their sovereignty. They want to remain in control of the answer to the question «who belongs» both in terms of physical presence and redistributive justice».

[117] For this risk of political exposition by the ECJ, see M. DOUGAN, E. SPAVENTA, *'Wish You Weren't Here…' New Models of Social Solidarity in the European Union,* in M. DOUGAN, E. SPAVENTA (Edited by), *Social Welfare and EU Law,* cit., p. 203-204. For the conflict «between functionally differentiated structures representing different forms of rationality», the economic and the solidarity one, within the European integration process, see P.F. KJAER, *Between Governing and Governance, On the Emergence, Function and Form of Europe's Post-National Constellation*, Hart Publishing, Oxford, 2010, p. 141.

[118] C-308/14, European Commission v. United Kingdom of Great Britain and Northern Ireland, para. 80.

and the extent of such benefits, they are not implementing EU law»; consequently, any violation of the European Charter of Fundamental Rights might be brought before the ECJ[119].

On the contrary, the «commutative logic» underlying the migrant workers' position[120] or the internal market logic underlying the position of the recipients of services has allowed the Court to enter an in-depth reasonableness analysis in terms of the adequacy of the means for attaining the purpose of real social integration (for workers) or for maximising the openness in access to healthcare (for the recipient of this service). It thus delivers more effective protection for transnational social inclusion in a way that is more similar to the *modus operandi* of the Italian Constitutional Court when it deals with equality of treatment in access to social assistance. Consequently, any «budgetary considerations may justify a difference in treatment between migrant workers and national workers». Otherwise, «the application and scope of a rule of European law as fundamental as the principle of non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of the Member States»[121]. Analogously, when cross-border access to healthcare services is at stake, it is not public finance as such that integrates a legitimate objective, but rather the balance when consequences for the overall level of public-health protection are implied[122].

This judicial background makes it clear that equality bears and implies a certain degree of "dis-equality". Consequently, the core question is to assess the level beyond which inequality in treatment becomes unacceptable discrimination[123]. Indeed, the structure of the reasonableness scrutiny[124], as shown by the analysed case law, leaves open different exits according to the

[119] See, C-333/13, Dano, para. 91.

[120] S. GIUBBONI, G. ORLANDINI, *La libera circolazione dei lavoratori nell'Unione Europea,* cit., p. 224, speak about a commutative logic between the economic contribution of workers and their complete socio-economic integration within the host State.

[121] C-20/12, Giersch, para. 52.

[122] See, inter alia, Müller-Fauré, C-386/99, para. 72.

[123] See G. SILVESTRI, *Dal potere ai principi. Libertà ed uguaglianza nel costituzionalismo contemporaneo,* Editori Laterza, Rome-Bari, 2009, p. 65 ff.; A. SIMONCINI, *Dalle dis-eguaglianze alle differenze. Spunti per una revisione del concetto di "merito" nello stato costituzionale,* in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale. Atti del convegno di Campobasso 19-20 giugno 2015,* Editoriale Scientifica, Naples, 2016, p. 366.

[124] On the concepts of equality and proportionality in reference to the judicial assessment in terms of the relationship between means and ends that put rationality at the center, see A. SOMEK, *The Cosmopolitan Constitution,* Oxford University Press, Oxford, 2014, p. 112.

«interpretative paradigms»[125] assumed and implies the risk of crossing over to political evaluation. This also occurs when the judicial application of the principle of equality goes beyond its reference to a *tertium comparations* enshrined by legislation in order to strike-down possible unreasonable discrimination to engage in a deeper evaluation of the adequacy between the means and the ends[126].

A similar concern has currently also arisen with regard to the broader question about the «unequal balance»[127] between social needs (i.e. social rights) and budgetary constraints, which represents a real "dangerous ground" on which the Italian Constitutional Court has also, in turn, adopted an uneven stance. Indeed, in dealing with the austerity measures that were enacted to cope with the fiscal sustainability of the budget and the connected reductions in the social rights, the National Court has sometimes decided to curtail its reasonableness scrutiny in order to preserve the political discretion implied by the challenged choice[128]. Surprisingly, in the recent Ledra case[129], the ECJ, taking the Pringle judgement a step further, addressed the question of the protection of fundamental rights when an economic governance measure may

[125] S. STAIANO, *Per un nuovo paradigma giuridico dell'eguaglianza,* in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale,* cit., p.414.

[126] On the implications of the reasonableness scrutiny in reference to the equality principle, see F. SORRENTINO, *Eguaglianza formale,* cit., p. 8. On the different concepts of the principle of equal treatment at the European level, see F. GHERA, *Il principio di eguaglianza nella costituzione italiana e nel diritto comunitario,* cit., p. 85 ff.

[127] To recall the expression of M. LUCIANI, *Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant'anni della Corte costituzionale,* in *www.rivistaaic.it,* No. 3/2016, p. 8.

[128] As evidenced by A. ANZON DEMMING, *Un'inedita altalena nella giurisprudenza della Corte sul principio dell'equilibrio di bilancio*, in *Quaderni costituzionali*, No. 3/2015, p. 683; M. D'ONGHIA, *Sostenibilità economica* versus *sostenibilità sociale,* in *Rivista del Diritto della Sicurezza Sociale,* No. 2/2015, 319 ff. For an overall description of the Italian Constitutional Court's case law *vis à vis* the austerity measures that infringed upon the social rights during the crisis period, see D. TEGA, *Welfare Rights in Italy*, and A. LO FARO, *Fundamental Rights Challenges to Italian Labour Law Developments in the Time of Economic Crisis: An Overview,* both in C. KILPATRICK, B. DE WITTE (Edited by), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI – Working Papers, Law*, 2014/2015, respectively, at p. 52 ff. and 60 ff.

[129] C-8-10/15; in particular, the ECJ was asked to set aside the orders of the General Court, which declared in part inadmissible and in part unfounded the actions of the appellants seeking, first, the annulment of parts of the Memorandum of Understanding concluded between the Republic of Cyprus and the European Stability Mechanism (ESM) on 26 April 2013, and second, the compensation for the damage caused to the appellants by the national decrees implementing its provisions. More specifically, the national decrees adopted for the implementation of the Memorandum introduced a levy on bank deposits. Consequently, the appellants claimed the Commission had infringed Article 17, para. 1 of the Charter when it negotiated the Memorandum with Cyprus.

be infringing them, by making explicit reference to the European Charter of Fundamental Rights. The Court stated that when the European Commission acts under the European Stability Mechanism, it must ensure that the Memorandum of Understanding is consistent with EU law, including the provisions of the Charter: «[I]n the context of the adoption of a memorandum of understanding … the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law… , to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter» (para. 67).

This statement discloses the correct constitutional path to be undertaken and implemented in steering the reasonableness scrutiny when dealing with the social rights, their highly political implications and the legal ambiguities implied by both their constitutional status and the relevant level of competence[130]. Indeed, the decrease in the risk of crossing over to political evaluation is linked to the boundaries assumed by the judicial assessment: Its ability to remain within the bounds of legal reasoning is due to its adoption of such an unavoidable reference point within the set of values enshrined by the Constitutional documents[131].

Bearing this delivery in mind, and going beyond the judicial enforceability of the social rights for social inclusion, to their effectiveness within the "transnational" space, the European governance framework offers supplemental paths suitable for the concrete layers of the multifold structure of the social rights, which is a subject that will be addressed in the following Chapters.

[130] As stressed by N. BERNARD, *A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU,* in T.K. HERVEY, J. KENNER (Edited by), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, cit., p. 266, if, in reference to the socio-economic rights, where national competence primarily comes into account, judicial enforcement at the European level is not impossible, «it is bound to be very limited if it is to leave room for diverse [national] approaches». Consequently, the Open Method of Coordination is «the most obvious vehicle for the development of such benchmark and assessment of Member States compliance with them».

[131] F. SORRENTINO, *Eguaglianza formale,* cit., p. 8.

III.
TESTING NATIONAL SOCIAL INCLUSION

The effectiveness of social rights is complex, going beyond and sometimes overlooking their judicial enforceability. Consequently, the present chapter deals with another way to test it, as developed by the European governance. This way was originally created within the so-called Open Method of Coordination, but, as it will be seen, it is able to go beyond the specificities of this procedure and attain the different framework of European economic governance. Along this path, the effectiveness of social rights is deemed to encompass both its negative feature in reference to their safeguard from infringements (i.e. impact assessment) and its positive feature in reference to their effective promotion vis-à-vis the multidimensionality of challenges they currently face. The current evolution of the economic governance framework has undertaken both, making it in a manner that matches not merely a greater concern with social matters (as done in the recent past by means of the "social dimension") but also a better concern for the social rights underlying social issues (by means of a "European pillar of social rights").

Part I
European Governance

1. General features

The world of European governance, as described by the 2001 European Commission White Paper, is a true "mare magnum" that challenges traditional constitutional understanding[1].

[1] The implications within the concept of governance are broad; in this respect, it is sufficient to cite M.R. FERRARESE, *La governance tra politica e diritto*, il Mulino, Bologna, 2008, p. 52 ff., along with the 2001 White Paper of the European Commission on EU Governance. The doctrine has consistently spoken either of the possibility of governance without government (in this respect, see J.

It is a composite reality made of «a highly reflexive and pragmatic form of governance entailing the expansion of EU activity into virtually all policy fields, a profound degree of mixity in terms of the sharing of competence between levels and sites of decision-making, and the existence of a dense and complex system of governance alongside the formal structures of government»[2]. In this respect, reflexive governance implies that «rather than simply defending existing positions, [it] should reflect…on the beliefs and presuppositions on which their positions are based, and examine whether these positions should not be revised in the light of other, competing beliefs and presuppositions»[3].

Within this framework, the Open Method of Coordination, enshrined for the first time by the Lisbon Strategy, «can be viewed as yet another aspect of experimental governance without entailing a systemic change to the underlying constitutional settlement of 1957» and as part of «an inherent logic within the EU»[4]. It is «a pragmatic choice looking for a theory»[5], standing halfway between formal law (through the rule of law) and substantial law (through the welfare state)[6], which «softens the edges of the competence

N. ROSEANAU, *Governance, order and change in world politics*, in N. ROSENAU, E.O. CZEMPIEL (Edited by), *Governance without government: Order and change in world politics*, Cambridge University Press, Cambridge, 1992, pp. 4-5), or of a complementary role of the two (governance and government) (in this respect, see S. FABBRINI, *Il sistema governativo dell'UE: una prospettiva comparata*, in G. GUZZETTA (Edited by), *Questioni costituzionali del governo europeo*, Cedam, Padua, 2003, p. 41). With specific reference to the constitutional implications of governance models and procedures, see M. LUCIANI, *L'Antisovrano e la crisi delle costituzioni*, in *Rivista di Diritto Costituzionale*, No. 1/1996, pp. 162-165, and the broad overview of N. WALKER, *Flexibility within a metaconstitutional frame: Reflections on the future of legal authority in Europe*, in G. DE BURCA, J. SCOTT, *Constitutional change in the EU: From uniformity to flexibility?*, Hart Publishing, Oxford and Portland, 2000, p. 9 ff.

[2] G. DE BURCA, *The constitutional challenge of New Governance in the European Union*, in *European Law Review*, Vol. 28, No. 6/2003, p. 814.

[3] O. DE SCHUTTER, S. DEAKIN., Introduction: Reflexive governance and the dilemmas of social regulation, in O. DE SCHUTTER, S. DEAKIN (Edited by), Social rights and market forces: Is the open coordination of employment and social policies the future of social Europe?, Bruylant, Brussels, 2006, p. 5.

[4] E. SZYSZCZAK, *Experimental governance: The open method of coordination*, in European Law Journal, Vol. 12, No. 4/2006, p. 487.

[5] M. BARBERA, *Introduzione*, in E. ALES, M. BARBERA, F. GUARRIELLO, (Edited by), *Lavoro,* welfare *e democrazia deliberativa*, Edizione aggiornata, Giuffré, Milan, 2010, p. X.

[6] D. ASHIAGBOR, L'armonizzazione soft: Il «Metodo aperto di coordinamento» nella strategia europea per l'occupazione, in M. BARBERA (Edited by), Nuove forme di regolazione: Il metodo aperto di coordinamento delle politiche sociali, Giuffré, Milan, 2006, p. 120 ff.

debate…[as] it makes little demands in terms of hard powers for the EC/EU»[7].

Beyond its experimental background, the OMC raised chiefly the same questions encompassing EU governance as a whole, dealing with both input legitimacy perspectives (participation, transparency, accountability) and output legitimacy perspectives (effectiveness, efficiency, impact)[8]. In this respect, Scharpf's and Schmidt's contributions[9] are telling about the endeavour of social sciences to overcome the trap of legal studies in facing the challenges the EU has created for traditional constitutional categories[10]. Furthermore – and always from a constitutional perspective – the OMC compounds the EU's governance shortcomings in terms of the social imbalance and the lack of a rights-driven perspective linked to the still ambiguous scope of Article 51 of the EU Charter[11]. Consequently, the OMC

[7] N. BERNARD, A 'New Governance' approach to economic, social and cultural rights in the EU, in T.K. HERVEY, J. KENNER, Economic and social rights under the EU Charter of Fundamental Rights – A legal perspective, Hart Publishing, Oxford and Portland, 2003, p. 264.

[8] J. ZEITLIN, The open method of coordination in question, in J. ZEITLIN, P. POCHET, (Edited by), The open method of coordination in action – The European employment and social inclusion strategies, P.I.E. – Peter Lang S.A., Brussels, 2005, p. 449.

[9] On the concept of output legitimacy, see F. W. SCHARPF, *Governare l'Europa: Legittimità democratica ed efficacia delle politiche dell'Unione Europea*, Bologna, 1997, p. 113 ff.; on the concept of throughput legitimacy, see V.A. SCHMIDT, *Democracy and legitimacy in the European Union revisited: Input, output and 'throughput'*, in *Political Studies*, Vol. 61, No. 1/2013, pp. 2-3.

[10] J.H.H. WEILER, *European democracy and its critics: Polity and system*, in J.H.H. WEILER, *The constitution of Europe*, Cambridge University Press, Cambridge, 1999, p. 270.

[11] A. LO FARO, Coordinamento aperto e diritti fondamentali: un rapporto difficile, in M. BARBERA (Edited by), Nuove forme di regolazione: Il metodo aperto di coordinamento delle politiche sociali, cit., p. 353 ff., underlines the difficulty in matching «two grammars or two paradigms of so different regulative discourse», such as the OMC and fundamental rights normative background. The European Parliament has denounced the lack of due consideration for the rights-driven perspective of the Charter many times. In particular, in its analysis on fundamental rights, it has assessed social rights as an essential part of the Charter that needs to be particularly valued during periods of economic crisis. For this purpose, it has called on «the Commission, the Council and the Member States to fully assume their responsibilities in relation to the proper and full application of the EU's mandate and competencies with regard to fundamental rights, on the basis of both the Charter and the articles of the Treaties dealing with fundamental rights and citizens' rights issues, in particular Articles 2, 6 and 7 of the TEU; believes that this is the only way to ensure that the European Union equips itself — as it has done in other areas of common interest and importance, such as economic and budgetary matters — to deal with the democracy, rule of law and fundamental rights crisis and tensions that are affecting it and its Member States; calls for the urgent strengthening of European mechanisms to ensure that democracy, the rule of law and fundamental rights are respected in the European Union». In addition, it has urged «national parliaments to enhance their role in human rights scrutiny of EU activities and national implementation of EU law», see European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011) (2011/2069(INI)), paras. 1, 22. Against this warning, a recent European Parliament study underlined the lack of social rights-based attention on the assessment of

«remains the governance technique through which the newly articulated social values and objectives of the Union are to be pursued»[12], rather than an instrument embedding social rights. Furthermore, «if the eminently procedural effort to co-ordinate national regulatory policies is to be able to realise all of its potential virtuous effects, a constant dialectic link needs to be maintained with the fundamental social principles and values proclaimed by the Charter of Fundamental Rights of the European Union»[13].

This ambiguity implied by the OMC leads one to consider it as «part of the solution… or instead part of the problem»[14] and to put under enquiry its empirical ability to influence substantial policy change at the national level[15].

In this composite scenario, the doctrine has chiefly been divided into two strands according to the assumed perspective: those who see the glass of social inclusion policies by means of the OMC as half full and those who see the glass as half empty.

The first rests on «contents», as the evolution followed by the EU in reference to social inclusion eventually took into consideration all the relevant aspects of a social inclusion strategy necessary to deliver effectiveness in terms of social improvement and equality, leaving the Member States with a sufficient margin of discretion to adapt solutions to domestic features: «common objectives are put forward for each Member State to strive for individually in accordance with a policy of their choice»[16]. According to this

macroeconomic policies, and as such, a lack of consideration for the constitutional dimension of people, see European Parliament's Policy Department C on Citizen's Rights and Constitutional Affairs — The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework — Study for the AFCO Committee (PE 571.397 of 2016), para. 2.2 ff.

[12] K. ARMSTRONG, Governing social inclusion — Europeanization through policy coordination, Oxford University Press, Oxford, 2010, p. 245.

[13] S. GIUBBONI, Social rights and market freedom in the European constitution – A labour law perspective, Cambridge University Press, Cambridge, 2006, p. 128.

[14] J. ZEITLIN, *The open method of coordination in question*, cit., p. 449. In the introduction of the book (p. 22), Zeitlin's argument rests on the reconstruction of the «contradictory assessments from both academic researchers and EU policy actors alike» in reference to the OMC; however, on the «competing representations» of the OMC, see A. ANDRONICO, A. LO FARO, *Defining problems: The open method of coordination, fundamental rights and the theory of governance*, in O. DE SCHUTTER, S. DEAKIN (Edited by), *Social rights and market forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruylant, Brussels, 2006, p. 44 ff.

[15] On the difficulty implied in the measurement of the impact on national policy-making by the OMC, see S. SACCHI, *Governance e coordinamento aperto delle politiche sociali,* in M. FERRERA, M. GIULIANI (Edited by), *Governance e politiche nell'Unione europea*, il Mulino, Bologna, 2008, p. 298; J. ZEITLIN, *The open method of coordination in question*, cit., p. 449 ff.

[16] B. CANTILLON, N. VAN MACHELEN, Between dream and reality…on anti-poverty policy, minimum income protection and the European social model, in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), Social inclusion and social protection in the EU: Interactions between law and policy, Intersentia Ltd., Cambridge-Antwerp-Portland, 2012, p. 178.

perspective, under the light of European tradition, nothing in the integration process is meaningless, so following the «pas à pas» approach, each single little step ahead and each single word in the many documents delivered by European institutions (and their bureaucratic organisations) have weight and could reveal the way for further improvement at the European level[17].

The second doctrinal stance rests more on the «containers», criticising the lack of effectiveness and democratic legitimacy, as well as the risk of a race to the bottom in relation to soft law and the relevant coordination procedures (i.e. the Open Method of Coordination). Consequently, it points out the imbalance compared to the stronger means laid down for market and economic policies[18] and downgrades the Social Inclusion OMC as a mere instrument of «cooperation rather than coordination»[19].

[17] F. PIZZOLATO, *Il minimo vitale: Profili costituzionali e processi attuativi*, Giuffré, Milan, 2004, p. 32 ff., criticizes the common approach focused on the liberal matrix of the EU in reference to social policy. Indeed, according to Pizzolato, if one follows diachronically the development of the European soft law, it is an integrated European social model that stems from it, made up of a composite of national welfare and European social policies that aim to support the gradual harmonisation of national social protection through coordination. K. LENAERTS, *La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne*, in *Revue Trimestrielle des Droits de l'Homme*, 2010, p. 197 ff., follows and evaluates in positive terms the course of the progressive integration of social rights by means of the ECJ's case law and the Charter within the EU. K. ARMSTRONG, *Governing social inclusion – Europeanization through policy coordination*, cit., p. 61, recalling that doctrine is not unanimous on the market-driven intervention of EU in social matters, stresses the positive social achievements along the European evolutionary path. G. DE BURCA (Edited by), *EU law and the welfare state*, Oxford University Press, Oxford, 2005, pp. 1-2, observes that, contrary to the widespread conviction about the division of work between the EU and the Member States, «[o]ne of the aims of this volume is to revisit and to question this perception by investigating the various ways in which the EU, and EU law in particular, is having a significant impact on the laws and practices of the Member States in the area of welfare more broadly conceived». As underlined by B. CANTILLON. H. VERSCHUEREN, P. PLOSCAR, *Social protection and social inclusion in the EU: Any interaction between law and policy?*, in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), *Social inclusion and social protection in the EU: Interactions between law and policy*, Intersentia Ltd., Cambridge-Antwerp-Portland, 2012, p. 15, the Open Method of Coordination on Social Inclusion «could be perceived as a form of 'brain storming' for more binding agreements» with positive outputs in terms of social inclusion and EU legitimacy.

[18] C. MATHIEU, H. STERDYNIAK, *Le modèle social européen et l'Europe sociale*, in *Revue de l'OFCE*, No. 104/2008, p. 96 ff. Mathieu and Sterdyniak highlight the limited social and parliamentary participation of the OMC; S. SACCHI, *Il metodo aperto di coordinamento, origini, ragioni e prospettive del coordinamento delle politiche sociali*, in *Il Politico*, No. 1/2007, p. 29, observes that the OMC could be seen as insuring the Member States against the loss of power in welfare issues stemming from the ECJ and the EU Commission; A. LO FARO, A. ANDRONICO, *Metodo aperto di coordinamento e diritti fundamentali: Strumenti complementari o grammatiche differenti?*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, No. 108/2005, p. 518, highlight the risk of deregulation implied in the OMC.

[19] C. DE LA PORTE, P. POCHET, G. ROOM, Social benchmarking, policy making and new governance in the EU, in Journal of European Social Policy, Vol. 11, No. 4/2001, p. 297.

On this basis, every detailed study on the topic of social rights for social inclusion risks either a deadlock because of this complex and composite framework, or the proposal of new (sometimes, and *rebus sic stantibus*, utopian) scenarios regarding the «future of the EU»[20] on social matters. Conversely, our purpose is both more modest and more concrete, resting on a methodological approach that follows the 'acquis' that the EU governance has so far developed within the limit of its constitutional concern and the aim to underpin its current steps forward that fit the purposes of more effective social rights for social inclusion.

2. New challenges for legal studies

Against this background, our intention is not to deepen the OMC on social inclusion, either in substantial or procedural terms vis-à-vis its constitutional stance[21], nor to dispute its effectiveness (which is still an open question discussed by both social scientists and legal experts)[22]. As stressed by Armstrong, while lawyers are familiar with interpreting certain legal texts, dealing with the OMC demands a different approach. In this last respect, it is the discovery of a wide range of general texts — not only authoritative legal texts — that is at stake[23]. Consequently, our examination into the broad documentation of the OMC on social inclusion has been guided by a twofold

[20] To borrow the title of the recent white paper of the European Commission on the future of Europe, COM(2017) 2025 of 1 March 2017.

[21] Plenty of doctrine can be cited either within legal or social studies. It is sufficient to cite, from a legal perspective, K. ARMSTRONG, *Governing social inclusion —— Europeanization through policy coordination,* cit., p. 29 ff.; J. ZEITLIN, *Social Europe and experimentalist governance: Towards a new constitutional compromise?*, in G. DE BURCA (Edited by), *EU law and the welfare state*, cit., p. 213 ff.; S. GIUBBONI, *Social rights and market freedom in the European constitution – A labour law perspective*, cit., p. 121 ff.; from a social science perspective, see B. CANTILLON, N. VAN MECHELEN, *Between dream and reality…on anti-poverty policy, minimum income protection and the European social model*, cit., p. 173 ff.; M. FERRERA, M. MATSAGANIS, S. SACCHI, *Open coordination against poverty: The new EU 'social inclusion process'*, in *Journal of European Social Policy*, No. 8/2002, p. 227 ff.

[22] On the lack of effectiveness of the OMC on national policy-making, except for what was called «institutional mimetism» or the «lever effect» on national policy making choices otherwise difficult to be accepted by citizens, see F. GUARRIELLO, *Le lezioni apprese dal metodo aperto di coordinamento*, in E. ALES, M. BERBERA, F. GUARRIELLO (Edited by), *Lavoro,* welfare *e democrazia deliberativa*, Edizione aggiornata, Giuffré, Milan, 2010, p. 730; M. FERRERA, S. SACCHI, *Il Metodo aperto di coordinamento e le capacità istituzionali nazionali: l'Esperienza italiana*, in M. BARBERA, (Edited by), *Nuove forme di regolazione: Il metodo aperto di coordinamento delle politiche sociali*, cit., 2006, p. 205 ff.

[23] In this sense, see K. ARMSTRONG, Governing social inclusion – Europeanization through policy coordination, cit., p. 94.

reference point: on the one hand, to go beyond the lack of both a formal constitutionalization and utilization of formal constitutional discourse (i.e. rights) to find out what issues of constitutional relevance are in any way implied in the OMC on social inclusion; and on the other hand, to go beyond the different paradigms within which the OMC on social issues has been interpreted by political scientists[24] or legal experts[25].

For this aim, some «impairments» that affect constitutionalists when dealing with the inherent evolutionary logic that the functionalist EU approach has habitually followed need to be addressed. Accordingly, the usual path is rather reversed: it is not from constitutionalism to the EU governance with the aim of measuring it against constitutional standards, but rather from the latter to the former. It is not for discovering how to properly interpret European documents, but rather to look into a wide range of documents to learn what is under the surface to transcend the peculiarity of the OMC and join other relevant European governance frameworks.

Such a systematic reconstruction delivers some useful approaches that match the subject of the present research as they cope with the broad, ongoing challenges that the multi-tiered structure of social rights (i.e. their effectiveness) and the multidimensionality of poverty and social exclusion are facing. These deliveries, which involve constitutionally relevant concepts (equality, human dignity), should not be overlooked and overhauled by the constitutional understanding and awareness of constitutionalists. Furthermore, in doing such a reconstruction, a bridge is paved towards social studies, which are already accustomed to these sorts of EU social inclusion legacies, and a seed is planted for a scientific dialogue that — in a time of evident political standstill and mistrust — could help to revamp these European legacies relevant to the effectiveness of social rights for social rights.

All these premises should help to clear away any «constitutional prejudices» for the purpose of a scientific dialogue vis-à-vis the multi-tiered structure of social rights, as their very substance falls beyond mere constitutional entitlement and instead involves their effectiveness, which is usually tracked by social inclusion surveys led by social scientists.

[24] About the «history of European Social Policy» and its swinging features between more liberal or socially oriented stances according to the dominance of right- or left-oriented parties within the Member States' governments, P. POCHET, *The open method of coordination and the construction of social Europe – A historical perspective,* in J. ZEITLIN, P. POCHET, (Edited by), *The open method of coordination in action – The European employment and social inclusion strategies,* cit., p. 39 ff.

[25] K. ARMSTRONG, *Governing social inclusion – Europeanization through policy coordination*, cit., p. 19 ff. In particular, Armstrong distinguishes three main paradigms: redistribution, social citizenship and activation (p. 25).

On this basis, the path followed by the EU to cushion the very highly political features of social inclusion matters and to deliver a way more suitable of dealing with its effectiveness represents a methodological approach that entails positive outcomes for the multilevel structure of fundamental social rights, their stance within the multilevel system of governance and the fight against the current socioeconomic threats.

Within this perspective, two main legacies (of constitutional concern) originated within the OMC on social inclusion but went across, over and beyond it, and reached out the governance system engendered by the European Semester, have been insulated.

On the one hand, despite its swinging between different paradigms (more economic or social-oriented), it remains true that «since Lisbon there has been a *substantial* change within policies by means of the express and unequivocal link between social, employment and economic policies»[26] that carries on and currently reaches and influences the recent ongoing changing wave within the economic governance system. On the other hand, this process of entanglement and overlapping of different policy domains, which replaced the previous segmented approach that put each strand within 'watertight compartments'[27], has been supported by the use of social indicators which are deemed to be «the most valuable outcome of this process [the OMC on social inclusion]…provid[ing] a common standard for the measurement of poverty and social exclusion»[28]. Both the entanglement of economic and social matters as well as the recourse to social indicators match and support each other and have played an instrumental role in decreasing the highly political sensitivity of social issues by means of languages and tools with which the EU governance is more accustomed to dealing.

At this point in our research, these are the two acquis that will be undertaken first and then deepened, and which institutional relevance deserves to be

[26] D. ASHIAGBOR, L'armonizzazione soft: Il «Metodo aperto di coordinamento» nella strategia europea per l'occupazione, cit., p. 114. Similarly, see S. SACCHI, Governance e coordinamento aperto delle politiche sociali, cit., p. 302. E. BARBERIS, Y. KAZEPOV, Tendenze e prospettive dei welfare state europei, in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), Diritto di welfare: Manuale di cittadinanza e istituzioni sociali, il Mulino, Bologna, 2010, p. 163, speak about the progressive comunitarisation of social policy, which has improved convergence in the practice and discussion of concepts (such as active inclusion).

[27] It suffices to remember the approach adopted by the Kok Report and the Sapir Report, focusing on employment and growth while underestimating the role of social policy in the fight against poverty and social exclusion in this mutually supportive interaction.

[28] P. SCHOUKENS, J.B. SMETS, Fighting social exclusion under EU Horizon 2020: Enhancing the legal enforceability of the social inclusion recommendations?, in European Journal of Social Security, Vol. 16, No. 1/2014, p. 55.

stressed as their consistency has finally 'infringed' the previous 'untouchable' domain of the economic governance procedures (see Chapter IV).

Part II
From Lisbon to Europe 2020

This mostly reconstructive part aims to prove that the European governance approach to social matters swings between different paradigms that imply political and legal obstacles to find out a rightful place for social policy within the EU framework. On the one hand, the legal basis of EU-level intervention on social inclusion matters was under debate (either by liberal or socio-democratic governments or by academic researchers)[29]. On the other hand, the conflict between different political and ideological trends within the Council (not only trends between the right-wing and left-wing orientations but also among the different sensitivities of the Council's configuration, such as those of the different committees) and the conflict between the more 'centralized' perspective of the Commission vis-à-vis the Council's stance, fuelling further uncertainty[30]. More specifically, when the social policy argument is raised at the European level, several institutional, political, economic and social (i.e. sensitive) concerns always come into play[31]. With regard to institutional concerns, the conferral principle, the subsidiarity principle and — definitely — national sovereignty are key issues[32]. With regard to political concerns, social policy choices have embodied one of the main features of national identities, and as such, have been core issues during electoral races[33]. In

[29] For an in-depth analysis of the relation between European social policies and European law, see the doctrinal contribution in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), *Social inclusion and social protection in the EU: Interactions between law and policy*, Intersentia Ltd., Cambridge-Antwerp-Portland, 2012.

[30] In this respect, see P. POCHET, The open method of coordination and the construction of social Europe – A historical perspective, in J. ZEITLIN, P. POCHET, (Edited by), The open method of coordination in action – The European employment and social inclusion strategies, cit., p. 65.

[31] A first overall overview of the legal and historical framework of European social policy was provided by R. NIELSEN, E. SZYSZCZAK, *The social dimension of the European Union*, Handelshøjskolens Forlag, Copenhagen, 1997, p. 15 ff.

[32] P. SCHOUKENS, Combating social exclusion in the European Union: In search of hidden competences for legal action, in Rivista del Diritto della Sicurezza Sociale, No. 3/2015, p. 541. In trying to determine the legal basis within the Treaty for EU legislative intervention in the fight against social exclusion, Schoukens highlights the notion that «true citizenship in Europe can only occur when Europe itself guarantees a minimum of protection».

[33] F. W. SCHARPF, The European social model: Coping with the challenges of diversity, in JCMS, Vol. 40, No. 4/2002, p. 651. G. PITRUZZELLA, Chi governa la finanza pubblica in Europa?, in

reference to economic and social concerns, the complexity inherent in welfare issues, the connected complexity of the correct mix of means for dealing more effectively with them, and their balance with market and budgetary constraints are at stake[34]. Accordingly, state interventions through the redistribution of revenues, the repartition of charges and benefits, and the funding of general interest services are intertwined with national traditions, identities and interests. So, while the asymmetry inherent to the economic integration process vis-à-vis the Monetary Union has more easily been offset, the same has not occurred so easily for social inclusion. Indeed, while economic questions fit more effectively into a governance made of rules, targeted criteria, indicators and reference values[35], the conflicting political implications of the complex and uneven questions presupposed by social issues have delayed the ability to follow a similar path[36].

However, the chiefly reconstructive function of this Part II is to insulate the instrumental path followed by the EU governance when it started to deal with social inclusion subjects, which is also relevant for the follow-up, finding out what has represented an institutional sediment that, as such, has more recently evolved within the economic governance framework, which are, in turn, of constitutional importance for the effectiveness of rights on social inclusion.

Quaderni Costituzionali, No. 1/2012, p. 28, recalls the 2011 attempt by Angela Merkel, with the support of Sarkozy, to shift economic and social policies at the EU level, against the strong opposition of other heads of states and governments.

[34] See N. BERNARD, *Between a rock and a soft place: Internal market versus open coordination in EU social welfare law*, in M. DOUGAN, E. SPAVENTA (Edited by), *Social welfare and EU law*, Hart Publishing, Oxford and Portland, 2005, p. 277 ff., who describes a different position on a positive European integration of social policies and the related pros and cons. Regarding the different theoretical model proposed to address social matters at the EU level, articulating the «competitive model», the «solidaristic model» and the «mixed model» or «co-operative federalism», see S. GIUBBONI, *Social rights and market freedom in the European constitution – A labour law perspective*, cit., p. 259 ff. On the importance of a constitutional bedrock for the integration of social matters within EU governance, see S. FREDMAN, *Transformation or dilution: Fundamental rights in the EU social space*, in *European Law Journal*, Vol. 12, No. 1/2006, p. 43.

[35] In this respect, it is foretelling the publication of V.A. SCHMIDT, *Forgotten democratic legitimacy: «Governing by the Rules» and «ruling by the numbers»*, in M. BLYTH, M. MATTHIJS (Edited by), *The future of the Euro*, Oxford University Press, New York, 2015.

[36] In this regard, it is worth recalling the political science theory according to which the EU's efficiency work is inversely proportional to the level of political sensitivity of the question (which is due, in turn, to the conflicting interests involved), see F.W. SCHARPF, *The European social model: coping with the challenges of diversity*, cit., p. 651.

1. The background

The intention of the Founding Fathers to preserve a separation of competences between the Community and national levels is well known, as is their presupposed trust that economic growth would be sufficient to generate an overall increase in European wellness. It is likewise known that this pattern has not produced the anticipated results, and that social impairment progressively worsened[37] during the years of the economic and financial crisis[38].

Whether one looks into the European social acquis, it can see that beyond the labour market, where there are important pieces of hard law aimed at minimum standards of harmonisation for the protection of workers, either in access to work or in conditions of employment (Art. 153, para. 1, a)-i), TFEU)[39], the whole EU social acquis is quite limited[40].

Although the Treaty of Lisbon adopted a formal rebalancing of values through the enshrinement of the «highly competitive social market economy» (Art. 3, para. 3, TEU) and the mainstreaming clause of Article 9, TFEU due to the Belgian government's position[41], EU social competences have not been changed. In addition, the Charter of Fundamental Rights did not improve the

[37] S. GIUBBONI, Verso la costituzione europea: la traiettoria dei diritti sociali fondamentali nell'ordinamento comunitario, in P. COSTANZO, S. MORDEGLIA (Edited by), Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria, Milano, 2005, p. 24 ff. The author (p. 31) observes that the cause of the European social impairment rests on the weakness of the European social approach, which does not lay down directly enforceable social rights, but rather, social objectives.

[38] M. PANIĆ, *The Euro and the Welfare State,* in M. DOUGAN, E. SPAVENTA (Edited by), *Social Welfare and EU Law,* Oxford and Portland, Hart Publishing, 2005, p. 43, shows how the Treaty of Maastricht and the Stability and Growth Pact failed to provide an adequate institutional framework for long-term improvement rather than a deterioration in the socio-economic welfare of all, setting the clock back to the 1930s with respect to the macroeconomic management of the EU.

[39] For the distinction at the EU level between harmonisation and coordination, see D. BIFULCO, *L'inviolabilità dei diritti sociali*, Jovene, Naples, 2003, p. 267 ff.

[40] In this regard, see the European Commission SWD(2016) 50 final, 8th March 2016 on the *EU Social Acquis* and the SWD(2017) 201 final, 26th April 2017, *Accompanying the document on Establishing a European Pillar of Social Rights,* which enshrines twenty social rights and principles, and for each of them, it outlines the Union social *acquis*, starting with the relevant provisions of the Charter of Fundamental Rights of the European Union, recalling the legislative powers and their limits set out in the Treaty on the Functioning of the European Union (TFEU) and concluding with the key legislative and non-legislative measures already in place which are contributing to the implementation of the principle or right in question.

[41] For this rebalance of values, see M. DAWSON, B. DE WITTE, *The EU Legal Framework of Social Inclusion and Social Protection: Between the Lisbon Strategy and the Lisbon Treaty,* in B. CANTILLON, H. VERSCHUEREN, P. PLOSCAR (Edited by), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy,* cit., p. 55.

situation because, as known, it did not establish any new power or task for the Union (Art. 51, para. 2), and the rights therein recognised must be exercised under the conditions and the limits defined by the Treaties (Art. 52, para. 2)[42].

According to Art. 153, para. 2, a), TFEU, in combating social exclusion and modernising the social protection system, the EU level (the European Parliament and the Council) «may «adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States». In addition, EU interventions to support and complement States' actions in social fields «shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof» (Art. 153, para. 4, TFEU). Furthermore, this legal basis for cooperation between the Member States is weaker than that envisaged in Art. 147 and 148 TFEU, wherein the process of cooperation is better articulated on employment policies; it is also far away from the tightness of the coordination and convergence process provided for economic policies by Art. 121, TFEU[43].

Consequently, in relation to positive European integration, a scale of relevance between different coordination procedures has clearly emerged: the top position is occupied by economic policies, which must be coordinated for a better convergence; in the middle position, there are employment policies for which the Member States' cooperation is requested within a specific treaty procedure; and finally, at the bottom, there are social policies, for which cooperation «may» (and not «shall» as for employment policies) be encouraged.

Against this background, it is evident that the different steps for the consideration of social policies within the EU primary law mirror their

[42] As stressed by K. ARMSTRONG, *Governing Social Inclusion – Europeanization through policy coordination,* cit., p. 254, «it seems evident that despite the enhanced references to social values and objectives, and notwithstanding the recognition of social rights as fundamental rights alongside traditional civil and political rights, the EU is not set to take on the primary role in promoting and protecting social solidarity in the EU. Indeed, the end result of the process of constitutional reform may be something which is not satisfactory whatever one's preferred approach to constitutionalism». Apart from the substantive content of the Charter, it has been described as «an instrument of political and moral legitimacy of the EU», in this respect, see G. DE BURCA, J.B. ASCHENBRENNER, *European Constitutionalism and the Charter,* in S. PEERS, T. HERVEY, J. KENNER, A. WARD (Edited by), *The EU Charter of Fundamental Rights. A commentary,* Hart Publishing, Oxford, 2004, p. 18.

[43] F. FABBRINI, *Economic Policy in the EU after the Crisis: Using the Treaties to Overcome the Asymmetry of EMU,* in *dUE,* No. 3/2016, p. 529 ff., argues in favour of the very existence of a Treaty legal basis for managing economic policies at the EU level.

«historical» dynamic of introduction[44]. First, the coordination of economic policy was introduced by the Maastricht Treaty as a matter of common interest and as a complement of the asymmetry produced by the assumption of the monetary policy at the EU level without a consistent European stance in fiscal and macroeconomic policy[45]. Second, after realising that economic growth was not sufficient per se to increase and improve employment, in November 1997, the European Council launched the so-called Luxembourg process, which anticipated the Employment Economic Strategy provided for by the Amsterdam Treaty[46], which also laid down provisions on social policies that were previously banished from the Treaty's content because of the UK's opposition (and for this reason, were incorporated in a Protocol attached to the Treaty)[47]. Lastly, specific provisions for social inclusion were addressed in the Treaty of Nice[48].

[44] C. DUPRÉ, *Human Dignity in Europe: A Foundational Constitutional Principle*, in *European Public Law*, No. 2/2013, p. 331 ff., remembers that in general, the EU has followed a «reverse» approach to constitutionalism (economic identity first and human dignity next).

[45] F. AMTENBRINK, Denationalizing Monetary Policy: Reflections on 60 Years of European Monetary Integration, in N.N. SHUIBHNE, L.W. GORMLEY (Edited by), From Single Market to Economic Union, Essays in Memory of John A Usher, Oxford University Press, Oxford, 2012, p. 17: «[T]he rationale for European monetary integration can be traced back to the very roots of European economic integration, namely in the shape of the 1957 Treaty establishing a European Economic Community (EEC Treaty)». For a description of the steps towards a Monetary Union and its features, see J.V. LOUIS, L'Union européenne et sa monnaie, University of Brussels Editions, Brussels, 2009, p. 85 ff., the author underlines that the Member States, step by step, have gone straight to a Monetary Union, but they have had some difficulties in establishing a real economic Union because of many different opinions on what «coordination» must be and because of their preference of giving more power to intergovernmental institutions (the Council, the Eurogroup, the European Council) rather than into supranational institutions (the Commission, the Court of Justice).

[46] The European Council of Essen on 9-10 December 1994 started an informal method of policy cooperation in matters of employment; in particular, it urged «the Member States to transpose these recommendations in their individual policies into a multiannual programme having regard to the specific features of their economic and social situation. It requests the Labour and Social Affairs and Economic and Financial Affairs Councils and the Commission to keep close track of employment trends, monitor the relevant policies of the Member States and report annually to the European Council on further progress on the employment market, starting in December 1995».

[47] «The Treaty of Amsterdam heralded a new phase of Community integration characterized by an attempt to regain a more appropriate and even balance between the necessity of constructing a totally unified market and the need to reaffirm the essential values of the European social model… What in fact emerged clearly at Amsterdam for the first time was an awareness that central aspects of the democratic legitimacy and very sustainability of the entire integration process are linked to such a balance», in these terms, S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective*, cit., p. 96.

[48] On the evolution of the EU with reference to social matters in relation to the introduction of the OMC, see S. SACCHI, *Il metodo aperto di coordinamento, origini, ragioni e prospettive del coordinamento delle politiche sociali,* cit., p. 25 ff. As stressed by D. BIFULCO, *L'inviolabilità dei diritti sociali*, cit., p. 28, the attention that the EU has recently started to give to social matters

Anyway, on the one hand, at the very outset, any blindness of the Communities towards social matters has been emphasized, as this was chiefly deemed the right balance for the time according to the dominant faith (summarised by the brocard «Keynes at home, Smith abroad»), which had been demonstrated to work well during the «trente glorieuses». On the other hand, in the aftermath, the imbalance has been denounced as evidence of the victory of neo-liberal and ordo-liberal theories, which were chiefly adopted by Germany.

Consistently, the focus on social aspects in the Communities occurred later (chiefly since the Lisbon Strategy), except for the workers' provision, which is part and parcel of the functioning of the internal market[49]. In this last respect, it is telling that the first time the European Community addressed the issue of social rights, it made exclusive reference to workers[50].

Lastly, it is worth to recall that this delay was mirrored in the institutional setting as only in 2000 the Nice Treaty enshrined the Social Protection Committee (Article 144, now Article 160 of TFEU) in addition to the already existing Economic and Financial Committee (present Article 134 of TFEU) and Employment Committee (present Article 150 TFEU). It is an advisory Committee composed by high-level officials (appointed by each Member States and the Commission) with a key role on social inclusion and social protection issues and specific focus on social indicators (by means of its Indicators Sub-Group). Its composition and functions are laid down by the Council Decision 2000/436/EC, repealed and replaced by Council Decision 2004/689/EC, lastly repealed and replaced by Council Decision (EU) 2015/773, long a way of increasing involvement and cooperation with the two other advisory committees competents for economic and employment matters.

provides evidence of both the failure of the exclusive economic approach and its rebalancing within a framework qualified no longer by competition, but rather by coordination and mutual stimulus between social and economic matters.

[49] R. NIELSEN, E. SZYSZCZAK, *The Social Dimension of the European Union,* cit., 1997, p. 151 ff.

[50] J. KENNER, *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility,* in T.K. HERVEY, J. KENNER (Edited by)*, Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, cit., p. 9, stresses that in the final version of the Community Charter of Fundamental Social Rights of Workers, «all references in the draft to 'citizens' had been deleted and replaced with 'workers' or 'person'. Whereas the original text had placed emphasis on the need to address the concerns of the unemployed and socially excluded, the 'Workers' Charter' excised and diluted these references».

2. Beginning the route

Since the end of the 80s, two factors have driven attention towards social inclusion: the first is factual, and the second is political and institutional. With respect to the factual aspect, increasing social distress and long-term unemployment were spreading; as for the political and institutional aspect, the asymmetry between the social and economic rationales risked the over-exposure of the European project when the positive economic integration took a step further with the Single European Act and the Maastricht Treaty's provisions on the Economic and Monetary Union.

In 1989, the Council Resolution of 29 September 1989 on combating social exclusion underlined this task as an important part of the social dimension of the internal market, recording that economic policies need to be accompanied by social integration policies and requesting that the Member States implement the necessary measures, calling on them, along with the Commission, to undertake the first hints of the cooperation process in social fields[51]. Moreover, when the European Council adopted (on 9 December 1989) the Community Charter of the Fundamental Social Rights of Workers, it highlighted the strong link between solidarity and social inclusion, making reference to sufficient resources, an adequate level of social security benefits, and social and medical assistance in keeping with each person's situation. In particular, Article 10 stated of this Charter that « Persons who have been unable either to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation».

Also in 1989, the European Parliament and the Economic and Social Committee declared that they were in favour of establishing a guaranteed minimum income as a safety net for the poor in all the Member States, boosting their reintegration into society[52].

[51] In particular, this resolution requests the Member States to pool their knowledge and assessments of the phenomena of exclusion and the Commission to report on the measures taken by the Member States and by the Community in the spheres covered by the resolution within three years of its adoption.

[52] For the legal basis of the right to a minimum income within the European system and the Italian constitutional system, see C. TRIPODINA, *Il diritto a un'esistenza libera e dignitosa – Sui fondamenti costituzionali del reddito di cittadinanza,* Giappichelli, Torino, 2013, respectively, p. 151 ff and 55 ff. For a focus on an EU legal basis in relation to the provision of a minimum income and for the description of the EU stance on the issue of a minimum income, see, respectively, H. VERSCHUEREN, *Union Law and the Fight against Poverty: Which Legal Instruments?* and B. CANTILLON, N. VAN MECHELEN, *Between Dream and Reality… on Anti-poverty Policy, Minimum Income Protection and the European Social Model,* cit., p. 205 ff. and p. 173 ff. The latter authors observed that «[i]n sum, the necessity of adequate minimum income protection has been recognized

In 1992, the Maastricht Treaty's Protocol (and the annexed Agreement) on social policy (adopted with the opting out of the United Kingdom of Great Britain and Northern Ireland, which opposed the insertion of these provisions in the Treaty) was limited to workers' protection. However, the Council Recommendation of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (92/441/EEC) went a step further in the direction of social inclusion beyond the labour market, implementing as such Article 10 of the Social Charter for EU workers[53]. In this last respect, it required the Member States «to recognise the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity as part of a comprehensive and consistent drive to combat social exclusion, and to adapt their social protection systems». In accordance with this premise, it stated several general principles: the first, which is linked to legal residence and nationality in accordance with their relevant provisions, was aimed at progressively covering all exclusion situations in that connection as broadly as possible; the second made access to the minimum of subsistence subject either to the active availability for work or for vocational training, with a view to obtaining work in cases involving persons whose age, health and family situation permit such active availability, or where appropriate, to economic and social integration measures in the case of other persons; the third enshrined the principle of no time limits to enjoy these benefits, but its implementation by the Member States should be progressively realised, taking into account economic and budgetary resources, as well as the priorities set by the national authorities and the balances within their social protection systems. Like the 1989 Council Resolution, this recommendation stood for weak cooperation between the Member States, supporting their systematic exchange of information and experiences within a framework of the continuous evaluation of the national provisions adopted based on the encouragement of the Commission. The latter was also asked to submit reports on a regular basis based on information supplied by the Member States describing the progress achieved and the obstacles encountered in implementing the recommendations to the European Parliament, the Council and the Economic and Social Committee.

in the European policy agenda for at least twenty years. However, the political majority required for binding agreements on this matter has always been lacking».

[53] It is worthwhile to recall that along with this step ahead on the scale of social matters, for the first time, the Maastricht Treaty has put a focus on the role of national parliaments (in this last respect, see C. MORVIDUCCI, *Convenzione europea e parlamenti nazionali: quale ruolo?,* in *Rivista italiana di diritto pubblico comunitario,* No. 3-4/2003, p. 552). Both improvements represent more (social and political) democratic legitimacy for the EU.

In a way that was less weak, the Council recommendation of 27 July 1992 (92/442/EEC) on social protection asked for more «convergence» in the State systems. In fact, it could be founded on a stronger legal basis linked to measuring better functioning of the internal market, which was aimed at the removal of obstacles to the mobility of workers, particularly obstacles stemming from the great disparities in the levels of social protection between the north and the south of the Community.

These are only some «records» of the early European approach to social inclusion, pavin the way towards the Lisbon Strategy.

3. The Lisbon Strategy

The conventional starting point of the EU approach to social inclusion is usually linked to the Lisbon European Council on 23-24 March 2000. It adopted the so-called Lisbon Strategy, which set out a «new strategic goal» for the following decade and represented a first institutional intervention to «Europeanize» a domestic matter such as the fight against poverty: «[T]his attention towards issues of poverty formed the social strand of the EU's overarching 'Lisbon Strategy'… aiming to reconcile economic and employment objectives – 'competitiveness' and 'more and better jobs' – with concerns about social cohesion and social protection»[54].

This was the period of the Belgian Presidency of the EU and the Belgian social affairs minister Frank Vandenbroucke highly supported the strategy for both, its content on poverty and social exclusion and its coordination procedures.

From a procedural perspective, the Lisbon Strategy involved the definition of common objectives at the European level, with National Action Plans (NAPs) for inclusion and National Strategy Reports (NSRs) for pensions in which the Member States set out their policy plans for an agreed time period to meet the common objectives. It also entails an evaluation of these plans and strategies in the Joint Commission/Council Reports, along with joint work on indicators to facilitate mutual understanding and evaluation.

Accordingly, the OMC attempted to broaden the coordination system beyond the existing coordination procedure for economic and employment policies and to promote social inclusion by means of spreading best practices and achieving greater convergence towards the main EU goals. It was designed to help the Member States to progressively develop their own

[54] K. ARMSTRONG, Governing Social Inclusion – Europeanization through Policy Coordination, cit., p. 2.

policies in accordance with European guidelines and benchmarks that are tailored to the needs of the different Member States and to submit them to periodic monitoring, evaluation and peer review. In addition, the existing procedure was revamped; in particular, the Broad Economic Policy Guidelines (BEPG) were intended to increasingly evaluate both their economic and social impact in the medium and long-term.

From a more substantial perspective, the aim of the Strategy was to face «new challenges» that affect «every aspect of people's life» and its scope embedded a «new strategic goal» for the following ten years, i.e. «to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion» (para. 5). Accordingly, people were its «active» pivotal issue: «People are Europe's main asset and should be the focal point of the Union's policies. Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty» (para. 24). At this last regard, it is worth to stress that its «foundational principle» seems to be far from the Essen European Council's exclusive focus on market needs, with its connected request to moderate wage agreements below increases in productivity as the main tool for encouraging job-creating investments[55].

Moreover, it is evident that contrary to the previous overarching focus on economic issues, the Lisbon Strategy's basic principle was the pairing of economic and social goals: «the time is right to undertake both economic and social reforms as part of a positive strategy which combines competitiveness and social cohesion» (para. 4)[56].

Under the specific strand of promoting social inclusion, the endeavour was to take «steps … to make a decisive impact on the eradication of poverty by setting adequate targets», in particular through the promotion of «a better understanding of social exclusion… on the basis of commonly agreed indicators», the mainstreaming of inclusion in the Member States' policies and the more targeted use of the Structural Funds (para. 32).

[55] See the Presidency conclusions of the European Council meeting in Essen on 9-10th December 1994, para. 1.

[56] C. DE LA PORTE, P. POCHET, G. ROOM, *Social Benchmarking, Policy Making and New Governance in the EU,* cit., p. 296, observes that the Lisbon Strategy «is driven by the recognition of the linkages between economic, monetary and labour market policies on the one hand, and employment, social protection and social cohesion policies on the other hand: the latter cannot be left to be managed at national level alone, given their consequences for the former».

In this respect, while the opinion «that the primary means of opposing marginalization is inclusion in the labor market through active policies, the more recent extension of the open method of co-ordination to the area of the fight against social exclusion is also intended to focus Community attention on the more traditional question of the redistribution of economic resources in favour of persons who are excluded»[57].

Accordingly, the European Council adopted the European Social Agenda in Nice on 7-10 December 2000, setting specific priorities for the following five years. It recognised that the European Social Model was characterised by systems that offered a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities that are vital for social cohesion. Beyond the diversity of the Member States' social systems, this system was based on a common core of values enshrined in the European Charter on Fundamental Rights and deployed by the Treaties. Consequently, it – in turn – stated that economic growth and social cohesion are mutually reinforcing, and thus, social policies are both a productivity factor and a tool for the protection of individuals, the reduction of inequalities and social cohesion. Thus, it admitted the importance of a holistic approach[58] that goes beyond the exclusively economic aspects of growth, competitiveness and stability, adding a social aspect to them. In fact, growth should benefit all, but it is not sufficient per se to reach this aim[59]; it needs to be coupled with proactive measures that are able to deal with the complex nature and multiple facets of exclusion and inequality. To this end, not only are employment policies necessary, social protection has a fundamental role to play along with other factors such as housing, education, health, information and communication, mobility, security and justice, leisure and culture[60].

[57] S. GIUBBONI, Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective, cit., p. 124.

[58] This holistic approach is also confirmed from a procedural point of view both for the institutions and the actors involved and the normative instruments deployed: «All those involved, the institutions of the European Union (European Parliament, Council, Commission), the Member States, local and regional authorities, the social partners, civil society and businesses have a role to play. In the implementation of the Social Agenda all existing Community instruments bar none must be used: the open method of coordination, legislation, the social dialogue, the Structural Funds, the support programmes, the integrated policy approach, analysis and research» (para. 27-28).

[59] See the third Orientation of the Social Agenda, «Fighting Poverty and all forms of Exclusion and Discrimination in order to promote social integration», according to which «[t]he return to sustained economic growth and the prospect of full employment in the near future do not mean that poverty and exclusion in the European Union will automatically decrease».

[60] Annex I of the Nice European Council Conclusions states: «[T]he Agenda must ensure the modernization and deepening of the European social model and place the emphasis on the promotion of quality in all areas of social policy» (para. 26).

Consistently, the Social Agenda invited the Member States to develop their priorities in relation to the objectives of combating poverty and social exclusion, to submit their National Action Plans covering a two-year period and to define indicators and monitoring mechanisms capable of measuring progress.

Following this social path blueprint, the Stockholm European Council of 23-24 March 2001 agreed to improve the procedural side of the Strategy. In particular, it envisaged that the spring European Council meeting would become the focal point for an annual review of economic and social questions and for setting Broad Economic Policy Guidelines within an integrated approach for sustainable development, including the social aspects (beyond the economic ones) and the environment aspects (as confirmed by the Göteborg European Council on 15-16 June 2001).

The original slant of the Lisbon Strategy did not produce effects. The Barcelona European Council of 15-16 March 2002 admitted the lack of political will for a more effective implementation of the Lisbon Strategy. Despite the initial orientation of a comprehensive social vision, the concept of sustainable development was reduced in amplitude, and the focus was instead on employment and pensions, along with the environment. Once again, employment was described as the best strategy against social exclusion, «so that it is essential that employment services and social services work together in such a way that both mechanisms improve the employability of the socially excluded». Further, wages must be differentiated according to productivity and skills, and the pension system must be reformed to assure its viability[61]. As highlighted by the Commission in 2004, the shortcomings at the European level were coupled by similar flaws at the national level. Not all the Member States had identified clear national targets in their National Action Programmes or backed up these targets with adequate and effective implementation. Thus, more precision, including the quantification of more targets, was essential to focus and carry out the national measures more effectively[62].

Further, the positive economic previsions developed in 2000 were definitely subjected to a downturn in 2001; thus, the social and economic outlooks were very different in the mid-term (2003) review of the European Social Agenda: economic growth fell sharply, employment creation slowed, and unemployment and poverty rose. Within this picture of the endangerment of social cohesion, which was aggravated by the enlargement of the EU, the focus of the mid-term review was on competitiveness, adequate and

[61] Barcelona European Council Conclusions on 15-16 March 2002, p. 46-47.

[62] See COM(2004) 137 final – Scoreboard on implementing the social policy agenda, para. 3.3.

sustainable pensions, quality in work, flexibility and security in the labour market, along with human capital investments as the key productivity factors. The approach aimed at fighting against poverty and all forms of social exclusion fell behind, with less highlighted and targeted, and more confused and blurred benchmarks[63].

Despite this ineffectiveness, the OMC on social inclusion did produce the added value of clarifying the multi-dimensionality of poverty and exclusion, and the consequent need for full, joint policy responses (not only of social nature). This is the symmetric side of the complexity of the question that is implied within the multi-tier structure of social rights and the first outcome facilitated by the reduction in their highly political (and blocking) implications stemming from their intersection with economic factors.

4. The Revised Lisbon Strategy

In 2005, in Brussels, on 22-23 March 2005, the European Council admitted: «Five years after the launch of the Lisbon Strategy, the results are mixed. Alongside undeniable progress, there are shortcomings and obvious delays» (para. 4). Against this background, the European Council decided to re-direct its action, focusing its priorities on growth and employment, aiming at major competitiveness and productivity through a main emphasis on knowledge, innovation and the optimisation of human capital[64]. It also stressed that sound macroeconomic conditions are essential to underpin the efforts in favour of growth and employment. Thus, the «vital strands on the relaunch» of the Lisbon Strategy were headed by the following orientations: knowledge and innovation as engines of sustainable growth; the completion of the internal market and the streamlining of the regulatory environment in a business-friendly way as factors for increasing business investment and growth; full employment, active employment policy, job quality, better balance between work and family life, and labour productivity as essential tools for social cohesion. However, no specific headline was enshrined for the fight against poverty and social inclusion except for the adoption of the European Youth Pact, although it was adopted from a human capital investment and productivity perspective[65]. Accordingly, the European

[63] COM(2003) 312 final – *Mid-term review of the social policy agenda*, see, in particular, para 5.

[64] On this focus on growth and employment rather than social inclusion, see A. ALAIMO, Da «Lisbona 2000» a «Europa 2020». Il «Modello Sociale Europeo» al tempo della crisi: bilanci e prospettive, in Diritto dell'Unione europea e comparato, No. 3/2012, p. 241.

[65] As COM(2005) 706 final – *Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union,* para. 3.5,

Council's conclusions stated a simplified governance arrangement based on a three-year cycle and a set of «integrated guidelines» adopted by the Council and made of two elements: broad economic policy guidelines (BEPGs) and employment guidelines (EGs). The former (BEPGs) should continue to embrace the whole range of macroeconomic and microeconomic policies, as well as employment policy, in so far as it interacts with those policies, and the Member States should draw up National Reform Programmes geared to their own needs and specific situations[66].

During this period (2005), in the attempt to re-balance this tendency and to re-gain the European stance, the Commission consistently advanced proposals to more effectively overhaul the procedural and substantial side of social inclusion.

First, it proposed to streamline the OMC on social inclusion[67]. In particular, it sought a timely coordination of the work on inclusion, pensions, health and long-term care[68], when relevant, with the integrated process of the Broad Economic Policy Guidelines (BEPGs) and the European Employment Strategy (EES) for the purpose of better reflecting this coordination in the National Reform Programmes. As «the current debate about the future of Europe's social model has placed policies for social protection and social inclusion under an unprecedented political spotlight», there was momentum for the European Commission's goal: «[C]oming as it does in the wake of the focus by Heads of State and Government on the social dimension of the European Union, this proposed streamlining of the OMC can receive the strong political support which it needs to succeed» (para. 4).

Second, on the substantive side, while stressing that this procedural streamlining would allow a better awareness of the social inclusion goals in setting overall expenditure priorities[69], the European Commission, in its Communication of 2005 on the Social Agenda, tried to put both social dimensions on an equal footing: employment, along with equal opportunities

stressed: «There should be a renewed focus on target setting in relation to poverty and social exclusion. Target setting has always been a part of the social inclusion process», but «[t]here has been steady but slow growth in their use».

[66] See, para. 38-41 of the Presidency Conclusions.

[67] COM(2005) 706 final – *Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union.*

[68] The Commission's proposition to streamline the Open Method of Coordination, endorsed by the Council, has entailed, since 2006, a strengthened coordination in the social domain, bringing social inclusion, pensions, and health care within one open method of coordination. This should simplify the reporting requirements and make work pay through the internal interaction between social policy strands and the external interaction with employment and economic coordination processes.

[69] COM(2004) 137 final – Scoreboard on implementing the social policy agenda, para. 3.3.

and inclusion, which is to say, prosperity and solidarity. In compliance with the latter, the Commission's engagement was for a Community initiative on minimum income schemes[70].

At this point, it became evident that in spite of its fluctuating movement towards the economic or social coin, the seeds planted by the Lisbon Strategy grew in the direction of the continuous mutual interaction between the social and the economic, which were no longer treated as «watertight compartments», as well as the connected multi-dimensionality of social exclusion.

5. The Active Social Inclusion approach

The Active Social Inclusion strategy was developed in an attempt to correct the deficiencies of the previous fluctuating and uneven approach. Even in its wording, the valorisation of the economic implications of social inclusion was evident, as it was viewed as an «active» factor and no longer as a passive burden[71].

This strategy enshrined a compromise which underlined the aim of minimising questions that were too highly political, reconciling them within a framework that was potentially able to address conflicting interests: on the one hand, neo-liberal and ordo-liberal ideologies, the globalisation of the

[70] COM(2005) 33 final, para. 2. Beyond the political concerns, doctrinal stances also differ in relation to the best way to address the question of a minimum income, including the issue of the relevant implementation at the national or EU levels and the mechanisms to adopt for the latter option; on this argument, see B. CANTILLON, N. VAN MECHELEN, *Between Dream and Reality… on Anti-poverty Policy, Minimum Income Protection and the European Social Model,* cit., p. 194, who discuss a binding European initiative; P. VAN PARIJS, Y. VANDERBORGHT, *Basic Income in a Globalized Economy*, in B. REYNOLDS, S. HEALY (Edited by)*, Does the European Social Model Have a Future?*, Social Justice Ireland, Dublin, 2012, p. 41 ff. who discuss a «Euro-dividend» for a gradual upward convergence; F. VANDENBROUCKE, *Automatic Stabilizers for the Euro Area and the European Social Model,* in *Tribune, Jacques Delors Institut,* Berlin, September 2016, p. 4, who stands for a reinsurance device at the EU level; for an analysis of the different models of insurance at the EU level, see N.J. SPATH, *Automatic Stabilizers for the Euro Area: What is on the Table? Promises and Problems of Three Proposals for Cyclical Stabilization*, in *Policy Paper 166, Jacques Delors Institut,* Berlin, June 2016.

[71] S. GIUBBONI, *Solidarietà*, in *Politica del diritto*, No. 4/2012, p. 551-552, stresses the risks implied in this approach towards the competitiveness and productivity side of social inclusion. On the different doctrinal stances about social policy as a productive factor, see K. ARMSTRONG, *Governing Social Inclusion – Europeanization through Policy Coordination,* cit., p. 62 ff.

market and finances, claims of capitalism, and consolidation policies[72], and on the other hand, the needs of the most vulnerable people[73].

The Brussels European Council of 14 December 2007 pointed out that an «active» inclusion policy, rather than a mere «social» inclusion policy, placed itself on a complementary basis with flexicurity[74]. It defined this strategy as a combination of measures, such as «integration in the labour markets, mobility of the workforce, motivation to actively search for a job, adequate income support and quality, accessible and effective social services»[75]. Consequently, the European Commission recommendation of 3 October 2008 addressed to the Member States[76] adopted this comprehensive, integrated policy approach: «Active inclusion policies should facilitate the integration into sustainable, quality employment of those who can work and provide resources which are sufficient to live in dignity, together with support for social participation, for those who cannot» (para. 1).

In particular, the active inclusion strategy, aimed at effectively addressing the multifaceted causes of poverty and social exclusion, was based on three main strands: first, on adequate income support defined as «the individual's basic right to resources and social assistance sufficient to lead a life that is compatible with human dignity»[77]; second, on inclusive labour markets described as arrangements to facilitate the integration or re-integration of those excluded from the labour market, enhancing their employability and the support to the social economy and sheltered employment; and last, on access

[72] W. STREECK, Tempo guadagnato – La crisi rinviata del capitalismo democratico, la Feltrinelli, Milano, 2013, p. 134 ff.

[73] V.E. PARSI, *La fine dell'uguaglianza. Come la crisi economica sta distruggendo il primo valore della nostra democrazia,* Mondadori, Milano, 2012, p. 8 ff., identifies in the year 1989 the starting point of the imbalance that has led to a reduction in terms of equality and – conversely – an increase in market and capitalisms values.

[74] For the Common Principles of Flexicurity, see the Council Conclusions on 6 December 2007, in particular: «Flexicurity should promote more open, responsive and inclusive labour markets overcoming segmentation. It concerns both those in work and those out of work. The inactive, the unemployed, those in undeclared work, in unstable employment, or at the margins of the labour market need to be provided with better opportunities, economic incentives and supportive measures for easier access to work or stepping-stones to assist progress into stable and legally secure employment. Support should be available to all those in employment to remain employable, progress and manage transitions both in work and between jobs».

[75] Presidency Conclusions, on 14 December 2007, para. 50.

[76] Recommendation No. 2008/867/EC, on the active inclusion of people excluded from the labour market.

[77] But this is also a conditioned right to «be combined with active availability for work or for vocational training with a view to obtaining work in the case of persons whose conditions permit such active availability, or be subject, where appropriate, to economic and social integration measures in the case of other persons», see Recommendation No. 2008/867/EC, sub a)-i).

to quality services, including social assistance services, employment and training services, housing support and social housing, childcare, long-term care services and health services.

With respect to the financial side of these interventions, the Commission recommended the use of resources from the Structural Funds, particularly the European Social Fund, and with reference to financial constraints, it suggested striking the right balance between work incentives, poverty alleviation and sustainable budgetary costs.

In a nutshell, active inclusion shapes an «active welfare state» by providing personalised pathways towards employment and ensuring that those who cannot work can live in dignity and can contribute as much as possible to society.

Therefore, in a period in which competitiveness, growth and jobs had become the main objectives under the strands of the revised Lisbon Strategy, social objectives received a re-styling, both in language and substance. Rather than social inclusion, active inclusion was at issue, such that economic priorities were social, and vice versa. Its vision was: «Reaching out to those at the margins of society and the labour market is an economic priority as much as it is a social priority. Far from there being any contradiction between an efficient dynamic economy and one that places social justice at its core, these elements are closely interdependent. On the one hand, economic development is necessary to sustain the provision of social support. On the other hand, bringing back to work the most excluded from the labour market, provided that they can work, and supporting their social integration is an integral part of the Lisbon strategy, which aims to mobilize the full potential of our human resources»[78].

However, to make active inclusion a truly inclusive endeavour, on the one hand, conditionality must be carefully monitored and balanced to avoid engendering further exclusion, and on the other hand, a job assures effective social inclusion only if in-work quality and social protection are paired with each other.

From this perspective, it is worthwhile to remember that the European Parliament Resolution of 6 May 2009 on the active inclusion of people excluded from the labour market[79] clearly made three undeniable points: the first was that «active inclusion must not replace social inclusion, as vulnerable groups unable to participate in the labour market have a right to a dignified life and full participation in society, and therefore a minimum income and

[78] COM(2007) 620 final – *Modernising social protection for greater social justice and economic cohesion: taking forward the active inclusion of people furthest from the labour market*, para. 1.

[79] Resolution No. 2008/2335(INI).

accessible and affordable high-quality social services must be available regardless of a person's ability to participate in the labour market»; the second was that «active inclusion is not only related to the capacity of the individual, but also to the way in which society is organized», setting forth the structural causes of exclusion, including discrimination and inadequate service provision; and last, «apparent exclusion from the labour market may be the result of a lack of availability of sufficient decent employment possibilities rather than the result of a lack of individual effort», i.e. low quality and inadequately remunerated jobs[80]. Thus, as shown in a 2010 European Parliament study, if during the economic crisis, employment in fixed-term work increased, it was not only because of its flexibility, but also because it meant weaker social protection, which chiefly affects young or less educated persons, who are always more vulnerable to unemployment-related poverty[81].

Consequently, the European Parliament, although welcoming the positive input enshrined by the active inclusion strategy, called for a concrete roadmap for its implementation, including specific time lines and realistic qualitative and quantitative targets based on specific indicators[82]. In fact, as its 2015 Report pointed out, there was still a long way to go for the effective implementation of the Recommendation on active inclusion across the EU[83]. In particular, with reference to the strand on adequate income support and access to quality services, there was a real lack of implementation. However, even if some progress had been made in the strand for an inclusive labour market, it was uneven and mainly concentrated on persons who had become unemployed only recently, leaving the long-term unemployed (i.e. the most vulnerable people) partially uncovered.

Finally, two points must be underlined: on the one hand, active social inclusion made the mutual implications between economic and social issues even more clear and accepted as it addressed the multi-dimensionality of social exclusion matters; on the other hand, and for the first time in a more targeted way, social inclusion policies were connected with their subjective side, i.e. social rights. Perhaps the signing of the Treaty of Lisbon on 13 December, as well as the (new) proclamation of the Charter of Fundamental Rights on 12 December 2007, played a role in this. Accordingly, the

[80] Resolution No. 2008/2335(INI), para. A-B-C.

[81] See IP/A/EMPL/ST/2009-07, a study for the European Parliament's Committee on Employment and Social Affairs on *The Role of Social Protection as Economic Stabilizer: Lessons from the Current Crisis*, para. 2.

[82] See Resolution No. 2008/2335(INI), para. 52.

[83] See IP/A/EMPL/2015-05, a study for the European Parliament's Committee on Employment and Social Affairs on *Active Inclusion: Stocktaking of the Council Recommendation (2008)*.

Recommendation of the Commission expressly made reference to Article 34 of the Charter of Fundamental Rights of the European Union[84] and recognised individuals' basic right to the resources and social assistance sufficient to lead a life that is compatible with human dignity as part of a comprehensive, consistent drive to combat social exclusion[85].

6. Europe 2020

The year 2010 was characterised by three main strands: it was the European Year for combating poverty and social exclusion[86], the year of the launching of the European strategy, Europe 2020[87], and the year of the European Platform against Poverty and Social Exclusion[88].

Europe 2020 introduced five measurable EU targets (for employment; for research and innovation; for climate change and energy; for education; and for combating poverty), quantifying the last target (combating poverty) with the specific goal of lifting at least 20 million people out of poverty and social exclusion in the following decade. In a nutshell, «Europe 2020 sets out a vision of Europe's social market economy for the 21st century»[89]. But once again, this strategy focused above all on growth and competitiveness, based on the confidence that these achievements would improve social cohesion. In addition, in dealing with the composition and quality of government expenditures, on the one hand, it warned about fiscal consolidation and long-term financial sustainability, and on the other, it focused on growth-enhancing items that demand, on the revenue side of the national budgets, a more growth-friendly tax system.

Against this background, the European Commission launched the European Platform against Poverty and Social Exclusion to implement one of the five headlines of Europe 2020. This Commission's initiative marked «the start of a new phase in European policies for social inclusion and social cohesion. Born from the political will to shape the new European vision for smart, sustainable and inclusive growth, it will take advantage from the

[84] Article 34 of the EU Charter of Fundamental Rights provides for the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.

[85] See Recommendation No. 2008/867/EC, para. 4.

[86] See Decision No 1098/2008/EC of the European Parliament and of the Council of 22 October 2008 on the European Year for Combating Poverty and Social Exclusion (2010).

[87] COM(2010) 2020 – A European strategy for smart, sustainable and inclusive growth.

[88] COM(2010) 758 final – The European platform against poverty and social exclusion: a European framework for social and territorial cohesion.

[89] See the Executive Summary, COM(2010) 2020.

political impetus generated by the European Year 2010 against poverty and exclusion»[90].

Consequently, it gave full attention to the complexity of the goal due to the multi-faceted aspects that had characterised the poverty and material deprivation-related troubles since the 2000s and which had been further worsened by the economic downturn in 2008, along with new types of vulnerabilities, disadvantages and challenges. In this respect, it underlined that although unemployment remained the dominant cause of social exclusion and poverty, other significant factors also engendered it.

On the one hand, it tracked – by reference to relevant indicators – in-work poverty, which was mainly due to low skills and underemployment. Thus, it increased the share of households with very low work intensity resulting from temporary and part-time work, sometimes coupled with stagnating wages. On the other hand, its reference to the material deprivation indicators tracked the causes of poverty other than those that are income-related[91]. In particular, it addressed new vulnerabilities and specific disadvantages such as homelessness, housing exclusion, fuel poverty, financial exclusion, high indebtedness, disabilities, and ethnic or migrant discrimination[92].

Because of this challenging scenario with multiple dimensions, the Platform proposed an innovative social protection approach using more targeted social benchmarks. In particular, it referred to «a broad set of social policies including targeted education, social care, housing, health, reconciliation, and family policies, all areas where welfare systems have so far tended to intervene with residual programmes»[93]. By the same token, the intervention required synergy between many different policy domains through the better coordination of macro-economic and micro-economic policies, and the mainstreaming of the fight against poverty in all policy fields[94]. Moreover, the review of the European Budget (launched by the Commission in October 2010) stressed the importance of solidarity, paying more attention to the concentration of cohesion funds on Europe 2020 social inclusion objectives.

[90] COM(2010) 758 final – The European platform against poverty and social exclusion: a European framework for social and territorial cohesion, para. 4.

[91] On the concept of material deprivation and the relevant non-monetary poverty indicators, see K. NELSON, *Counteracting Material Deprivation: The Role of Social Assistance in Europe,* in *Journal of European Social Policy,* Vol. 22, No. 2/2012, p. 148 ff.

[92] For the indicators that are able to track new social challenges and vulnerabilities, see COM(2010) 758 final, para. 2.3. From a national constitutional point of view, the ability of Art. 2 and Art. 3, para. 2, of the Italian Constitution to encompass openness to new social rights is stressed by S. SCAGLIARINI, «*L'incessante dinamica della vita moderna*». *I nuovi diritti sociali nella giurisprudenza costituzionale*, in *www.gruppodipisa.it,* p. 1-5.

[93] COM(2010) 758 final, para. 3.

[94] COM(2010) 758 final, para. 3.1.

For this purpose, notably the European Social Fund and the European Regional Development Fund were considered key tools of the EU budget that play an important role in combating poverty. Other tools must be added to these financial levers, such as the Commission's support for evidence-based social experimentation using small-scale projects designed to test policy innovations (or reforms) before adopting them more widely; the Commission's support for the development of the social economy as a means of active inclusion within a model of a pluralist and inclusive economy[95]; the promotion of Corporate Social Responsibility by encouraging companies to employ people from disadvantaged groups and to manage diversity more effectively, as well as to take account of social considerations in public procurement[96].

Because of the multifaceted dimensions of social exclusion, along with budget constraints and demographic challenges, the Commission's Social Investment Package[97] urged the Member States to exploit the available resources more efficiently and effectively through simplified and better targeted policies, considering that both universalism and selectivity need to be used in an intelligent way. These financial resources must be better exploited in both qualitative or quantitative ways. Qualitatively, social policies need to be oriented not only towards the protection and reparation of the consequences of occurred risks but also towards the promotion of the conditions necessary to prepare people to afford these risks and to enable them to enjoy active participation in social and economic life. In this respect, in some instances, social services could be more supportive than cash benefits, and conditionality could fit specific and targeted needs; in other words, «[w]ell-designed welfare systems combining a strong social

[95] The social economy encompasses different forms of organisations whose main purposes are the general interest and solidarity rather than maximising profits, as their *esprit* is based on the primacy of people over capital (Many documents could be cited about the European stance on the social economy, including: the European Parliament Resolution on 19 February 2009 (2008/2250(INI)); COM(2010) 608 final on a highly competitive social market economy; the Commission Social Business Initiative (COM(2011) 682) and the Commission Social Investment Package (COM(2013) 83 final); the Council's conclusions on 7 December 2015 (No. 15071/15) on the promotion of the social economy as a key driver of economic and social development). According to the Council's conclusion on 7 December 2015, No. 15071/15, para. 1, the «social economy… plays an important role in the transformation and evolution of contemporary societies, welfare systems and economies thus substantially contributing to economic, social and human development across and beyond Europe and are supplementary to existing welfare regimes in many member states».

[96] For the full purview of the tools engaged by the EU to support social policies, see COM(2010) 758 final, para. 3.2-3.5.

[97] COM(2013) 83 final – *Towards social investment for growth and cohesion – including implementing the European Social Fund 2014-2020.*

investment dimension with the other two functions, protection and stabilization, increase the effectiveness and efficiency of social policies, whilst ensuring continued support for a fairer and more inclusive society»[98].

Quantitatively, as the share of EU resources allocated by the Member States for employment, human capital development, health and social policies – notably through the ESF – has decreased since 1989, the Commission proposed, for the period 2014-2020, that at least 25% of cohesion policy funding should be allocated to human capital and social investment, and that at least 20% of the total European Social Fund resources in each Member State should be allocated to the thematic objective of «promoting social inclusion and combating poverty» enshrined by Europe 2020[99].

Finally, it is clear – at this point – that a first shift toward «dignity» in the consideration of social inclusion policies was accomplished, i.e. they were rebalanced within the framework of their intertwinement with economic objectives. As such, the path towards taking a step further was paved. In this regard, the 2010 European Platform against Poverty and Social Exclusion had already attuned its purposes, underlining that to produce maximum effectiveness, the OMC on social inclusion would be integrated with Europe 2020 within the framework of the European Semester. Accordingly, the Annual Growth Survey, the National Reform Programmes and the Country Specific Recommendations would review progress in the implementation of social targets[100]. But before entering the way towards the Economic governance framework (Chapter IV), it is worth to rest on the second major delivery of the OMC on social inclusion: the use of social indicators. This further legacy is intertwined with question of re-balancing of economic and social matters within the EU governance: on the one hand, evidence given by social indicators, denounced the increasing social distress, contribute to put the question in the headline and consequently to exert a certain political

[98] COM(2013) 83 final, see *Introduction*. In particular, the Member States are requested to pay «particular attention to: - Progress on putting an increased focus on social investment in their social policies, particularly on policies such as (child)care, education, training, active labour market policies, housing support, rehabilitation and health services. - The implementation of integrated active inclusion strategies, including through the development of reference budgets, increased coverage of benefits and services, and simplification of social systems through for instance a one-stop shop approach and avoiding proliferation of different benefits», see COM(2013) 83 final, para. 5, sub. 1.

[99] COM(2013) 83 final, para. 3.

[100] As for the coordination procedure under Europe 2020, the European Council will adopt integrated guidelines to cover the scope of EU priorities and targets, Country Specific Recommendations will be addressed to the Member States, along with policy warnings for cases of inadequate responses within a time frame. The reporting under Europe 2020 and the Stability and Growth Pact evaluation will be done simultaneously, although the instruments will be kept separate and the integrity of the Pact will be maintained.

pressure; on the other hand, their technical background and their features by rates and numbers facilitate their matching with the language and tools that are habitual for the EU governance procedures[101].

Part III
The evolutionary path followed by social inclusion indicators

In exploring this field, not usual for legal studies, we first trust an assessment, made clear at the beginning of the 2000's by the then–Minister of Social Affairs and Pension, Franck Vandenbroucke (currently a professor at the University of Amsterdam) under the then–Belgian Presidency of the Council. He asserted that to improve the quality of social protection in Europe, one condition must be fulfilled: «[W]e have to move beyond generalities about the unacceptability of poverty in our societies. This is why indicators are of fundamental importance. In order to be able to fight social exclusion effectively, we need to be able to measure it accurately»[102]. For the purpose, «we do have sufficient scientific knowledge to define social indicators conceptually, to apply them empirically, and to use them in politics. There might be political arguments for not engaging in this process (unconvincing arguments, in my opinion), but there cannot be scientific arguments»[103].

Bearing this starting assessment in mind, rather underexplored and underestimated is the contribution that legal studies might have given (and might give) to the scientific understanding of social indicators. On the one hand, social indicators and their analytical foundations are classically deemed to be rooted in statistics, sociology, social policy, geography, welfare economics and political science[104], as «from the early days research on social indicators was not primarily considered as pure, but rather applied research»[105]. On the other hand, legal studies traditionally focus on the denouncement of deficits and the deficiencies of tools of statistical

[101] V.A. SCHMIDT, Forgotten Democratic Legitimacy: «Governing by the Rules» and «Ruling by the Numbers», cit.

[102] F. VANDENBROUCKE, *Foreword*, in T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN, (Edited by), *Social indicators: The EU and social inclusion*, Oxford University Press, Oxford, 2002, p. VI.

[103] *Ivi*, p. VII.

[104] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion,* Oxford University Press, Oxford, 2002, p. 3.

[105] As stressed by H.H. NOLL, Social monitoring and reporting: A success story in applied research on social indicators and quality of life, in Social Indicators Research Centre, 2016, p. 2.

measurement, either for their dominant concern with public policy performance irrespective of the consequent social impact of the implied reforms[106] or for their insufficiently rights-driven perspective when dealing specifically with social indicators[107].

Consequently, while no significant turmoil qualified the academic debate in reference to the content of the social inclusion concept (in effect, significant content was registered), social indicators encountered different destiny in reason of both the questions of definition (and comparability of definition) and of methodology (what to measure and how to measure, with specific reference to data collection)[108].

Indeed, under the multidimensionality of poverty and social exclusion lies complex issues, most the concern of the social sciences (i.e. research on the different aspect of exclusion, their social and economic roots; research on the reason of a lack of take-up of welfare benefits or their ill-performance results; research on simulation and performance measurement of social policy) but some are also of legal concern.

In effect, dealing with social inclusion means dealing with presupposed social rights, and attempting to measure their effectiveness involves being able to detect the infringement of these rights with a cautionary approach: not only to denounce encroachments but also to prevent them. Consequently, the use of social indicators is considered a priority duty «within a society that wish[es] to be democratic in the substance»[109].

[106] A. GUAZZAROTTI, Crisi dell'Euro e conflitto sociale: L'illusione della giustizia attraverso il mercato, FrancoAngeli, Milan, 2016, pp. 33-35.

[107] As stressed by De Schutter, there is a «confusion between social indicators (such as at-risk-of-poverty levels or levels of integration in the labour market) and rights-based indicators (that require to assess potential instances of discrimination against certain groups within society, and that should result in improved accountability)». Consequently, De Schutter asserted the need to move «beyond these antiquated views… using an appropriate set of indicators broken down by gender, age group, nationality or ethnic origin where appropriate, and region, in order to ensure that sufficient attention is paid to the situation of the members of the weakest groups of society. Rather than generous but vague references to social fairness, such assessments should be based explicitly on the normative components of social rights. They should move beyond references to the EU Charter of Fundamental Rights alone, to integrate the full range of social rights guaranteed in the Council of Europe Social Charter and the International Covenant on Economic, Social and Cultural Rights», see O. DE SCHUTTER, *The implementation of the Charter of Fundamental Rights in the EU Institutional Framework*, Study for the Committee on Constitutional Affairs of the European Parliament, November 2016, PE 571.397, para. 2.6.3.

[108] P. POCHET, The open method of coordination and the construction of social Europe – A historical perspective, in J. ZEITLIN, P. POCHET, (Edited by), The open method of coordination in action – The European employment and social inclusion strategies, cit., pp. 68-69.

[109] G. TOGNONI, G. BACCILE, M. VALERIO, La salute-sanità e servizi come indicatori di misura dell'effettività dei diritti, in M. CAMPEDELLI, P. CARROZZA, L. PEPINO (Edited by), Diritto di welfare: Manuale di cittadinanza e istituzioni sociali, cit., p. 467.

Consequently, social indicators are tools able to give 'voice' to vulnerable people, to those who are most in need and those that within democratically representative institutions find it difficult to get adequate representation and receive adequate hearing before a court. As such, evidence delivered by social indicators performs a double democratic function: on the one hand, by showing the multidimensionality and complexity of social issues, which go beyond the ability of political parties and civil society to join government and governance dynamics[110]; on the other hand, by laying the foundation for a preventive approach to the effectiveness of social rights that, in turn, are necessary for full participation in society and full enjoyment of fundamental liberties. It is true that their ultimate performance depends on the political will to make them effective through the revision of welfare policies and the relevant social rights. However, it is nonetheless true that numbers and ratios (if transparent, un-manipulated and statistically validated, see the following paragraphs) put government accountability under enquiry in a way that is more direct and more widely understandable, either towards that government's citizens or towards the EU governance system, a system that has long proved to be more sensitive to evidence given by indicators than to the language implied by the claim of social rights.

Finally, well-defined social indicators allow one to overcome any concern with different policy paradigms (socio-democratic, neo-liberal, ordo-liberal) as they are able to test their effectiveness in terms of social inclusion (and the presupposed social rights) as such, reducing the scope that remains open to a misleading political interpretation.

Against this background, an increased involvement of legal studies to examine the definitional questions implied by social indicators becomes necessary by means of an interdisciplinary dialogue with social sciences for the benefit of both: for the latter, a more rights-driven perspective and, for the former, a wider and deeper understanding of the multidimensionality of poverty and social exclusion when interpreting and updating the catalogue of social rights.

1. Implications of social indicators

The history of commonly agreed social indicators within the EU governance framework is relatively recent, but at the international level their

[110] As such, social indicators could be deemed to perform an enlightenment function, see H.H. NOLL, Social monitoring and reporting: A success story in applied research on social indicators and quality of life, in Social Indicators Research Centre, 2016, p. 5.

appearance dates back to the United Nations's 1954 'Report on international definition and measurement of standards and levels of living', these social indicators have attempted to link Article 55 of the Charter, pursuant the promotion of «higher standards of living, full employment, and conditions of economic and social development», to guidance on statistical tools, with the aim to offer the 'lowest common denominator' for those concerned with the selection and compilation of measurement of living standards and related social and economic conditions. Later relevant and up-to-date UN publications clarified two primary difficulties in using social indicators: the need for a continuous evolutionary approach «as new needs are constantly being identified and national statistical programmes and their underlying statistical concepts, methods and technologies are continuing to evolve and develop at a rapid pace to meet these needs»[111], and the various purposes which social indicators might serve in planning, policy making or research and general monitoring of social conditions[112].

Shifted to the European level, these are essentially the same and main concerns that affected the then–Minister of Social Affairs and Pensions, Franck Vandenbroucke, in 2000 when the Belgian Presidency of the Council, in reference with the launching of the Lisbon Strategy and the relevant OMC on social inclusion, strongly supported the establishment of an agreed set of common European social indicators. Regarding the dynamic process implied by social indicators, he emphasised that «it is essential that the choice of indicators not be regarded as fixed in stone, for at least three reasons. First, as we gain experience in their operation, we will no doubt be able to refine the definition and implementation of indicators. Second, the social and economic situation is constantly changing, generating new issues and new challenges…Third, discussion of indicators needs to be broadened, responding to the views of social partners, non-governmental organizations, those experiencing social exclusion»[113].

As social indicators fit different purposes ranging from the detection and understanding of a problem, to its assessment and implementation by means of decision making and policy choices, to comparisons over time and across space, as well as monitoring and evaluation[114], their use calling upon scientific

[111] *Handbook on Social Indicators*, United Nations, Studies in Methods, Series F, No. 49, New York, 1989, p. IV.

[112] *Ivi*, p. 1.

[113] F. VANDENBROUCKE, *Foreword*, in T. ATKINSON, B. CANTILLON, E .MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, cit., p. X.

[114] H.H. NOLL, Towards a European system of social indicators: Theoretical framework and system architecture, in M.R. HAGERTY, J. VOGEL, V. MØLLER (Edited by), Assessing quality of life and living conditions to guide national policy — State of the art, Kluwer Academic Publisher, New York, Boston, Dordrecht, London, Moscow, 2002, p. 47 ff.

and expert contributions not limited to the statistical field of research but extended to social sciences and law as well, as these indicators presuppose choices that entail broad political sensitivity and their discretionary scope needs to be legally (and constitutionally) oriented as well as opened up to democratic participation.

Indeed, they entail more sensitive issues than do economic and financial indicators because of the heavy political implications of their selection. Given the vicious cycle of social objectives, the implied social rights, and their relevant measurement through social indicators, these latter are influenced by targets to join but – in turn – they are able to affect the choice of social goals by means of lacks and deficiencies evidenced by them[115]. Consequently, the focus shifts first to the composition and the methodology followed by the European body entrusted with this delicate matter: the Social Protection Committee and its Indicators Sub-group.

2. The Social Protection Committee (SPC)

The Social Protection Committee (SPC) plays a key role in monitoring the effectiveness of social outcomes within the EU. According to the Council decision of 29 June 2000 (2000/436/EC), the SPC replaced the interim group of high-level officials which dealt with the enhancement of European cooperation in social protection policies established by the 17 December 1999 Council conclusions. Article 1 of the 2000 decision enshrined the SPC's status as Advisory Committee of the Council and the Commission. Article 2 pointed out that it shall consist of two representatives appointed by each Member State and two representatives of the Commission, while the SPC may call on external experts.

Moreover, the SPC received 'constitutional' status by Article 144 of the 2000 decision's Nice Treaty (now Article 160 TFEU), adding it to the existing Economic and Financial Committee (now Article 134 TFEU) and Employment Committee (now Article 150 TFEU)[116]. Lately, the Council

[115] On the connection between indicators and targets, see R. PEÑA CASAS, Les indicateurs des plans d'actions nationaux de lutte contre la pauvreté et l'exclusion sociale: Approche comparative européenne, in Observatoire Sociale Européen, September 2001, p. 8 ff.; on the existence of a break between indicators and common objectives within the social inclusion framework, see D. MABBETT, Learning by numbers? The use of indicators in the coordination of social inclusion policies in Europe, in Journal of European Public Policy, 2007, p. 86 ff.

[116] In J. S. O'CONNOR, *Policy coordination, social indicators and the social-policy agenda in the European Union*, in *Journal of European Social Policy*, Vol. 15, No. 4/2005, p. 349, the author speaks about «the formation of a constitutionally based Social Protection Committee» through the

decision of 4 October 2004 (2004/689/EC), which had repealed the 2000 decision, was in turn repealed by the 2015 Council decision (2015/773 /EU).

The SPC has the task of reviewing the social situation in the EU and monitoring the development of social policies in the Member States. For our concerns, the SPC has been entrusted by the 2000 Nice European Council and the 2001 Stockholm European Council to develop commonly agreed indicators in reference to the fight against poverty and social exclusion in accordance with the pivotal role that the Lisbon European Council recognised is played by these sorts of indicators (see Presidency Conclusions, para. 37). Consequently, pursuant to its ability to establish working groups on specific questions, which may, in turn, call upon experts to assist them, the SPC set up an Indicators Sub-group composed of national delegations of experts that submit recommendations on technical issues to the SPC.

From a constitutional perspective, on the one hand, the SPC renews the dispute against comitology procedures in terms of lack of democracy, accountability and transparency; on the other hand it increases the classical European ambiguity in reference to social matters[117].

Even if one embraces an output legitimacy perspective and values well-informed problem solving and efficient decision making as vital parts of modern government realised by comitology[118], and as such tries to skip the usual European political trap[119] and the underlying «legitimacy paradox»[120], it remains nonetheless true that this rational approach is only a part of the whole problem, as it focuses on the depth of knowledge and expertise but overshadows the perspective of more deliberative and reflexive approaches[121], pursuant to wider 'throughput legitimacy'[122].

Treaty of Nice that «gives the coordination of policies on social exclusion and social protection constitutional recognition on a par with employment and economic policy».

[117] The ambiguity of European institutions about the role of rights (and social rights in particular) within the economic governance framework is stressed by M. DANI, *Il diritto pubblico europeo nella prospettiva dei conflitti*, Cedam, Padua, 2013, p. 351.

[118] See E.O. ERIKSEN, J.E. FOSSUM, *Europe at a crossroads: Government or transnational governance?*, in C. JOERGES, I. SAND, G. TEUBNER (Edited by), *Transnational governance and constitutionalism*, Hart Publishing, Oxford and Portland, 2004, p. 127.

[119] M. FERRERA, *Rotta di collisione: Euro contro welfare?*, Laterza, Rome-Bari, 2016, p. 47.

[120] About the vicious circle of legitimacy in its input and output version, see P. POPELIER, *Governance and better regulation: Dealing with the legitimacy paradox*, in *European Public Law*, No. 3/2011, p. 561 ff.

[121] In these terms, see P. VESAN, *Conoscenza e apprendimento nella governance europea*, in M. FERRERA, M. GIULIANI (Edited by), *Governance e politiche nell'Unione europea*, il Mulino, Bologna, 2008, p. 241 ff.

[122] See V.A. SCHMIDT, Democracy and legitimacy in the European Union revisited: input, output and 'throughput', cit., pp. 2-3.

Consequently, taking a small step in this last respect, Article 1, para. 4, 2004/689/EC, provides that, in fulfilling its mandate, the Committee shall establish appropriate contacts with the social partners and social nongovernmental organizations (NGOs), while the European Parliament shall also be informed regarding the SPC's activities. Conversely, it is worth to recall that the original Article 1, para. 4 entailed the only reference to social partners without any reference to the European Parliament and social nongovernmental organisations.

Against this background, it is worthwhile to remember that part of the doctrine has celebrated the SPC's practice on social indicators for its transparent methodology and its openness to non-state actors, with specific reference to the participation of the European Anti-poverty Network (EAPN), which enjoys a semi-official role consulting on key elements of social inclusions matters (among which are social indicators)[123] and as such, implementing the SPC's rational and deliberative background and adding EAPN's more rights-driven approach.

3. A first set of common agreed social indicators: the Laeken indicators

Moving further down the path started by the Lisbon Strategy, the 2000 Nice European Council and the 2001 Stockholm European Council invited the Member States and the Commission to develop commonly agreed indicators in reference to the fight against social exclusion and poverty[124]. The SPC, and in particular its Indicators Sub-group, undertook this task and implement it by following the principles and recommendations developed by a report prepared by academic researchers and presented at the conference on 'Indicators for Social Inclusion: Making Common EU Objectives Work' held on 14–15 September 2001 at Antwerp at the request of the Belgian Presidency of the Council[125]. According to the report, social indicators should respect some fundamental principles laying on a twofold background: they should address outputs rather than inputs within the aim to measure social outcomes and not the means by which they are achieved[126]; they should capture the

[123] J. ZEITLIN, The open method of coordination in question, cit., p. 463.

[124] The importance of common agreed indicators had already been recognised by the Lisbon European Council (see Presidency Conclusions, para. 37).

[125] This report became a book, see T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, Oxford University Press, Oxford, 2002.

[126] As explained by the Joint Report by the Council and the Commission on Social Inclusion adopted by the Council (EPSCO) on 4 March 2004, p. 128 (English version): «[T]his is because an indicator that merely measures policy effort is of little help if there is no way of knowing whether

multidimensionality of social exclusion as a concept broader than sole reliance on a monetary poverty indicator[127]. Consequently, general principles on indicators are divided between principles that pertain to a single indicator and those that pertain to a whole portfolio of indicators. For the former, a social indicator: should identify the essence of the problem and have a clear and accepted normative interpretation[128]; should be robust and statistically reliable; should be responsive to effective policy interventions but not subject to manipulation; should be measurable in a sufficiently comparable way across member states and comparable; should be timely and susceptible to revision; should not impose too large burden on those measured. For the latter, the portfolio: should be balanced across different dimensions; should have indicators that are mutually consistent and mutually proportional; and should be transparent and accessible as possible to EU citizens[129]. The main statistical sources for common indicators have been: Eurostat (which coordinates some surveys developed at the EU level, such as the Labour Force Survey (LFS), which is related to employment and education data); the European Community Household Panel (ECHP), which has been a key source on income and living conditions; and the EU Statistic on Income and Living Conditions (EU-SILC). Since 2003 this latter (EU-SILC) has become the EU reference source for the level and composition of poverty and social exclusion, replacing the ECHP. The EU-SILC prioritises cross-sectional and longitudinal dimensions, but does so differently from the ECHP because it is a common statistical framework rather than a common survey and it was organized by a 2004 Council Regulation that made its usage compulsory for all Member States[130].

that effort is achieving its goal. Furthermore, it is in the very nature of the open co-ordination method that Member States agree on the indicators by which performance is to be judged but are left free to choose the policies by which these objectives are to be met». In such a manner, for instance, the focus should be on education attainment rather than on total spending on education.

[127] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, cit., pp. 20, 33.

[128] As explained by the Joint Report by the Council and the Commission on Social Inclusion adopted by the Council (EPSCO) on 4 March 2004, p. 128 (English version): «[T]his means that indicators must be of a form that can be linked to policy initiatives and there should be agreement that a movement in a particular direction represents an improvement or deterioration of social outcomes». Furthermore, they should be robust and statistically validated, measurable in a sufficiently comparable way across the Member States, and timely and susceptible of revision for the purpose of the continuous improvement of both their quantitative listing and their qualitative statistical foundation».

[129] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, cit., pp. 20-25.

[130] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *The EU and social inclusion: Facing the challenges*, The Policy Press – University of Bristol, Bristol, 2007, pp. 62, 144 ff.

Furthermore, indicators, according to the referred recommendation developed by the academic research, should have a three-tiered structure: a small set of lead headline indicators (Level 1) covering the broad fields considered to be of utmost importance in leading to social exclusion; a second, wider range of indicators (Level 2) providing greater detail and describing other dimensions of the problem[131]; and a third Level that (differently from Level 1 and 2 which are common across Member States) should be of specific concern to Member States. Moreover, Level 1 and 2 indicators should be broken down in different ways (in reference to a population sub-group or across sub-groups) according to gender, age, regional dimension, etc.[132]

This three-tiered structure, which has the main aim of allowing for balance across different dimensions, was undertaken by the Indicators Sub-group within the SPC. In defining the EU common social indicators, it operated in conjunction with the Directorate-General for Employment, Social Affairs and Equal Opportunities of the Commission and the Statistical Office of the EU (Eurostat). It finally adopted a first set of eighteen indicators articulated between a first level of ten primary indicators and a second level of eight secondary indicators, endorsed by the European Council meeting in Laeken on 14–15 December 2001. This list of commonly agreed indicators, delivered by the Laeken European Council, focused on lack of income, income inequality, lack of employment and lack of an adequate educational attainment level, but left other key dimensions of social exclusion and poverty, such as health, living conditions and housing in the shadows[133]. These aspects will be addressed later.

4. Deepening the Laeken indicators: the multidimensionality of poverty and social exclusion

Since its establishment, the Indicators Sub-Group (ISG) has continued to work on and revise common social indicators. Consequently, «the list of EU

[131] This set of indicators covered four dimensions of social exclusion, «namely financial poverty, employment, health and education», see J. S. O'CONNOR, *Policy coordination, social indicators and the social-policy agenda in the European Union*, in *Journal of European Social Policy*, Vol. 15, No. 4/2005, p. 346.

[132] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, cit., p. 70 ff.

[133] About «the gaps in coverage», see A.B. ATKINSON, E. MARLIER, B. NOLAN, *Indicators and Targets for Social Inclusion in the European Union*, in *Journal of Common Market Studies*, Vol. 42, No. 1/2004, p. 59 ff.

social indicators is continuously being improved as statistics, data collection and policy needs evolve»[134].

In 2006, in accordance with the streamlined OMC on social protection that integrated the three main strands on social inclusion, pension and health[135], the portfolio of social indicators was articulated in an 'overarching' portfolio common to the three fields of social protection and a portfolio for each of the latter. These individual portfolios maintains the distinction between primary and secondary indicators but major emphasis put on their function in order to identify priority objectives[136]. With specific reference to social inclusion, primary indicators, more than poverty risk, unemployment and joblessness, low educational qualifications and the employment situation of migrant workers, also refer to material deprivation, housing quality, access to health care and child well-being with their breakdown in terms of gender, broad age group and socioeconomic conditions. Secondary indicators were also more detailed in their disaggregation, in particular the at-risk-of-poverty rate, which was broken down by the work intensity of households to complement information on the 'working poor'[137]. Consequently, the revised set of social indicators focused better on the multifaceted aspect of social exclusion and poverty. Indeed, factors of a non-monetary nature or aspects not only related to employment play a significant role in depriving people from fully developing and participating in society[138].

The improvement of the list of social indicators went hand in hand with the improvement of reliable statistic instrument filling the data gap for the whole EU Member States first of all through the statistical development of EU-SILC set up by a framework Regulation that made them compulsory for all Member States (unlike the previously used ECHP)[139]. According to this methodology,

[134] See Portfolio of EU Social Indicators for the Monitoring of Progress Towards the EU Objectives for Social Protection and Social Inclusion, Social Protection Commiteee – Indicators Sub-group, 2015, p. 3.

[135] On this streamlined OMC and its synchronisation with employment and the economic policy coordination process, see J. S. O'CONNOR, *Policy coordination, social indicators and the social-policy agenda in the European Union*, in *Journal of European Social Policy*, Vol. 15, No. 4/2005, p. 350.

[136] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *The EU and social inclusion: Facing the challenges*, The Policy Press – University of Bristol, Bristol, 2007, p. 43.

[137] *Ivi*, p. 46 ff.

[138] *Ivi.*, p. 174. Moreover, the set of common agreed social indicators (both overarching indicators and single strand indicators) was articulated in commonly agreed EU indicators (which allow Member States comparison and are mostly outcomes-oriented) and commonly agreed national indicators. Both must be interpreted in the light of contextual information that helps in understanding each indicator.

[139] T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *The EU and social inclusion: Facing the challenges*, cit., p. 145.

Eurostat regularly calculates and updates figures for the set of commonly agreed social indicators.

In 2010, by means of the Europe 2020 strategy, the focus on the multidimensionality of social exclusion and poverty gain further importance following the quantitative target established by this strategy. In this last respect, the at-risk-of-poverty or exclusion indicators (AROPE) assumed pivotal importance, extending the original concept of relative income poverty to cover some important non-monetary aspects of poverty and labour market exclusion «by recognizing the multidimensional approach to fighting poverty and social exclusion»[140], as it encompasses the combination of three indicators (the at-risk-of-poverty rate, the severe material deprivation rate and the share of people living in quasi-jobless households)[141]. Moreover, the severe material deprivation rate in reference to the single portfolio of social inclusion was broken down not only by gender and age (such as the others rates) but also by socioeconomic status (household type, most frequent activity, urbanisation). Consequently, the shift in focus followed by the evolution of social inclusion indicators during their development has performed better on different types of inequalities, their causes and the inherent vulnerabilities.

Consequently, two early assessments could be drawn at this point in time. First, the EU has given itself well-developed social indicators able to track most of the ongoing factors that limit the effectiveness of social rights, such as those causing social exclusion, inequality and poverty. It suffices to focus on the Social OMC and the SPC's annual reporting system, which monitors the social situation in the EU, to become aware of this[142]. Second, and importantly, it is clear that social indicators entail not only technical and applied issues, but also theoretical ones with particular reference to value judgements, and as such, constitutional scholars need to get involved to improve the understanding of constitutional principles and rights that need to be considered as a unavoidable reference framework within the elaboration and review of social indicators.

Against to this background, the SPC and the relevant Council formation (EPSCO) have agreed that «[n]o new targets, processes or tools are required to deliver the Europe 2020 objectives more effectively. On the contrary, a

[140] Portfolio of EU Social Indicators for the Monitoring of Progress Towards the EU Objectives for Social Protection and Social Inclusion, Social Protection Committee – Indicators Sub-group, 2015, p. 5.

[141] As highlighted by E. ALES, La lotta all'esclusione sociale attraverso l'Open Method of Co-ordination: prime riflessioni (2000-2002), in M. BARBERA (Edited by), Nuove forme di regolazione: Il metodo aperto di coordinamento delle politiche sociali, cit., p. 197, the Laeken indicators have the merit to fully catch the multi-causal dimension of social exclusion.

[142] See *http://ec.europa.eu/social/main.jsp?catId=758*.

stronger and more effective use of existing processes should be promoted. The integrated nature of Europe 2020, bringing together the separate economic and social and employment strands, was important progress and should be further strengthened» with particular reference to their better insertion within the European Semester that «has proven to be a valuable instrument for engaging Member States in the coordination of key structural reforms and an effective tool to implement the Europe 2020 Strategy. However, the Semester needs to work in a more balanced way»[143], taking social aspects in due account. The EU has picked up these two assessments and has implemented them, embedding aspects of the social inclusion monitoring system within the economic governance framework and placing greater focus on social rights (i.e. by means of a more rights-driven perspective) that goes beyond the mere impact assessment of structural reform on the social situation for the positive promotion of social inclusion.

[143] See the Council's (EPSCO) 3 October 2014 endorsement of the Joint Opinion of the Employment Committee and of the Social Protection Committee on *Europe 2020 Strategy: Mid-term review, including the evaluation of the European Semester*, paras. 10, 17.

IV.
EMBEDDING SOCIAL INCLUSION WITHIN THE ECONOMIC GOVERNANCE FRAMEWORK

Part I
The follow-up: social inclusion for its own sake

Before examining the core question, it is worthwhile to recall that social monitoring could be undertaken using different approaches: according to the notion of well-being (concept-driven approach), according to the desired policy goals (policy-driven approach) or according to the available data (data-driven approach)[1]. Moreover, when attention is focused on the social situation stressed by the cyclical social monitoring different deliveries could be highlighted according to the importance and weight recognized to a broad set of conflicting values and purposes, namely those of a fiscal or economic nature.

Bearing this in mind, it is likewise worthwhile to recall that, on the one hand, the approach developed by the OMC on social inclusion has followed the pattern of a policy-driven approach[2]; on the other hand, and importantly, the habitual pattern within the economic governance framework has usually recognised a dominance of macroeconomic and macro-financial imperatives and, above all most recently, has spoken of a 'social dimension' of the European semester, which is different from a real awareness of the fundamental rights herein involved.

However, lately, both approaches have been changing. On the one hand, a conceptual approach more in line with the social rights discourse has been starting to take place within social monitoring; on the other hand, and importantly, this increasingly more frequent reference to fundamental rights and values has planted the seed for reversing the usual perspective that

[1] As stressed by H.H. NOLL, *Social monitoring and reporting: A success story in applied research on social indicators and quality of life*, in *Social Indicators Research Centre*, 2016, p. 7.

[2] *Ivi*, p. 7.

functionalise social rights to economic and budgetary targets within the EU economic governance framework.

In this respect, the spread of the use of social indicators within the European Semester plays a relevant role. Indeed, evidence given by this set of tools goes far beyond the mere overlap of the general objectives of the Broad Economic Policy Guidelines (BEPGs), the Employment Strategy (EES) and the OMC on Social Inclusion and Social Protection[3], rather focusing on the specific issues of the multidimensionality of social exclusion and poverty, as such claiming for better performing social rights (i.e. effective social rights) which means, in constitutional terms, more equality and dignity. This conceptual shift from policy to rights[4] is well-addressed by the recent launch of a European Pillar of Social Rights that is deemed to be integrated, with its social scoreboard, within the economic governance framework. As such, social inclusion is deemed to be considered for its own sake and not overshadowed by economic concern. This is the subject explored in this chapter.

1. Political, doctrinal and technical context

In the aftermath of this Chapter, the political, doctrinal and technical context that has underpinned a changing approach to social concern within the European semester will be addressed.

a) Political context.

On the political background, several relevant documents could be tracked as paving the way towards a European economic governance that is more aware of social questions.

While the «Four President Report» of 5 December 2012, «Towards a Genuine Economic and Monetary Union», only addressed the general question of how to remain a highly attractive social market economy and preserve the European social models without any further reference to specific social issues, focusing rather on fiscal sustainability and the need to boost competitiveness, slightly greater consideration of the social aspect can be

[3] As described by P. POCHET, *The open method of coordination and the construction of social Europe – A historical perspective*, in J. ZEITLIN, P. POCHET (Edited by), *The open method of coordination in action – The European employment and social inclusion strategies*, P.I.E. – Peter Lang S.A., Brussels, 2005, p. 60.

[4] On the management of social rights through social policies over time, see M. FERRERA, *Trent'anni dopo: il welfare state europeo tra crisi e trasformazione*, in *Stato e Mercato,* No. 81/2007, p. 357 ff.

found in the Commission Communication of 2012 «A blueprint for a deep and genuine economic and monetary union launching a European debate»[5]. It asked not only for a reinforcement of the coordination and surveillance of employment and social policies but also for the promotion of convergence in these areas within the framework of the economic and budgetary governance (para. 3.2.1). Consequently, the Commission's proposal for ex ante coordination of the major economic policy reforms, along with its proposal on the contractual arrangements with Member States involved in financial support, provided for the assessment of the social impact of the requested structural reforms[6] and the enforcement of the link between the funding and the effectiveness of the implementation of social reforms[7].

More specifically, the European Council conclusions of 27–28 June 2013 set out that «the social dimension of the EMU should be strengthened. As a first step, it is important to better monitor and take into account the social and labour market situation within EMU, notably by using appropriate social and employment indicators within the European semester. It is also important to ensure better coordination of employment and social policies, while fully respecting national competences» (para. 14 sub c). Accordingly, the Commission's Communication of 2 October 2013[8], «Strengthening the Social Dimension of the Economic and Monetary Union (EMU)», stated that «[t]he 'social dimension of EMU' relates to the ability of economic governance mechanisms and policy instruments to identify, take into account and address problematic developments and challenges related to employment and social policies in the EMU. Strengthening the social dimension should help all Member States achieve their growth and employment potential, improve social cohesion and prevent increasing disparities, in line with the Treaties and the Europe 2020 strategy» (para. 2). For this purpose, the Commission expressed the advantages of an overhaul of the consideration of social aspects within the economic governance framework: «Progress is needed on incorporating the social dimension in surveillance of the macroeconomic imbalances. It is also needed more generally in the European Semester of economic policy coordination, and can be done by strengthening the existing framework for coordination of employment and social policies. Better catering for the social dimension in surveillance of macroeconomic imbalances would help to improve the design of the policies recommended to

[5] COM(2012) 777 final, para. 2.
[6] COM(2013) 166 final, para. 3.2.
[7] COM(2013) 165 final, para. 3.
[8] COM(2013) 690 final.

countries undergoing macroeconomic adjustment» and to detect adverse social developments at an early stage (para. 3)[9].

The European Council held in December 2013, in reiterating the importance of employment and social development within the European Semester by means of the reference to a scoreboard of key employment and social indicators, also referred to a system of mutually agreed contractual arrangements and associated solidarity mechanisms to facilitate and support the Member States' ownership and effectiveness of reforms in areas which cover a broad range of fields: not only those that are growth and job-related, but also those that are socially oriented, consistent with matters regarding social inclusion[10].

Along this path, a relevant political step forward was represented by the 2014 European Council President Speech on «A Consistent Strategy for Jobs and Growth in Europe», which deepened the sense of the social dimension of the European economic governance: «My main message is this: our economic models need to change. It is the only way to save our welfare systems, reduce inequality and guarantee more jobs and a brighter future to the younger generations…On the economic front, Europe should evolve towards a new model where growth is driven by innovation. A growth model that is truly inclusive, taking the interest of the next generations into account and addressing inequality at its source». Accordingly, he denounced the duality in the labour markets caused by the growing divide between «insiders» and «outsiders», between those who receive protection and those who are less protected or unprotected. He specifically addressed inequality as one of the present challenging themes for the EU: «It is an issue close to my heart and I am glad it is finally again in the headlines. The rise in inequality, and the feeling that the gains before the crisis and the pain after the crisis have been unfairly distributed, are at the core of people's disenchantment with politics — both national and European politics…Ultimately, rising inequality could threaten not only social cohesion and the stability of democratic institutions, but also put a break on growth and prosperity…That is why it is at the root that we must tackle inequality». He also admitted that «[t]he stability of our single currency and the solidity of public finances are as important…as social fairness in implementing necessary structural reforms», and with specific reference to the financial stability support for Euro Area Member States experiencing difficulties, he advanced the proposal that «any support and reform programme goes not only through a fiscal sustainability assessment;

[9] It is worthwhile to remember that the Macroeconomic Imbalance Procedure (MIP) introduced by Regulation No. 1176/2011 does not expressly address social issues, except for unemployment.

[10] European Council Conclusions on 19/20 December 2013, para. 32, 34.

but through a social impact assessment as well». He also pointed out that «internal market provisions cannot be valued more highly than social provisions, which would otherwise just be minimum standards. The internal market does not automatically have priority; social factors must also play a role in Europe»[11].

Against this background, the Five Presidents' Report of 22 June 2015, «Completing Europe's Economic and Monetary Union», marked an important further step, particularly compared to the Four Presidents' Report of three years earlier. It explicitly broadens the focus to include social issues in addition to the existing economic and fiscal issues, placing «social cohesion» directly in the headlines. It stressed that welfare systems, not only economic and fiscal issues, were matters of common concern, chiefly within the Euro Area Member States, where asymmetric shocks could have spill-over effects, and the cushioning capacity of national welfare systems were at issue[12]. This was the reason an Economic Union of convergence rested on four pillars, one of which entailed «a greater focus on employment and social performance» with the ambition of gaining a «social triple A» (para. 2.1). It also pointed out that the economic and social aspects were two sides of the same coin: «For EMU to succeed, labour markets and welfare systems need to function well and in a fair manner in all euro area Member States. Hence, employment and social concerns must feature highly in the European Semester. Unemployment, especially long term unemployment, is one of the main reasons for inequality and social exclusion…Beyond labour markets, it is important to ensure that every citizen has access to adequate education and that an effective social protection system is in place to protect the most vulnerable in society, including a 'social protection floor'» (para. 2.1). A similar convergence path was a precondition for the creation, over the longer term, of a euro area–wide fiscal stabilisation function that could be activated

[11] President Junker, in his opening statement before the European Parliament on 15 July 2014, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the Next European Commission*, para. 5. From this perspective, it is worthwhile to recall that the European Social Committee's report on the social dimension of the Europe 2020 strategy delivered in June 2014 clearly addressed two main issues. On the one hand, as the European Semester had been moving beyond traditional macroeconomic and employment matters, involving a wider range of social protection policies (pensions, health care and long-term care), the Committee stressed the need to adjust the governance instruments to the specificity of these policies. On the other hand, it stated that «budgetary consolidation needs to be coherent with social goals and take into account the social implications of the different policy choices and their distributional impact across income groups, generations and time, as well as their impact on growth, social cohesion and job creation» (para. 23).

[12] For the virtues encompassed by an asymmetric way ahead (Eurozone first) in relation to the evolution of federal systems, see G. MARTINICO, *Le implicazioni della crisi: Una rassegna della letturatura*, in *www.federalismi.it*, No. 26/2016, p. 18-19.

when national fiscal stabilisers were not enough to absorb an economic shock (para. 4).

This changing vision, which no longer placed social aspects in a definitively subordinate position, but elevated them to a more deserving position in striking a balance with economic and fiscal priorities, was well-mirrored in the 2015 Strategic Note of the European Political Strategy Centre of the Commission[13]. It stated: «The social dimension of Economic and Monetary Union (EMU) has too often been neglected, due to the implicit assumption that making EMU more «social» would somehow hamper the economic performance of the euro area. Nothing could be further from the truth. Not coincidentally, the recent financial crisis proved that countries with more dynamic and inclusive labour markets — as well as a better skilled labour force and interventionist social systems — are more resilient: they better withstand shocks and recover more quickly». Furthermore, it stated that «social imbalances pose a political and economic threat to the sustainability of the euro area, similar in magnitude — even if different in character — to economic and financial risks»[14].

Importantly, this Note held that the flipside of activation (i.e. helping everyone to use his or her potential to the fullest from a labour-driven perspective) is protection (i.e. ensuring not only a «living income» and robust social welfare systems, such as effective tools against poverty and social exclusion, but also monitoring the distributive impact of reforms in terms of equality). For this purpose, the Note deemed the development of indicators beyond the labour market, covering fundamental social aspects, to be necessary. These indicators should specifically include a «social protection floor» and should be inserted into the European Semester framework: «EMU needs to augment the use of social indicators to better assess economic impact, both in the short- and long-term. The interplay between social and economic indicators can also serve as a tool to discourage countries from enacting indiscriminate cuts because it is the easiest way to bring budgets in line in the short-run, without understanding the scarring implications over time. In general, the European Semester must ensure that policies are ranked with respect to their effects on short and long-term growth, employment and income distribution, social impact and fiscal sustainability»[15].

[13] The EPSC is a Commission internal think tank delivering papers (called Strategic Notes) upon the request of the President of the European Commission and on subjects chosen by the latter. The Strategic Note in question was issued on 18 June 2015 on *The Social Dimension of Economic and Monetary Union – Towards Convergence and Resilience*.

[14] Strategic Note of 18 June 2015 on *The Social Dimension of Economic and Monetary Union – Towards Convergence and Resilience*, p. 1 (English version).

[15] *Ivi*, p. 3.

The European Parliament too supported the insertion of social indicators that go further than mere employment-related indicators within the existing scoreboard of macroeconomic and macrofinancial indicators in relation to the monitoring procedure and the consequent Alert Mechanism for the early detection of imbalances of Member States within the European Semester procedures[16]. Accordingly, on several occasions, it has underpinned the introduction and broadening of social indicators within the European Semester, calling for their reinforced consideration on an equal footing with macroeconomic and macro-financial indicators[17].

This political background has planted the seed for a rebalancing of social issues within the European economic framework. Even if this re-balance stands more on a negative perspective, in terms of cushioning the impact of structural reforms on the social situation (by means of impact assessment), it also gets involvement in a more positive perspective, in terms of the need to promote better social inclusion. This is the further step that the EU is starting to implement (see below), and that needs to be supported by our call for a doctrinal interdisciplinary dialogue between social scientists and legal scholars.

b) Doctrinal context.

As shown by several economic studies from the European Parliament, unequal countries are worse not only in terms of social cohesion, life expectancy, health and the general common good, all of which affect both the poorest and the wealthiest (i.e. the majority of the population), but also in terms of future economic growth[18]. In particular, «[e]xpenditure on social protection can actually be expected to have a larger stabilising effect than the average of total government expenditure. Empirical evidence gathered in this study can show that this was and still is the case, also with respect to the

[16] *Mainstreaming Employment and Social Indicators into Macroeconomic Surveillance*, PE 569.985, IP/A/EMPL/2014-18, February 2016, p. 99, note 131.

[17] See, among others, the European Parliament resolution of 26 October 2016 on the *European Semester for economic policy coordination: Implementation of 2016 priorities* (2016/2101(INI)) or the *Report on the European Semester for economic policy coordination: Employment and Social Aspects in the Annual Growth Survey 2017* (2016/2307(INI)), that «[w]elcomes the progress towards achieving a balance between the economic and social dimensions of the European Semester process, the Commission having met some of Parliament's requests; stresses, however, that more effort is needed to improve the political visibility and impact of the scoreboard of key employment and social indicators».

[18] To deepen these references, see the study developed in 2016 by the European Parliament's Policy Department A on Economic and Scientific Policy (PE 587.294) and the attached documents.

recent global economic crisis»[19]. On the one hand, social protection provides a safety net for those groups which have been hit the hardest by the crisis, and on the other hand, it produces a stabilising effect on the overall demand for goods and services[20]. This Report also emphasised that while recent economic studies have provided evidence of the stabilising properties of social spending, earlier studies, in contrast, focused only on the virtues of taxes and unemployment benefits[21]. Indeed, social rights started to be conceptualised as a bridge between the welfare state and the market, as they are mechanisms for enhancing the substantive economic freedoms to achieve a wide range of functioning[22]. Not only are they imbued with a social function but also with an economic function, which, in turn, helps them to increase their position on the scale of conflicting values and augment their original limited purposes within the EU[23]. Consequently, since inequality has become a very popular topic of research among economists[24], it has smoothed the path for the relaunch of that part of doctrine that underpins more public intervention to correct market failures and the connected inequalities[25]. Since the year 2000, studies, such that of Piketty denouncing the inequalities stemming from the accumulation of capital and the positive influence of progressive taxation in

[19] See IP/A/EMPL/ST/2009-07, PE 451-484, a study for the European Parliament's Committee on Employment and Social Affairs on *The Role of Social Protection as Economic Stabilizer: Lessons from the Current Crisis*, para. 1.

[20] In the same way, see the recent European Commission *Reflection Paper on the Social Dimension of Europe*, COM(2017) 206 of 26 April 2017, p. 19.

[21] *Ivi*, para. 1.3: «In spite of some conflicting theoretical expectations with respect to the stabilising effects of specific social spending items, recent empirical evidence indicates that government spending in social areas has on average a more stabilising effect than total government spending as a whole».

[22] See A.K. SEN, *La diseguaglianza*, il Mulino, Bologna, 2010, p. 63 ff.; M.C. NUSSBAUM, *Giustizia sociale e dignità umana: da individui a persone,* il Mulino, Bologna, 2002, p. 75 ff.; and, from a similar perspective, S. DEAKIN, J. BROWNE, *Social rights and market order: Adapting the capability approach*, in T. K. HERVEY, J. KENNER (Edited by), *Economic and social rights under the EU Charter of Fundamental Rights – A legal perspective*, Oxford and Portland, 2003, p. 42.

[23] In F. BILANCIA, *Crisi economica e asimmetrie territoriali nella garanzia dei diritti sociali tra Mercato Unico e Unione Monetaria*, in *www.rivistaaic.it*, No. 2/2014, p. 11, the author highlights the macroeconomic balancing function of social rights.

[24] In this sense, see K. C. LAND, A. C. MICHALOS, *Fifty years after the Social Indicators movement: Has the promise been fulfilled? An assessment of an agenda for the future*, in *Social Indicators Research*, 2017, p. 6 ff. G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?,* in *Quaderni Costituzionali*, No. 1/2012, p. 41.

[25] In this sense, see G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?*, cit., p. 41, points out that the recent economic crisis has relaunched economic, legal and political doctrines that stand for more public intervention to correct market failures.

terms of equality[26] or that of Streeck with its criticism against the 'consolidation State'[27] or furthermore that of Stiglitz on the fights against inequalities as a means for economic growth[28] discuss the different perspective economists have towards social issues. Moreover, a different economic and philosophical perspective (the 'capability approach'), which aims to address the issue of social justice beyond the principle of 'justice as fairness' enshrined by Rawls, has helped to put significant focus on the multidimensionality of inequalities, social exclusion and poverty[29]. Furthermore, as already treated in paragraph 4 of Chapter I, legal studies have started to get major involvement in the economic governance procedure, especially after the financial downturn of 2008, to stress the negative effects of austerity measures in terms of increasing inequalities and the connected infringement on the effectiveness of social rights[30]. Finally, the ECJ, in the *Ledra* case, has overcome the deadlock of the *Pringle* case, stating that the European Commission is bound to the EU law, including the European Charter of Fundamental Rights, when negotiating structural reform with Member States under financial assistance (see Chapter II, paragraph 3).

c) Technical context.

On the technical background, even if the social indicators movements date back to the 1960s[31], renewed attention on indicators of well-being and quality of life aiming at overcoming the mere reference to Gross Domestic Product indicator has increased since 2008, when the crisis experienced its peak. On the one hand, in 2008 the French president, Nicolas Sarkozy, appointed a Commission on the measurement of economic performance and social progress made of twenty-five economists[32]; on the other hand, the European

[26] T. PIKETTY, *Capital in the twenty-first century*, The Belknap Press of Harvard University Press, Cambridge, MA, London, England, 2014.

[27] W. STREECK, *Tempo guadagnato – La crisi rinviata del capitalismo democratico*, la Feltrinelli, Milan, 2013.

[28] J.E. STIGLITZ, *Le nuove regole dell'economia: sconfiggere la disuguaglianza per tornare a crescere,* Il Saggiatore, Milano, 2016.

[29] A. K. SEN, *La diseguaglianza*, cit.; M. C. NUSSBAUM, *Giustizia sociale e dignità umana: Da individui a persone*, cit.

[30] C. KILPATRICK, B. DE WITTE (Edited by), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges*, in *EUI – Working papers, Law* - 2014/05; C. KILPATRICK, *Constitutions, Social rights and sovereign debt states in Europe: A challenging new area of constitutional inquiry*, in *EUI – Working papers, Law* – 2015/34.

[31] As stressed by H.H. NOLL, *Social monitoring and reporting: A success story in applied research on social indicators and quality of life*, cit., 2016, p. 2.

[32] J. E. STIGLITZ, A. SEN, J. P. FITOUSSI, Report by the Commission on the Measurement of Economic Performance and Social Progress*, www.stiglitz-sen-fitoussi.fr*.

Commission adopted some initiatives aimed at the integration of economic evidence with more socially oriented evidence[33].

Moreover, especially since the 2010s, technical developments in the measurement of the complex concept of quality of life have occurred, shifting the focus onto inequalities within countries (including gender inequality) rather than on the mere ranking among countries, as well as on the multidimensionality of poverty[34].

In parallel, the reference to outcome indicators rather than input measures revalidated the original address on which the Laeken indicators were developed[35]. Consequently, as seen in the previous chapter, social inclusion indicators within the EU have reached a major level of development and reliability thanks to their continuously being reviewed and refined. In particular, in October 2012, the Council approved a common methodology to monitor social development in Member States (SPPM), and a database of commonly agreed key social and employment indicators integrated into a Joint Assessment Framework (JAF).

This improvement on social indicators at the European level has been supported by endeavours at the national level: less recent, such as the spread of the use of social indicators since the 1960s by the Swedish government, or more recent, such as what occurred in Italy. In this last respect, according to the modification introduced by Law No. 163/2016 to the Law No. 196/2009 (Budgetary law) and waiting for the final set of Equitable and Sustainable Well-being Indicators (BES indicators) that a government-appointed committee has to articulate for the aim of their employment within the budgetary cycle[36], the 2017 Economic and Financial Document has for the first time experienced a provisional set of four social indicators, among which are an inequality income index and a labour force participation rate[37].

This overview of EU political and technical documents along with the doctrinal stance shows the ongoing 'winds of change' supporting a further step within the economic governance framework, which previously was

[33] C. PANICO, E. SAPIENZA, *Sul Rapporto della Commissione nominate da Sarkozy per la misurazione dei risultati economici e del progresso sociale*, in *Diritti Lavori Mercati*, No. 1/2010, p. 81. In reference to the initiative of the European Commission, the November 2007 conference «Beyond GDP» and the Communication COM/2009/0433 «GDP and beyond: Measuring progress in a changing world» could be quoted.

[34] K. C. LAND, A. C. MICHALOS, *Fifty years after the Social Indicators movement: Has the promise been fulfilled? An assessment of an agenda for the future*, cit., p. 16.

[35] *Ivi*, p. 19 ff.

[36] See Article 14, Law No. 163/2016.

[37] See Italian Economic and Financial Document 2017, p. 44 ff.

completely blind to social issues[38]. When the Five Presidents' Report stresses the need to go beyond the labour market and focus on a 'social protection floor', and support not only a well-functioning labour market but also a well-functioning welfare system, or when the 2015 Strategic Note of the European Political Strategy Centre of the Commission emphasises the positive effects of an interventionist welfare state, the EU governance has — for the first time — addressed issues of social inclusion (and their multidimensionality) with reference to the European Semester procedures. Against this background, continuously improving research on social indicators, the consequent habit to use them as much as their technical and numerical features, are all ingredients that have contributed to smoothing their political acceptance and their consequent insertion within the monitoring procedures of the economic governance system[39]. Furthermore, the alarming social situation these indicators have delivered at the European level have caught the attention of legal scholars and social scientists, specifically economists leading to a changing perspective of someone between these latter.

Therefore, the whole context attests to the need to give more evidence to issues that remained overshadowed by the dominance of attention on financial and economic statistics, primarily issues like social inclusion, where deficiency in terms of effectiveness risks becoming the real (negative) feature of the current European Social Model. Consequently, within the economic governance the time seems to be ripe to undertake and deepen further the work done by the SPC and its Indicators Sub-group.

In parallel with the attempt made by scholars and some governments to replace exclusive economic indicators (such as GDP) with 'quality of life' indicators[40], the degree of technical and political acceptance of indicators on social inclusion within the EU have paved the way for placing them on more balanced ground with economic indicators, for the purpose of promoting not

[38] This marks a clear difference with the approach followed by the Kok Report end the Sapir Report in 2003, which were two key reports for the employment policy and economic policy and which «adopted a segmented view of economic and social affairs»; in this sense, see P. POCHET, *The open method of coordination and the construction of social Europe – A historical perspective*, in J. ZEITLIN, P. POCHET, (Edited by), *The open method of coordination in action – The European employment and social inclusion strategies*, cit., p. 62.

[39] In this regard, it is worth recalling the political science theory according to which the EU's efficiency work is inversely proportional to the level of political sensitivity of the question (which is due, in turn, to the conflicting interests involved), see F. W. SCHARPF, *The European social model: Coping with the challenges of diversity*, in *JCMS*, Vol. 40, No. 4/2002, p. 651.

[40] C. PANICO, E. SAPIENZA, *Sul Rapporto della Commissione nominate da Sarkozy per la misurazione dei risultati economici e del progresso sociale*, cit., p. 92; D. SPERONI, *Sostenibilità: il DEF, i quattro indicatori BES e la ricerca di una Strategia delle strategie*, in *Corriere della Sera*, 23 April 2017.

only a wider and deeper understanding of the impact of structural reform in the short-, medium- and long-term, but also reforms that better fit social needs. This is the concrete way that the European economic governance procedures have been starting to undertake, as we will explain below.

Indeed, some steps for the implementation of this ambitious programme have already been enacted, while others have been proposed (see the following paragraphs). Consequently, this social imprinting within the evolutionary process of the EU governance system deserves the attention of constitutional scholars in two directions: to identify legacies that could improve and complete their awareness and understanding of social issues, and to emphasise and suggest corrections — based on their normative view — of the process undertaken at the EU level aimed at effective substantial equality and human dignity by means of effective social rights.

2. The "social dimension" of the European economic governance

The economic governance framework is well-known for its deliveries in terms of sound fiscal policies and the connected austerity measures. To sum up, these governance procedures are aimed at assuring sound fiscal policies, sustainable budgets, macroeconomic surveillance and financial assistance. From a procedural perspective, they involve both European-level and national-level orientations, monitoring (within the «preventive arm») and surveillance, and sanctions (within the «corrective arm»). This framework rests on Treaty provisions (Articles 121, 126, 136, 146, 153 TFEU) that have been carried out, implemented and enhanced over time. In this respect, some provisions of secondary law have been enacted: the Six Pack, composed of five Regulations and one Directive (Regulations EU Nos. 1173/2001, 1174/2011, 1175/2011, 1176/2011 and 1177/2011; and Directive No. 2011/85/UE), and the Two Pack, composed of two Regulations (Regulations Nos. 472/2013 and 473/2013), both of which have strengthened the governance mechanisms set out by the Stability and Growth Pact (composed of Regulations EC Nos. 1466/97 and 1467/97 and the European Council Resolution of 17 June 1997). In 2012, two international treaties were adopted: the Treaty on Stability Coordination and Governance in the Economic and Monetary Union (TSCG), which was agreed by twenty-five Member States (the United Kingdom and the Czech Republic opted out) and the Treaty on the European Stability Mechanism (ESM), agreed by the Euro Member States for conditioned financial assistance, replacing the previous European Financial Stabilization Mechanism (EFSM) and European Financial Stability Facility

(EFSF)[41]. Moreover, the economic governance procedures are subject to ongoing improvement, enhancement and evolution[42].

In this last respect, the evolutionary approach that the economic governance framework is undertaking for the development of a 'social dimension' could be tracked with reference to some paces that have already assumed legislative form.

Consequently, it is worthwhile to recall that the European Parliament played a counterbalancing role during the co-legislative procedure for the Six Pack and Two Pack legislation, as it strived to provide more evidence of fairness, equality and social concern[43]. Both the provisions that lay down the involvement of the Social Protection Committee, the relevant stakeholders (*in primis* social partners)[44] and the European Parliament (i.e. its competent committees) or national parliaments[45] in some stages of the European

[41] The doctrine on the European economic governance mechanisms is voluminous; for some of the earlier comments, see A. DE STREEL, *The evolution of the EU economic governance since the Treaty of Maastricht: An unfinished task*, in *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 3/2013, p. 336 ff., in which De Streel structures the economic governance framework through four pillars: fiscal surveillance, macroeconomic surveillance, economic coordination, and financial solidarity; N. DE SADELEER, *The new architecture of the European economic governance: A leviathan or a flat-footed colossus?*, in *Maastricht Journal of European and Comparative Law*, Vol. 19, No. 3/2012, p. 355 ff., in which the author provides evidence of the impact on the institutional equilibrium of the evolutionary process of the EU economic governance procedures; R. DICKMANN, *Governance economica europea e misure nazionali per l'equilibrio dei bilanci*, Jovene, Naples, 2013, in which Dickmann examines the impact of the European economic governance on the national system; E.C. RAFFIOTTA, *Il governo multilivello dell'economia: Studio sulle trasformazioni dello Stato costituzionale in Europa*, Bononia University Press, Bologna, pp. 31-88.

[42] As proven by the most recent documents, such as COM(2015) 600 final, Five presidents' report on steps towards completing Economic and Monetary Union; COM(2017) 291, 31 May 2017, *Reflection paper on the deepening of the Economic and Monetary Union*; and COM(2017)821 final, 6 December 2017, *Further steps towards completing Europe's Economic and Monetary Union: A roadmap*.

[43] As documented in the 2015 study for the European Parliament's Constitutional Affairs Committee, *The European Parliament as a Driving Force for Constitutionalisation*, para. 6 (in particular, the case studies sub 6.1.1 and 6.1.2).

[44] See Recital 19-20-25, Article 9, para. 3 of Regulation No. 1176/2011, which provides for the involvement of social partners and relevant stakeholders within the framework of the Macroeconomic Imbalance Procedure; in the same direction and with reference to the European Semester procedures, see Recital 16, Article 2a, para. 4 of Regulation No. 1175/2011. For their involvement in the procedure for the preparation, evaluation and monitoring of financial assistance programmes, see Recital 11 and Article 8 of Regulation 472/2013.

[45] See Recital 11, 14, 16 and Article 1, para. 4 of Regulation No. 1175/2011; Recital 12, 23, 25 and Article 2, para. 4, Article 5, para. 3, Article 6, para. 1,2, Article 7, para. 1 of Regulation No. 1176/2011; Recital 11, 12, 17 and Article 3 of Regulation No. 1173/2011; Recital 5, 10 and Article 3, paras. 1, 5, 8, 9, Article 7, paras. 4, 10, 11, Article 14, paras. 3, 5, Article 19 of Regulation No. 472/2013; Recital 6, 21, 25, 30 and Article 7, para. 3, Article 11, para. 2 of

Semester, and those that take the social impact of corrective measures into consideration[46] could be read in this light. Accordingly, a 2015 Council decision redrafted the Social Protection Committee to better adapt its functionings to the European Semester in order to enhance its cooperative role with respect to that of the other involved committees, such as the Economic and Financial Committee, the Economic Policy Committee and the Employment Committee[47]. Indeed, this Council Decision stressed that «it is important to better monitor and take into account the social and labour market situation within the Economic and Monetary Union, notably by using appropriate social and employment indicators within the European Semester» (Recital 4).

Moreover, the Commission has the room of manoeuvre to update the present scoreboard of macroeconomic and macro-financial indicators in order to early detect macroeconomic imbalances with potential spill-overs for other Member States and the Union as a whole (see Regulation No. 1176/2011), but by means of due cooperation with other institutions. In this last respect, it is worthwhile to recall that the European Parliament, during the decision making process of Regulation No. 1176/2011, strived to reinforce its participation in the definition of the relative scoreboard. In particular, although the European Parliament supported delegated acts (Article 290 TFEU) because of its co-equal right with the Council to revoke a Commission proposal, the Council preferred implementation acts (Article 291 TFEU). Finally, the deadlock was resolved through a third way procedure (Recital 12 of Regulation No. 1176/2011), according to which «[t]he Commission should closely cooperate with the European Parliament and the Council when drawing up the scoreboard and the set of macroeconomic and macro-financial indicators for Member States. The Commission should present suggestions for comments to

Regulation No. 473/2013. Also, see the provisions on the «Economic Dialogue»: Article 2ab, Regulation No. 1175/2011, Article 14, of Regulation No. 1176/2011, Article 18 of Regulation No. 472/2013, Recital 29 of Regulation No. 473/2013. Many doctrines on the role of parliaments within the European governance framework may be quoted. It suffices to reference M. CARTABIA, N. LUPO, A. SIMONCINI (Edited by), *Democracy and subsiadiarity in the Eu – National parliaments, regions and civil society in the decision-making process*, il Mulino, Bologna, 2013.

[46] According to Article 8, para. 1 of Regulation No. 1176/2011, when an excessive imbalance procedure is opened against a Member State, the relevant «corrective action plan shall take into account the economic and social impact of the policy action». Recital 2 of Regulation No. 472/2013 refers to the horizontal clause enshrined in Article 9 TFEU, as well as Recital 8 and Article 2, para. 3 of Regulation No. 473/2013. Article 7, para. 7 of Regulation 472/2013 states that «[t]he budgetary consolidation efforts set out in the macroeconomic adjustment programme shall take into account the need to ensure sufficient means for fundamental policies, such as education and health care».

[47] See Council Decision (EU) 2015/773 of 11 May 2015.

the competent committees of the European Parliament and of the Council on plans to establish and adjust the indicators and threshold. The Commission should inform the European Parliament and the Council of any changes to the indicators and threshold and explain its reasons for suggesting such changes».

In this last respect, the current Macroeconomic Imbalance Procedure drew up an evaluation on the basis of a set of indicators articulated between key and auxiliary indicators. Only the first ones (key indicators) have thresholds, infringement of which may lead (along with a whole and complex assessment of the economic and evolutionary path followed by Member States) to an in-depth review and a corrective action plan (see Regulation No. 1176/2011)[48]. According to a 2015 Commission proposal[49], this macroeconomic scoreboard was integrated with key and auxiliary indicators coming from the Joint Employment Report monitoring system and the Social monitoring (SPPM) [50]. In particular, not only did employment-related indicators such as activity rate, youth unemployment and long-term unemployment share join the existing macroeconomic and macrofinancial indicators within the MIP, but also more social-related indicators were included in the auxiliary indicators of the MIP (such as People at Risk of Poverty or Social Exclusion (AROPE), at-risk-of-poverty-after-social-transfers rate, severely materially deprived people, and people living in households with very low work intensity)[51]. This set of social indicators should help in detecting major adverse employment and social developments at an early stage, in understanding their multiple social and economic implications, in more effectively identifying the measures needed to

[48] P. SCHOUKENS, J. B. SMETS, *Fighting social exclusion under EU Horizon 2020: Enhancing the legal enforceability of the social inclusion recommendations?*, in *European Journal of Social Security*, Vol. 16, No. 1/2014, p. 61.

[49] Following the Social Protection Committee's address (see *http://www.eu2015lu.eu/en/agenda/2015/09/17-18-comite-protection-sociale/SPC-informal-meeting-17-18-September-2015-agenda.pdf*), the European Commission adopted its proposal in September 2015, «Adding employment indicators to the scoreboard of the MIP to better capture employment and social developments» (see *http://www.emeeting.europarl.europa.eu/committees/agenda/201510/EMPL/EMPL%282015%291012_1P/sitt-1233686*).

[50] See Social Protection Committee, 17 October 2012, Social protection performance monitor (SPPM) – methodological report by the Indicators Sub-group of the Social Protection Committee. The SPPM encompasses a dashboard more specifically related to the Europe 2020 objectives and based on the Portfolio of social indicators elaborated by the Indicators Sub-group of the Social Protection Committee in reference to social inclusion and social protection monitoring.

[51] See the study requested by the EMPL Committee of the European Parliament, *Mainstreaming Employment and Social Indicators into Macroeconomic Surveillance*, PE 569.985, IP/A/EMPL/2014-18, February 2016, p. 95.

correct them[52]. Moreover the SPC is striving for the introduction of further social indicators within European Semester procedures[53].

At any rate, the purpose of the current scoreboard is to provide better surveillance and coordination of economic and social matters in line with the Europe 2020 objectives. Furthermore, the intention is to make use of this scoreboard of social indicators for a more targeted Macroeconomic Imbalance Procedure in detecting those Member States that may be affected by or may be at risk of being affected by imbalances (see Regulation No. 1176/2011/EU).

As stressed by the Commission, «[t]he reading of the scoreboard should not be mechanical and more detailed interpretation of it should build on existing tools (the Employment Performance Monitor (EPM), the Social Protection Performance Monitor (SPPM), the Joint Assessment Framework (JAF) and agreed datasets like the European Labour Force Survey and EU Statistics on Income and Living Conditions). *The employment and social indicators for the scoreboard should capture the key phenomena for each country and identify the most serious problems and developments at an early stage and before the country diverges too strongly from its past performance or from the rest of the EU*»[54].

This increased attention on social monitoring through more socially oriented indicators fits the purpose of a deeper and more comprehensive understanding and purview of the whole socioeconomic situation affecting Member States. Consequently, all the relevant documents within the European Semester dealing with the analysis of such a situation have experienced a 'social improve', correcting their previous tendency to stick to exclusively economic matters. Indeed, this approach has been mirrored in the content of the priorities highlighted by the Annual Growth Survey (AGS) and the Country Specific Recommendations that are between the main documents of which the European semester procedures are made of.

With specific reference to the AGS (and the Joint Employment Report that is part of it) that launches the European Semester each year, the Commission, since 2012, has addressed the need for Member States to give priority to the effectiveness of social protection systems through the implementation of

[52] See COM(2013) 690 final, paras. 3.1, 3.2, and the study requested by the EMPL Committee of the European Parliament, *Mainstreaming Employment and Social Indicators into Macroeconomic Surveillance*, PE 569.985, IP/A/EMPL/2014-18, February 2016, p. 98.

[53] See the Working Programme of the Social Protection Committee from 2015 and 2016.

[54] *Ibidem* (emphasis added). The Employment Performance Monitor (EPM), the Social Protection Performance Monitor (SPPM), and the Joint Assessment Framework (JAF) are statistical and monitoring tools already in existence at the EU level, and the proposed socioeconomic scoreboard should complement them.

active inclusion strategies which encompass labour market activation measures, adequate and affordable social services to tackle the marginalisation of vulnerable groups, and efficient and adequate income support, such as other measures to prevent poverty. In these terms, the AGS recalled and stressed the multidimensionality of social issues, calling for more effective interventions by the Member States aimed at tackling it.

In line with this premise, the 2016 AGS stressed that «it is essential that Member States promote social investment more broadly…A lot can be done with the support of EU programmes, such as the European Structural and Investment Funds. Social investment offers economic and social returns over time, notably in terms of employment prospects, labour incomes and productivity, prevention of poverty and strengthening of social cohesion. Social infrastructure should be provided in a more flexible way, personalised and better integrated to promote the active inclusion of people with the weakest link to the labour market». The Survey concluded that «[t]he EU needs to act ambitiously and collectively to overcome its economic and social challenges. In this AGS, the Commission proposes that this take place based on the integrated pillars of relaunching investment, pursuing structural reforms and modernizing public finances, with a strong focus on job creation and social inclusion»[55]. This perspective was endorsed by the 2017 AGS, which pointed out that growth and social fairness go hand in hand[56], and it was deepened by the integrated approach of the 2016 Employment Guidelines. The latter, in addressing the purpose, stressed that «a variety of instruments should be used in a complementary manner, in line with the principles of active inclusion, including labour activation enabling services, accessible quality services and adequate income support, targeted at individual needs. Social protection systems should be designed in a way that facilitates take-up for all those entitled to do so, supports protection and investment in human capital, and helps to prevent, reduce and protect against poverty and social exclusion through the life cycle»[57].

Consequently, the Country Specific Recommendations (CSRs) have tracked increased and improved attention to social inclusion and employment issues. In particular, the «CSRs take up concepts which refer to the three

[55] COM(2015) 690 final, *Annual Growth Survey 2016: Strengthening the recovery and fostering convergence*, para. 2, 5.

[56] COM(2016) 725 final, *Annual Growth Survey 2017*, para. 2.

[57] Council Decision 2015/1848 of 5 October 2015 on the guidelines for the employment policies of the Member States for 2015, Guideline No. 8. These guidelines were maintained for the year 2016.

active inclusions strands or to the development of an integrated approach»[58]. As highlighted by the European Commission's communication about the Country Specific Recommendations within the 2017 European Semester, «[s]ocial priorities must be a key part of the reform efforts»; specifically, «[s]tructural reforms are needed to foster social justice, mitigate income inequalities and support convergence towards better outcomes. Social priorities and consequences should be taken into account when designing and implementing the reform agenda»[59]. Accordingly, specific headlines within the key priorities of the 2017–2018 Country Specific Recommendations address social protection, inequalities and education[60], and as shown in Table 1 annexed to the Communication, social inclusion policies represent, along with fiscal policies and sound public finances, the subject most frequently addressed by the Recommendations. In the meantime, the key priority for public finance is public expenditures, as the Recommendations call for their appropriate allocation with reference to better social inclusion[61].

A recent paper studied each CSR, giving attention to the social recommendations hidden behind references to other policy fields, chiefly those related to the Stability and Growth Pact. Against this background, it observed that, on the one hand, «it remains nonetheless true that the linkages between social inclusion and employability received considerably stronger emphasis than in previous years»[62]. On the other hand, «for now, it seems fair to conclude that the European Semester has never been more social, both in terms of its substantive policy orientations and of its governance procedures»[63]. Nonetheless, it remains true that the risk hidden behind this appearance of social sensitivity within the European Semester procedures is the economic contamination of social issues. What is to say that social questions are taken into consideration in mere negative terms, not for their own sake, but as for their being in compliance with economic needs

[58] IP/A/EMPL/2015-05, A study for the European Parliament's Committee on Employment and Social Affairs on «Active Inclusion: Stocktaking of the Council Recommendation (2008)», para. 2.2.

[59] COM(2017) 500 final, on 22 May 2017, Communication from the Commission on the 2017 European Semester: Country-specific recommendations, para. 1.

[60] *Ivi*, para. 3.

[61] *Ivi,* pp. 14-16 (English version).

[62] See B. VANHERCKE, J. ZEITLIN, *Socializing the European Semester: Moving forward for a 'Social Triple A'*, in *Inclusion and Exclusion in the European Union, Collected Papers*, Amsterdam Law School Legal Studies Research Paper No. 2016-34; Amsterdam Centre for European Law and Governance Research Paper No. 2016-05, p. 15.

[63] *Ivi*, p. 17.

(efficiency, cost-effectiveness, sustainability)[64]. Within this light, also the importance of the first social impact assessment of a Macroeconomic Adjustment Programme under the European Stability Mechanism[65], celebrated by President Junker in his 2015 Speech on the State of the Union[66], could be scaled down.

Conversely, the way forward is rather to rebalance this threat and to put social inclusion matters into focus, taking them into account in a positive (and promotional) perspective rather than in a limited, negative perspective. Moreover, in line with this scenario, the disequilibrium encompassed by either the «regulatory State»[67] or the «consolidation State»[68] would shift toward a more balanced model in which the focus on economic growth[69] would also mean social growth, not only through mere general social orientations and blurred social purposes (as has occurred in the past), but through an improved set of tools that is capable of coping more competently with the effectiveness and take-up aspects of the constitutional multi-tiered structure of social rights[70].

[64] In this sense, see P. SCHOUKENS, J.B. SMETS, *Fighting social exclusion under EU Horizon 2020: Enhancing the legal enforceability of the social inclusion recommendations?,* cit., p. 67 ff., and the study requested by the EMPL Committee of the European Parliament, Mainstreaming Employment and Social Indicators into Macroeconomic Surveillance, PE 569.985, IP/A/EMPL/2014-18, February 2016, p. 55.

[65] This was the case, in 2015, for the third Programme attached to the Memorandum of Understanding and negotiated with the Greek authorities within the framework of the financial assistance received under the ESM.

[66] As denounced by De Schutter in the study for the European Parliament Constitutional Affairs Committee on «The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework», para. 2.4, the Macroeconomic Adjustment Programme negotiated by the Member States for changes in financial assistance according to the provisions of Regulation No. 472/2013 do not require taking fundamental social rights into due consideration during the preparation and implementation of the Programme, except for the minor provision contained in Article 7, para. 7 with reference to education and health care policies.

[67] According to the well-known theory of Majone. See G. D. MAJONE, *Regulating Europe*, Routledge, London-New York, 1996, p. 284 ff.

[68] For the theory of the transition from the Tax State to the Debt State, and lastly to the Consolidation State, see W. STREECK*, Tempo guadagnato – La crisi rinviata del capitalismo democratico*, cit., p. 68 ff.

[69] In R. BIN, P. CARETTI, G. PITRUZZELLA, *Profili costituzionali dell'Unione Europea*, il Mulino, Bologna, 2015, pp. 346, 360 ff., the authors believe that according to the latest developments, the more probable EU scenario is their third constitutional model qualified by more cooperation within the multilevel system between the European and the national level for better targeted objectives of growth and more flexible fiscal rules.

[70] On the description of the mixed cooperative federalist model, see S. GIUBBONI, *Social rights and market freedom in the European constitution – A labour law perspective*, Cambridge University Press, Cambridge, 2006, p. 270.

3. Beyond the mere "social dimension": changing the usual approach

At this point in time, it is clear that for social inclusion (and the relevant social rights) consideration on its own, one step further needs to be taken. This neither hampers the idea of 'active social inclusion' and its feature like a productive factor, nor does it underestimate the path taken by the EU over the last few years, as shown by the European Semester's documents for a social impact assessment of structural reforms. However, beyond these acquis, aimed at reconciling social issues with the economic efficiency paradigm (by means of reference to 'active inclusion' and its consideration like a productive factor) or limiting the purview to the mere containment of the damages (in terms of social distress and social rights infringement) caused by the requested macroeconomic reforms, this further step implies a positive promotion of vulnerable peoples' needs within a more effective social citizenship[71].

This step does not entail adding other lists of fundamental social rights at the European level, but rather making the European level work better at promoting the effectiveness of existing social rights.

Against this premise, some underlying changes seem to prove that the time is ripe for this major social step.

On the one hand, the path that the European governance has followed until now, recorded by the technical and political documents analysed in the previous chapter, along with the earlier paragraphs of the present chapter, support this changing perspective. On the other hand, the level of reliability reached by social inclusion indicators thanks to the continuously revised work made by the Indicators Sub-group and, from an institutional perspective, the

[71] As stressed by De Schutter in a recent study for the Constitutional Affairs Committee of the European Parliament, «The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework» (see para. 2.2, 2.3, 2.4), the social impact assessment of the measures suggested by the European Semester procedure «is not equivalent to an explicit recognition that the social provisions of the Charter of Fundamental Rights should be complied with in the European Semester, and that the country-specific recommendations as well as the annual growth survey that the Commission submits to the Council should take into account the normative components of the social rights of the Charter». It also stressed that the exceptional circumstances allowing a temporary deviation from the balanced budget rule, under Article 3, para. 3, sub b) of the Treaty on Stability Coordination and Governance (TSCG), do not «encompass a situation in which the requirement to balance public budgets is seen as incompatible with the fulfilment of economic and social rights». A similar conclusion was reached regarding the Macroeconomic Adjustment Programme negotiated by the Member States for changes in financial assistance, as the provisions of Regulation No. 472/2013 do not require taking fundamental social rights into due consideration during the preparation and implementation of the Programme, except for the minor provision contained in Article 7, para. 7 with reference to education and health care policies.

increased concern for the role of the Social Protection Committee and the European Parliament (through the Economic Dialogue) within the European economic governance framework further smooths this approach towards a rebalanced consideration of social inclusion, for a positive promotion of it rather than a mere defensive consideration of it. In this last respect, the 25 March 2017 Rome Declaration of the 27 leaders of the EU, the European Council, the European Parliament and the European Commission is telling: «In these times of change, and aware of the concerns of our citizens, we commit to the Rome Agenda, and pledge to work towards…a social Europe: a Union which, based on sustainable growth, promotes economic and social progress as well as cohesion and convergence, while upholding the integrity of the internal market; a Union taking into account the diversity of national systems and the key role of social partners; a Union which promotes equality between women and men as well as rights and equal opportunities for all; a Union which fights unemployment, discrimination, social exclusion and poverty; a Union where young people receive the best education and training and can study and find jobs across the continent; a Union which preserves our cultural heritage and promotes cultural diversity».

Consequently, some recent initiatives of the Commission have moved Europe further down this path. First, the Commission recently launched an initiative to better highlight the rights side of the social dimension of the EMU. As this initiative is aimed at exceeding measures that have already been attained for the protection of workers, it is very pertinent to the purpose of social inclusion[72]. In this regard, it is the so-called European Pillar of Social Rights, launched by President Juncker in 2015 and primarily referring to the Eurozone but open to all the EU Member States, that comes into question. This project was confirmed in 2017 as one of the ten priorities of the Commission Work Programme, with the aim of a deeper and fairer Economic

[72] COM(2017) 250 final, 26 April 2017, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Establishing a European pillar of social rights*, para. 1, states that the rights enshrined in the Pillar are structured around three categories: the first and the second focus on access to the labour market and fair working conditions, but the third focuses on social protection and inclusion. Moreover, the Pillar stresses that «[b]eyond labour markets, it is also important to ensure that every citizen has access to adequate education and that an effective social protection system is in place to protect the most vulnerable in society, including a «social protection floor».

and Monetary Union[73] and it received an inter-institutional endorsement at the Gothenburg Social Summit on 17 November 2017[74].

In his speech on the State of the Union on 9 September 2015, President Juncker stated: «I will want to develop a European pillar of social rights, which takes account of the changing realities of Europe's societies and the world of work…The European Pillar of Social Rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU…I believe we do well to start with this initiative within the euro area, while allowing other EU Member States to join in if they want to do so». Accordingly, «the Pillar should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area»[75]. It entails not only the job-related aspects, but also a more comprehensive, adequate and effective social protection in order to maintain a life of dignity[76]. It aims at promoting modernisation, intensification and the proper taking-up of social rights, without repeating or replacing the existing social acquis and social rights, but rather spelling them out better, with more detailed principles and commitments to upward convergence.

Moreover, the Pillar remains in line with the active inclusion approach, confirming that welfare is both a productive factor and a safety net: «Action at EU level reflects the Union's founding principles and builds on the conviction that economic development should result in greater social progress and cohesion and that, while ensuring appropriate safety nets in line with European values, social policy should also be conceived as a productive factor, which reduces inequality, maximises job creation and allows Europe's human capital to thrive. This conviction is confirmed by evidence on employment and social performance. The best performing Member States in

[73] See the Letter of Intent attached to President Juncker's speech on the state of the Union from September 2016.

[74] At the Summit, the European Pillar of Social Rights was proclaimed by the European Commission, the European Parliament and the Council of the European Union.

[75] COM(2016) 127 final, *Launching a consultation on a European pillar of social rights*, para. 4. At the 23 January 2017 Conference on the presentation of the Pillar, President Juncker focused on a national minimum wage and a national minimum income as the main issues to be addressed, and Marianne Thyssen (Commissioner for Employment, Social Affairs, Skills and Labour Mobility) highlighted that the debate on social issues should be at the heart of the discussion on the kind of union European citizens want to have, towards a competitive economy that enables both quality job creation and long-term sustainable and appropriate social protection throughout life.

[76] G. BRONZINI, *Some considerations against European disintegration: Guaranteed minimum income and new rights to re-launch the integration process*, in *www.europeanrights.eu*.

economic terms have developed more ambitious and efficient social policies, not just as a result of economic development, but as a central part of their growth model»[77]. Consequently, it further clears the way forward considering economic and social performance as matters of common concern, not only for greater resilience but also for the «fair and effective distribution of rights, duties and income, also across generations»[78], and it matches this approach with the fundamental rights aspect.

Indeed, in the Pillar, the European Commission enshrined principles and rights structured around three categories: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. Each of them is addressed to all European citizens, both active and inactive[79]. It is also worthwhile to stress that the third chapter (on social protection and social inclusion) is broader than the other two, as it encompasses — per se — ten out of the twenty Articles.

Consequently, the Pillar resolves some of the ambiguities left open by the European Charter of Fundamental Rights, taking a step forward in respect of the Charter, as it does not make use of the misleading phrase «the Union recognizes and respects»[80], but clearly addresses the rights of people (who «… has/have the right to…»). However, it preserves the mixed use of «principles» and «rights».

In this respect, it is worthwhile to recall the conflicting opinions that have featured the consultation procedure around the Pillar, as delivered by the European Trade Union Confederation and BusinessEurope. The former, which represents employees, has accentuated the need to prioritise social rights, and generally has assumed a rights-oriented approach, pushing for real upward social convergence rather than a minimum standard objective in social matters; however, the latter, which represents employers, has deemed that the focus on social rights is not the correct approach and that the social acquis at

[77] See COM(2016) 127 final, *Launching a consultation on a European pillar of social rights*, para. 2.1.

[78] *Ivi*, para. 2.3.

[79] See Annex I to COM(2016) 127 final, *First preliminary outline of a European pillar of social rights*; COM(2017) 250 final, 26 April 2017, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Establishing a European pillar of social rights*, para. 2.

[80] A. GIORGIS*, Art. 34: Sicurezza sociale e assistenza sociale,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (Edited by), *L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, 2001, p. 241.

the European level is already sufficiently developed in accordance with respect for the Member States' competences[81].

Beyond any conflict of interest, the Pillar marks a step further in respect of a mere 'social dimension' of the European economic governance system as it introduces the concept of social rights that need to be monitored not only for their preservation but also for their better and more effective promotion.

4. More rights-driven social indicators within the European semester

As clearly stated by the Resolution of the European Parliament on the Pillar of Social Rights, the pivotal point does not draw on new list of social rights at European level but rather on ensuring their effectiveness: «The key issue in Europe is thus not necessarily one of recognition of rights, but rather their actual take-up and implementation, given the rapid changes in the social, legal and economic environment»[82]. In this respect, it called on the European Commission to propose a solid European Pillar of Social Rights «that is not limited to a declaration of principles or good intentions but reinforces social rights through concrete and specific tools…delivering a positive impact on people's lives in the short and medium term and enabling support for European construction in the 21st century by effectively upholding the Treaties' social objectives, supporting national welfare states, strengthening cohesion, solidarity and upward convergence in economic and social outcomes, ensuring adequate social protection, reducing inequality, achieving long overdue progress in reducing poverty and social exclusion, facilitating national reform efforts through benchmarking and helping to improve the functioning of the Economic and Monetary Union (EMU) and of the EU's single market»[83].

Accordingly, as pointed out by a recent ILO study, the shortcomings in an effective and upward social convergence within the European Union that have not been adequately addressed by soft coordination procedures might be better addressed through the European Pillar of Social Rights: «The European Pillar of Social Rights offers a unique opportunity to address these shortcomings

[81] See the European Trade Union Confederation's opinion, «Position on the European Pillar of Social Rights - Working for a Better Deal for All Workers», of 6 September 2016 and BusinessEurope's contribution to the debate on the Pillar of Social Rights of 24 August 2016.

[82] See European Parliament Resolution on a European Pillar of Social Rights, No. 2016/2095(INI), adopted on 19 January 2017, para. 2.4.

[83] See the European Parliament Resolution on a European Pillar of Social Rights, No. 2016/2095(INI), adopted on 19 January 2017, para. 1.

and to embed stronger types of cooperation in European socio-economic governance processes»[84].

Consequently, the Pillar states that «the major issue is not so much the recognition of rights but rather their actual take-up. There are cases where citizens cannot fully enjoy their rights due to a lack of awareness, implementation or enforcement of already existing legislation. This is why an important focus of the follow-up strategy will be the strengthening of the enforcement of existing rights»[85]. As such, it rests on the existing EU social acquis as developed by the ECJ's case law, EU secondary legislation and the European Charter of Fundamental Rights. It draws on both the European Social Charter signed at Turin on 18 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers, and it takes into account the adoption of the UN Sustainable Development Goals for 2030, which has provided a new agenda to address the eradication of poverty and the economic, social and environmental dimensions of sustainable development in a balanced and integrated manner[86].

Within this framework, the contribution of the Pillar to the instrumental apparatus with which the economic governance has been endowed is aimed at attuning it to more effective constitutional social rights[87]. The Pillar is a reference framework to be promoted within the European Semester through the assessment and monitoring of progress towards its implementation[88].

This was one of the main targets endorsed by the Gothenburg Social Summit in November 2017: while recalling the need to put people first through joint efforts at all levels, and to further develop the social dimension of the Union based on a shared commitment and established competences, the Social Summit also states, as next step to take forward, the implementation of «the principles and rights set out in the European Pillar of Social Rights, notably through the European Semester of Policy Coordination and in the

[84] See the 2016 ILO study on a Social Pillar for European Convergence.

[85] COM(2017) 250 final, 26 April 2017, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Establishing a European pillar of social rights*, para. 3.

[86] *Ibidem.*

[87] For each right or principle, the Pillar underlines the step that it adds to the existing social acquis. It also stresses the direction of the measure to be undertaken by the relevant level of competences to better implement and perform them. This is the outline followed by SWD(2017) 201 final, 26 April 2017, *Accompanying the document on establishing a European pillar of social rights*.

[88] COM(2017) 250 final, 26 April 2017, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Establishing a European pillar of social rights*, para. 4, and SWD(2017) 200 final, 26 April 2017, *Social Scoreboard*.

Member States' 2018 National Reform Programmes»[89]. Consequently, in 2017, the European Commission «has put social considerations on a par with economic ones in all its core activities»[90], on the one hand, by denouncing in the Reflection Paper on the Deepening of the EMU[91] its unbalanced governance in favour of monetary policies and fiscal rules, and on the other hand by emphasising in the Reflection Paper on the Social Dimension[92] that new and unprecedented challenges call for social rights and better-performing welfare systems. To this end, the modernisation of the existing welfare systems will help to empower individuals, will deliver equal opportunities with common social standards and will build a more resilient social and economic structure. Consequently, the Reflection Paper on the EMU envisaged the need for better coordination and enforcement of the European Semester in reference to these welfare reforms.

Against this background, regardless of the possible scenario that is chosen[93], an important acquis has been delivered. In this respect, «[i]t is undisputed that the centre of gravity for action in the social field should and will always remain with national and local authorities and their social partners», and thus, «there can be no mistaking that social support is and will remain primarily in the hands of Member States»[94], although the EU will play a reinforcing and supportive role. Consequently, the Reflection Paper on the Deepening of the EMU placed solidarity and social fairness among its guiding principles in addition to the traditional ones, i.e. economic growth, job, financial stability and responsibility[95] and within the aim of the stronger convergence and effectiveness of not only economic but also social outcomes, the instrumental means rest upon the social impact assessments, social indicators and benchmarks[96]. To this end, different steps are envisaged: the

[89] See Concluding Report, *Social Summit for Fair Jobs and Growth*, Gothenburg, Sweden, 17 November 2017, para. 1.

[90] See *Social priorities under the Juncker Commission: Three years on*, presented at the Gothenburg Summit on 17 November 2017, p. 4.

[91] COM(2017) 291, 31 May 2017.

[92] COM(2017) 206, 26 April 2017.

[93] See the range of possibilities envisaged by the White Paper on the Future of Europe, COM(2017) 2025 final. This paper described five possible scenarios under the following headline: «Carrying on, nothing but the Single Market, those who want more do more, doing less more efficiently, doing much more together».

[94] *Reflection Paper on the Social Dimension of Europe*, COM(2017) 206, 26 April 2017, para. 4.

[95] *Reflection Paper on the Deepening of the Economic and Monetary Union*, COM(2017) 291, 31 May 2017, para. 4.1.

[96] This model is in line with the doctrinal stance on the European Social Union as «a Union of national welfare States…its primary purpose is not to organize interpersonal redistribution between individual European citizens across national borders», bearing in mind the subsidiarity

first rests on the enforcement of the European Semester coordination tools in reference to social policies, although they chiefly remain in the hands of the Member States. A set of tools that fits this purpose will be built not only on the existing scoreboard and benchmarks, but also on the European Pillar for Social Rights.[97]. Consequently, the European Commission, in its Communication to the European Parliament, the European Council, the Council and the European Central Bank, on «Further steps towards completing Europe's Economic and Monetary Union: a Roadmap» of 6 December 2017, effectively enshrined the integration of the Pillar of social rights within the 2018 European Semester[98]. As the Pillar «is about delivering new and more effective rights for citizens, addressing emerging social challenges and the changing world of work»[99] and its aim «is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people's essential needs, and ensuring better enactment and implementation of social rights»[100], it provides for a new scoreboard of social indicators. In this last respect, it is deemed to assess employment and social trends that should be incorporated within the European Semester through its Annual Growth Survey (in particular its Joint Employment Report) and country-specific recommendations. Accordingly, it recognises that «[f]ollowing the increased importance of the employment and social aspects in the European Semester in recent years, the scoreboard will facilitate a stronger consideration of employment and societal challenges within the European Semester, and the euro area and country-specific recommendations that result from it, which may reflect and promote relevant, targeted reforms according to national specificities»[101]. Consequently, «[t]he scoreboard serves as a reference framework to monitor 'societal progress', in a tangible, holistic and objective way, which is easily accessible and understandable to citizens. It detects in a timely way the most significant employment and social challenges facing the Member States, the

principle and the necessity of convergence, which is not the same as harmonisation, F. VANDENBROUCKE, *The idea of a European social union*, in L. VAN MIDDELAAR, P. VAN PARIJS (Edited by), *After the storm: How to save democracy in Europe*, Lannoo Publishers, Tielt, 2015, p. 192.

[97] COM(2017) 291, para. 4.4.

[98] COM(2017) 821 final, 6 December 2017, p. 13.

[99] SWD(2017) 201 final, 26 April 2017, *Establishing a European Pillar of Social Rights*, p. 2 (English version).

[100] COM(2017) 251 final, 26 April 2017, *Proposal for an Interinstitutional Proclamation on a European Pillar of Social Rights*, p. 4 (English version).

[101] SWD(2017) 200 final, 26 April 2017, *Social Scoreboard*, p. 3 (English version).

EU and the euro area, as well as progress achieved over time»[102]. Furthermore, «[i]t could also become a reference point for the efforts made on the social dimension of the euro area and of Europe more generally»[103]. The indicators composing the social scoreboard annexed to the Pillar have been articulated in three broad dimensions of societal progress and broken down, where possible and relevant, by gender, age and level of educational attainment[104].

This is a delivery that deserves major attention, as it is the first time that a full set of social indicators expressly linked to a social rights perspective, by means of the framework of principles and rights enshrined in the Pillar, enters the European Semester procedures with the aim of paying more attention to the effectiveness side of these rights and in line with an approach not confined to the assessment of the social impact of structural reform but also extended to the need to value welfare rights vis-à-vis new socioeconomic challenges for an effective promotion of a more inclusive society.

5. Open challenges

As we stressed at the beginning of Chapter III, our aim was to pick up some legacies of the 'social inclusion movement' under the European governance procedures able to go beyond the ambiguities raised by the Open Method of Coordination and beyond its specific features. Both the increased concern for the entanglement of economic and social matters as well as the introduction and development of social indicators beyond macroeconomic and macro-financial indicators are inherent part of these legacies. The paradigm of rate and number, a paradigm with which the European governance is accustomed, has softened the political implication of the issue and as such, has smoothed the increasingly more frequent insertion of social concern by means of the evidence given by social indicators within the dominant economic stance of the European Semester procedures. As such, the circle is almost squared by means of the reverse perspective typical of the EU functionalist approach: moving from the mere 'social dimension' of the European economic governance (within a negative and policy-driven

[102] *Ivi*, p. 2.

[103] COM(2017) 250 final, 26 April 2017, para. 4.

[104] SWD(2017) 200 final, cit., p. 2 ff. (English version). In particular, the three dimensions of social progress are: (1) Equal opportunities and access to the labour market; (2) Dynamic labour markets and fair working conditions; and (3) Public support/Social protection and inclusion. They have been articulated in headline and secondary indicators.

perspective chiefly confined to the claim for impact assessment) it has moved towards the paradigm of fundamental rights (with the European Pillar for Social Rights and its social scoreboard that better match with a positive perspective for the promotion of effective social inclusion by means of social rights).

This is the way followed by the EU governance system pursuant to the concrete steps undertaken and previously analysed. However, under the appearance of this linear scheme, lies «the most sensitive issue»[105]: social indicators. Indeed, even if research on social indicators has mostly been considered applied research[106], showing «little interest in theory building»[107], they imply not only technical but also political and theoretical concern. If the first (technical questions) is more for statisticians and social scientists[108], political and theoretical questions are for both social scientists and legal scholars. Indeed, behind question of definition and selection of social indicators lie complex value judgements[109] involving concepts of social justice and constitutional relevance (human dignity, equality, the effectiveness of social rights). The mixture of social indicators with philosophical questions of social justice is proven by the critical reference made by Sen to the inequality index elaborated by Atkinson[110], while the mixture with constitutional concern is proved by their normative deficit denounced by De Schutter. In this last respect, De Schutter stressed «*the confusion between social indicators (such as at-risk-of-poverty levels or levels of integration in the labour market) and rights-based indicators (that require to assess potential instances of discrimination against certain groups within society, and that should result in improved accountability)*; or by the (equally ill-informed) presupposition that the impacts of macro-economic policies on the

[105] C. DE LA PORTE, P. POCHET, G. ROOM, *Social benchmarking, policy making and new governance in the EU*, in *Journal of European Social Policy*, Vol. 11, No. 4/2001, p. 298.

[106] As stressed by H.H. NOLL, *Social monitoring and reporting: A success story in applied research on social indicators and quality of life*, cit., 2016, p. 2.

[107] K.C. LAND, A.C. MICHALOS, *Fifty years after the Social Indicators movement: Has the promise been fulfilled? An assessment of an agenda for the future*, cit., p. 27.

[108] On European statistics, see the European statistics code of practice as laid down in Regulation (EC) No. 223/2009 of the European Parliament and of the Council of 11 March 2009. For a description of the technical questions involved in statistical measurement of poverty and social exclusion, see the Working Paper 25, 25 November 2013, prepared by Eurostat for the Conference of European Statisticians, *The measurement of poverty and social exclusion in the EU: achievements and further improvements*.

[109] For the intersection between the choice of social indicators and the implied value judgements, see S. ZOPPI, *Gli indicatori sociali*, in *Rivista Trimestrale di Scienza dell'Amministrazione*, No. 1/1996, p. 134.

[110] A. K. SEN, *La diseguaglianza*, il Mulino, Bologna, 2010, pp. 142-143.

enjoyment of rights are too indirect to be worth considering». Therefore, what is needed is that «sufficient attention [be] paid to the situation of the members of the weakest groups of society. Rather than generous but vague references to social fairness, such assessments should be based explicitly on the normative components of social rights»[111].

Consequently, the rational background of social indicators should be improved by means of the interdisciplinary dialogue between social scientists and legal scholars. While the former could help the latter with the evidence given by indicators to the multifaceted aspects of poverty and social exclusion[112], the latter could help the former in the definition, choice and wider context for interpretation of social indicators through the reference framework given by a rights-driven perspective oriented by fundamental values and principles of constitutional relevance. Conversely, the deliberative background of social indicators should receive an improvement too. Along with the enhancement of the Social Protection Committee (vis-à-vis the Economic and Financial Committee, the Economic Policy Committee and the Employment Committee)[113] a more open deliberative approach should benefit its legitimacy[114]. The social scoreboard developed under the European Pillar for Social Rights envisaged that it shall be submitted to discussion with the relevant Council Committees[115], but it omitted any reference to the relevant Committees of the European Parliament along the pattern contained in Regulation No. 1176/2011, Recital 12, for the definition of the macroeconomic and macrofinancial indicators of the Imbalance Procedure (see paragraph 2 of this chapter). Indeed, while it is for the Social Protection Committee to cooperate and establish appropriate contact with social partners and nongovernmental organisations

[111] See the 2016 study developed by De Schutter for the European Parliament Constitutional Affairs Committee on «The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework», para 2.6.3 (emphasis added).

[112] On the practical cognition stemming from the quantitative tools elaborated within the OMC, see F. ROMEO, *L'espansione della metodologia scientifica al diritto*, in E. ALES, M. BARBERA, F. GUARRIELLO (Edited by), *Lavoro,* welfare *e democrazia deliberativa*, Edizione aggiornata, Giuffré, Milan, 2010, p. 73 ff.

[113] See Council Decision (EU) 2015/773 of 11 May 2015, Establishing the Social Protection Committee and repealing Decision 2004/689/EC.

[114] In A. ANDRONICO, A. LO FARO, *Defining problems: The Open Method of Coordination, fundamental rights and the theory of governance*, in O. DE SCHUTTER, S. DEAKIN, (Edited by), *Social rights and market forces: Is the open coordination of employment and social policies the future of Social Europe*?, Bruylant, Brussels, 2006, p. 95, the authors stressed that full respect of the right to participation in the deliberative process ends up overcoming «the separation between the formation of the decision and its application, between legitimacy and effectiveness, between ends and means».

[115] SWD(2017) 200 final, 26 April 2017, *Social Scoreboard*, p. 3 (English version).

(Article 2, para. 4, Council Decision (EU) 2015/773), any cooperation is due with the European Parliament except for providing it with information on the Committee activity[116]. However, a due recognition of the importance of the social scoreboard within the European Semester should involve cooperation with the European Parliament at least comparable with that provided for the macroeconomic scoreboard within an inter-institutional 'dialogue' that places the duty of activation on the Commission.

The fulfilment of the openness of both the rational and deliberative background of social indicators could lead critics to scale down their criticism of possible distortion produced by the indicators[117] as well as their criticism of the hiatus between the indicators' input and output legitimacy[118]. Conversely, if 'governance' is usually considered with suspicion by constitutionalists, this time it turns in their advantage as a mixed framework through which their expert contribution could take place[119] within an interdisciplinary collaboration with the social sciences.

[116] In A. LYON-CAEN, J. AFFICHARD, *From legal norms to statistical norms: Employment policies put to the test of coordination*, in O. DE SCHUTTER, S. DEAKIN, (Edited by), *Social rights and market forces: Is the open coordination of employment and social policies the future of Social Europe?*, cit., p. 163, the authors stressed the definition of the indicators, «which are the outcome of a long process of definition of criteria, codification of situations, and adoption of collection methodologies», claims for reflexivity, and the «opening up of European-level statistical expertise to constructive criticism, in particular from other fields of expertise».

[117] As recalled by T. ATKINSON, B. CANTILLON, E. MARLIER, B. NOLAN (Edited by), *Social indicators: The EU and social inclusion*, Oxford University Press, Oxford, 2002, p. 184.

[118] J. GOETSCHY, *Le implicazioni della strategia di Lisbona per la costruzione dell'Europa sociale*, in E. ALES, M. BARBERA, F. GUARRIELLO (Edited by), *Lavoro,* welfare *e democrazia deliberativa*, cit., p. 285, emphasises that 'comitology' and deliberation by experts improve output legitimacy; conversely they deemphasise input legitimacy. As stressed by P. POCHET, *The open method of coordination and the construction of social Europe – A historical perspective*, in J. ZEITLIN, P. POCHET (Edited by), *The open method of coordination in action – The European employment and social inclusion strategies*, cit., p. 58, the 'openness' allows to go beyond a pure «bargain game» as it includes different interests and expert evaluation.

[119] On the problem-solving approach and the rational methodology encompassed within the concept of governance, many authors could be quoted, but it suffices to cite C. JOERGES, *Constitutionalism and transnational governance: Exploring a magic triangle*, in C. JOERGES, I. SAND, G. TEUBNER (Edited by), *Transnational governance and constitutionalism*, Hart Publishing, Oxford and Portland, 2004, p. 339 ff.

Part II
Some constitutional reference points

1. Rights and policies

The ambiguity underlying the constitutional status of social rights at the European level are known, they have been addressed in the first chapter and will be recalled here to make a consistent assessment.

On the one hand, the ambiguity implied by the European Charter of Fundamental Rights, with its enshrined difference between rights and principles, its reference to the mere 'recognition' and 'respect' of social rights and their legal boundaries by means of the *renvoi* to 'rules and practices' laid down at the European and national levels, moreover increased by the ambiguity underlying Article 34 of the Charter[120]. On the other hand, there is a lack of social competences at the European level and a consequent asymmetry towards market and economic imperatives. Both sides interact and implement each other, so that rather than referencing social rights (above all when attention is paid to rights for social inclusion), the EU has preferred to reference social policies without any specification to the policies' constitutional framework (and status)[121].

At the root of this ambiguity stands both, on the input side, a lack of political will to strain for a different competences arrangement at EU level, and on the output side, the troubles encompassed by the feasibility of a shift of social competences at the European level. These too are issues already addressed in Chapter I.

Moreover, if from a certain point in time (1992) — as a reaction to spreading criticism — the EU has started to speak the language of fundamental rights, as well as to value the role of national parliaments and to pay attention to social policies[122], it is true that this has not really helped to

[120] A. GIORGIS, *Art. 34: Sicurezza sociale e assistenza sociale*, in R. BIFULCO, M. CARTABIA, A. CELOTTO (Edited by), *L'Europa dei diritti: Commento alla Carta dei diritti fondamentali dell'Unione Europea*, cit., p. 241, states that while this Article does not make a distinction between economically active and inactive citizens, the original version of the Article contained such a distinction. D. BIFULCO, *L'inviolabilità dei diritti sociali*, Jovene, Naples, 2003, p. 283, points out that this Article has a personalist matrix that does not contain any added value for workers.

[121] In this sense, see P. BIANCHI, *Diseguaglianza e mercato*, in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale: Atti del convegno di Campobasso 19-20 giugno 2015*, Editoriale Scientifica, Naples, 2016, p. 377.

[122] G. DE BURCA, *Beyond the Charter: How enlargement has enlarged the human rights policy of the EU*, in O. DE SCHUTTER, S. DEAKIN (Edited by), *Social rights and market forces: Is*

strengthen the European constitutional stance of social rights above all when their effectiveness is in the headlines.

Indeed, the goal of realising substantial equality by means of the effectiveness of social rights, requires a real representative democracy working as a factor able to put the fight against inequality and the relevant institutional system all in order within the framework of a real substantial democracy[123]. Conversely, such a need for representation could not be replaced by the merely abstract Europeanization of fundamental rights, as its full accomplishment lacks of a real federalising project undertaken by both national parties and trade unions at the European level[124].

However, against the background of the current crisis of political parties and representative democracy, the risk is to stick to a deadlock, making the task of legal scholars very ardous in finding paths to overcome it. For this reason our purpose is modest but concrete: it aims to support the effectiveness of social rights as the people wait for better democratic representation and major political engagement at the EU level. In doing so, legal scholars need to avoid a twofold trap: on the one hand, they do not have to limit their perspective to merely denouncing impairments and deficits at the European level, which is too easy when the focus is on social rights and social inclusion issues. On the other hand, they do not have to halt their assessment at the door of mere formal acquis, which risks to build up social rights on symbolic gains rather than on their true effectiveness. This is an assessment that clarifies what is not requested of legal scholars, but it claims for a positive answer, clarifying what legal scholars are requested to do vis-à-vis the current political deadlock and democratic representative crisis.

2. The core question

Based on most of the European documents analysed, as well as most of the constitutional doctrine, it is a shared opinion that no new list of social rights and values is needed at the European level[125].

the open coordination of employment and social policies the future of social Europe?, cit. p. 252 ff.

[123] In this sense, see M. DELLA MORTE, *Costituzione ed egemonia dell'eguaglianza*, in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale: Atti del convegno di Campobasso 19-20 giugno 2015*, cit., p. 7.

[124] In this respect, see A. GUAZZAROTTI, *Crisi dell'Euro e conflitto sociale: L'illusione della giustizia attraverso il mercato*, FrancoAngeli, Milan, 2016, p. 129.

[125] J.H.H. WEILER, *Diritti umani, costituzionalismo ed integrazione: Iconografia e feticismo*, in *Quaderni costituzionali*, No. 3/2002, p. 529, states that the Union needs neither

The pivotal issue of social rights is rather the multiple dimensions of the challenges they are currently experiencing, their lack of effectiveness and the relevant consequences in terms of increasing inequalities, social exclusion and poverty.

Doctrine has long analysed several challenges inherent to social rights. In reference to their inherent structure, it has rested on the implied discretionary power of the legislature[126] and the implied limits on judicial enforceability[127]. In reference to their stance within the constitutional system, doctrine has rested on balancing these rights against conflicting values, such as economic and financial constraints[128], which have been aggravated by the European integration process[129] and the 2008 economic crisis, based on the dominant neo-liberal or ordo-liberal approach[130]. Consequently, in reference to the European governance system and the economic governance framework, constitutional scholars have started to delve further into the threats that this system was deemed to create to social inclusion policies and the protection of social rights[131]. In this last respect, constitutionalists have denounced the scope of the constraints stemming from both dimensions of the economic governance: on the one hand, the more general rules of the European Semester[132], and on the other, the more specific conditions imposed on the

further rights within its lists nor more lists of rights; rather, what it really needs is the programmes and administrative structure to effectuate the existing rights. This opinion has been recently confirmed by COM(2017) 250 final, 26 April 2017, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Establishing a European Pillar of Social Rights, paras. 2-3, according to which it is not a question of enshrining a new catalogue of social rights, but rather a question of «updat[ing] and complement[ing] the EU acquis».

[126] D. BIFULCO, *L'inviolabilità dei diritti sociali*, cit., p. 287 ff.

[127] B. PEZZINI, *La decisione sui diritti sociali: Indagine sulla struttura costituzionale dei diritti sociali*, Giuffré, Milan, 2001, p. 195 ff.

[128] A. BALDASSARRE, *Diritti della persona e valori costituzionali,* Giappichelli, Torino, 1997, p. 214.

[129] M. LUCIANI, *La Costituzione Italiana e gli ostacoli all'integrazione europea*, in *Politica del diritto*, n. 4/1992, p. 557 ff.; D. BIFULCO, *L'inviolabilità dei diritti sociali*, cit., p. 287 ff.

[130] O. CHESSA, *La Costituzione della moneta – Concorrenza, indipendenza della banca centrale, pareggio di bilancio*, Jovene, Naples, 2016, p. 172 ff.; G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?,* cit., p. 36;. A. GUAZZAROTTI, *Crisi dell'Euro e conflitto sociale: L'illusione della giustizia attraverso il mercato*, cit., p. 36.

[131] M. FERRERA, *Rotta di collisione: Euro contro welfare?,* Laterza, Rome-Bari, 2016, p. 6 ff.

[132] See C. KILPATRICK, B. DE WITTE (Edited by), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges*, cit.. This study divided social rights into two categories, work rights and welfare rights (such as income, housing, health, education), and consequently, treated the consequences of the austerity measures on each category of social rights separately.

Member States by financial assistance mechanisms (within the European Stability Mechanisms or the other two earlier tools, the European Financial Stability Facility [EFSF] and the European Financial Stability Mechanism [EFSM])[133].

Against this background, it is worthwhile to recall that these are only some of the multiple challenges currently facing the effectiveness of social rights, as the multidimensionality of social exclusion, poverty and inequality encompasses many complex aspects that do not stop at the flaws coming from their judicial enforceability or the constraints coming from budgetary and economic austerity; rather, they pertain all policies domains (see Chapter I, para. 5).

Given these challenges, it is also worthwhile to recall that within the intertwined multi-tiered system of the EU, the issue of the effectiveness of social rights for social inclusion is of common concern: not only because of the spill-overs among the Member States (even more so within the Economic and Monetary Union), but also because the real scope and consequences of the issue could be better understood if there were a commonly recognised interpretation tool at the European level. Indeed, if only the European economic governance framework were able to deliver a whole assessment of the socioeconomic situation of Member States, by means of a whole set of monitoring tools not limited to the macroeconomic and macrofinancial scenario, the framework could better fit the purpose of making a targeted use of the European budget funds (such as the European Structural and Investment funds) or other existing financial solidarity instruments between Member States (such as the ESM, which is due to become the future European Monetary Fund, according to a recent proposal)[134] as well as better featuring new proposals about solidarity tools at the EU level (such as the proposed macroeconomic stabilization mechanism deemed to cope with asymmetric shocks within the euro area but open to the other EU Member States)[135].

By means of the integration of the European Semester monitoring system with social indicators, solidarity between Member States could be drawn on more effective and holistic evaluation not limited to macroeconomic and macro-financial evidence but extended to social imbalances, encompassing

[133] C. KILPATRICK, *Constitutions, social rights and sovereign debt states in Europe: A challenging new area of constitutional inquiry*, cit., focuses on EU Member States under sovereign debt loan assistance (bailouts).

[134] COM(2017) 827 final, 6 December 2017, *Proposal for a Council Regulation on the establishment of a European Monetary Fund*.

[135] COM(2017) 822 final, 6 December 2017, Comunication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, *New budgetary instruments for a stable Euro Area within the Union framework*.

not only the labour-related ones but all the set of social inclusion challenges. As such, solidarity stemming from the (limited) EU resources could be better targeted and focused on those Member States that really need external support due to their overall socioeconomic situation. This could in turn support the ability of the single Member States to carry out, implement and enhance their redistributive policies at the national level. In other words, the use of social indicators (other than macroeconomic indicators) enacts a more appropriate functioning of the (horizontal) solidarity mechanisms between Member States within the EU (or euro area first) [136], that could in turn underpin a more adequate functioning of (vertical) solidarity between a single Member State and its citizens for more effective social rights.

3. A re-boosted role for legal studies *vis-à-vis* the effectiveness of social rights within the economic governance framework

Our call for a more experimental perspective within legal studies is surely not new.

Against the background of requests coming from the European integration process, not only has a renewed general perspective of constitutionalism vis-à-vis the European multilevel system been developed[137], but also more targeted approaches have been undertaken. In this last respect, the strain for an Open Method of Coordination better able to overhaul the consideration of fundamental rights (and social rights chiefly) within the EU multilevel governance is well known[138].

[136] For the distinction between the two levels of solidarity within the EU, transnational solidarity towards migrant citizens and the more recent concept of solidarity between Member States, based on discretionality and conditionality, see A. GUAZZAROTTI, *Unione Europea e conflitti tra solidarietà*, in *www.costituzionalismo.it*, No. 2/2016, p. 144 ff.

[137] Some authors have developed a renewed vision of constitutionalism vis-à-vis the European multilevel system offering new ways to interpret the traditional constitutional categories. G. DE BURCA, *The Constitutional challenge of new governance*, in *European Law Review*, Vol. 28, No. 6/2003, p. 814 ff.; P. CRAIG, *Constitutions, constitutionalism and the European Union*, in *European Law Journal*, Vol. 2, No. 7/2001, p. 125 ff; C. JOERGES, *Constitutionalism and transnational governance: Exploring a magic triangle,* in C. JOERGES, I. SAND, G. TEUBNER (Edited by), *Transnational governance and constitutionalism*, cit., p. 339 ff.; A. SOMEK, *The cosmopolitan constitution*, Oxford University Press, Oxford, 2014, p. 244 ff.; N. WALKER, *Flexibility within a metaconstitutional frame: Reflections on the future of legal authority in Europe*, in G. DE BURCA, J. SCOTT (Edited by), *Constitutional change in the EU – From uniformity to flexibility?*, Hart Publishing, Oxford and Portland, 2000, p. 9 ff.; J.H.H. WEILER, *Introduction: The reformation of European constitutionalism*, in J.H.H. WEILER, *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, p. 221 ff.

[138] K. ARMSTRONG, *Governing social inclusion – Europeanization through policy coordination,* Oxford University Press, Oxford, 2010, p. 255 ff.; N. BERNARD, *A 'New*

Furthermore, and particularly after the enhancement of the European economic governance procedure after the EU economic downturn and the connected revision of Article 81 of the Italian Constitution, constitutionalists have started to become more accustomed to developing more in-depth analysis in respect of the inherent logic of proper numerical and economic concepts of the European Semester[139].

Following this increasing 'experimentalism' and focusing on the subject of our concern, which is dealing with the effectiveness of social rights for more social inclusion, legal scholars have claimed for better understanding of the 'consequences' to social rights linked to multiple legislative, political and factual causes rather than limiting the analysis to a mere «abstract discourse»[140] on the formal entitlement to social rights[141]. Consequently, part of the doctrine has denounced the different approaches taken by economic theorists and legal scholars: while the former have demonstrated their ability to understand the transformation stemming from a rapidly changing world, the latter have faced this changing reality and the connected newly spreading inequalities by supporting the evolution of judicial reasonableness scrutiny without any understanding of its insufficiency to afford the whole set of modern forms of inequality and their multidimensionality[142]. In agreement

Governance' approach to economic, social and cultural rights in the EU, in T. K. HERVEY, J. KENNER (Edited by), *Economic and social rights under the EU Charter of Fundamental Rights – A legal perspective*, Hart Publishing, Oxford, 2003, p. 262; G. DE BURCA, *Beyond the Charter: How enlargement has enlarged the human rights policy of the EU*, in O. DE SCHUTTER, S. DEAKIN (Edited by), *Social rights and market forces: Is the open coordination of employment and social Policies the future of social Europe?*, cit., p. 265 ff.; O. DE SCHUTTER, *Fundamental rights and the transformation of governance in the European Union*, in BARNARD, C. (Edited by), *The Cambridge Yearbook of European Legal Studies*, Hart Publishing, Oxford and Portland, Vol. 9, 2006-2007, p. 153 ff.; S. FREDMAN, *Transformation or dilution: Fundamental rights in the EU social space*, in *European Law Journal*, Vol. 12, No. 1/2006, p. 41 ff.

[139] Among the more recent volumes that analyse this issue in depth is O. CHESSA, *La Costituzione della moneta – Concorrenza, indipendenza della banca centrale, pareggio di bilancio,* cit., and A. GUAZZAROTTI, *Crisi dell'Euro e conflitto sociale: L'illusione della giustizia attraverso il mercato*, cit.

[140] See the discussion of R. BIN, *Diritti e fraintendimenti: Il nodo della rappresentanza*, in *Studi in Onore di Giorgio Berti*, Jovene, Naples, 2005, p. 346.

[141] See C. PINELLI, *I rapporti economico-sociali fra Costituzione e Trattati europei*, in C. PINELLI, T. TREU (Edited by), *La Costituzione economica: Italia, Europa*, il Mulino, Bologna, 2010, p. 32. According to Pinelli, if this more substantial perspective is adopted, it would become difficult to speak about a real incompatibility between the national constitutions and the European system.

[142] S. STAIANO, *Per un nuovo paradigma giuridico dell'eguaglianza*, in M. DELLA MORTE (Edited by), *La dis-eguaglianza nello stato costituzionale: Atti del convegno di Campobasso 19-20 giugno 2015*, cit., p. 427.

with this perspective and its call for interdisciplinary research[143], our study supports the claim for an interdisciplinary dialogue between legal scholars and social scientists on the specific matter of commonly agreed social indicators at the European level. The purpose of this approach is to benefit both sides: on the one hand, to help legal scholars better understand and become aware of the multidimensionality of social exclusion and poverty and the presupposed ineffectiveness of social rights for social inclusion that infringes upon fundamental constitutional values such as equality and dignity; on the other hand, to support social scientists' more rights-driven perspective when questions of choice and the elaboration of social indicators are at stake.

We do not mean to convert constitutionalists to economists or sociologists, but rather to implement their concern with social indicators beyond the usual negative approach of denouncing the increasing inequalities and social distress, instead replacing it with a more positive approach of using this evidence and making the work paid for an interdisciplinary cooperation addressing the core question of the ineffectiveness of social rights.

Furthermore, we do not mean to underestimate the approach of classical constitutional studies but rather to overhaul its everlasting usefulness within this open interdisciplinary framework. Research aimed at the enforcement of the current understanding of fundamental values such as solidarity, human dignity and equality[144] is still welcomed, as the 'experimentalism' of our approach needs to be anchored to a very constitutional 'bedrock'[145].

4. Substantial democracy

As observed by legal doctrine, while citizens are more equal than in the past due to the many charters, constitutions and declarations that enshrine their rights, they are more and more unequal in concrete terms because of the

[143] *Ivi*, p. 428.

[144] Among the more recent research that could be cited that deal with the question of these fundamental values and principles vis-à-vis the new challenges stemming from a changing society in a globalized world, see S. RODOTÀ, *Solidarietà: Un'utopia necessaria*, Laterza, Rome-Bari, 2014; L. CARLASSARE, *Solidarietà: Un progetto politico*, in *www.costituzionalismo.it*, No. 1/2016, p. 45 ff.; A. APOSTOLI, *Il consolidamento della democrazia attraverso la promozione della solidarietà sociale all'interno della comunità*, in *www.costituzionalismo.it*, No. 1/2016; F. SORRENTINO, *Eguaglianza formale*, in *www.costituzionalismo.it*, No. 3/2017.

[145] To borrow the expression used by S. FREDMAN, *Transformation or dilution: Fundamental rights in the EU social space*, in *European Law Journal*, Vol. 12, No. 1/2006, p. 46.

lack of effectiveness of the protections and the consequent substantial equality[146].

As seen in Chapter II, at the European level the judicial enforceability of social rights increasingly stops the reasonableness scrutiny at the door of the equality of treatment principle emphasising the recognition of the margin of manoeuvre or margin of appreciation (whatever one prefers to name it) of the legislature. Moreover, this chiefly occurred when no economic rationale could underpin the ECJ's reasoning, that is to say, when the interests of those most in need and vulnerable are at stake (economically inactive European citizens). Consequently, on the one hand, judicial enforceability of social rights does not necessarily lead to their effectiveness; on the other hand, people facing social exclusion and poverty face difficulty in bringing their claims before courts. Accordingly, a whole transnational social inclusion founded at the European level on the pillar of a pure solidarity rationale not contaminated by the commutative logic underlying the status of migrant workers or the market logic underlying the cross-border recipients of healthcare services has not been attained by means of the ECJ's adjudications[147]. In this sense, the European citizenship has become a «bourgeois citizenship»[148], chiefly built up on private interests rather than on real sharing of burdens and benefits among citizens of different Member States.

This deficient delivery of the multilevel system of protection adds other challenges to the multi-faceted features of social exclusion and poverty, as it steals further 'voice' from the weak, with the risk that the rights of these people, left to the national political discretion (i.e. the judiciary-recognized margin of manoeuvre of the legislature, which reasonableness scrutiny does not really curtail), remain caught in the trap of a real lack of effectiveness. Indeed, the current crisis of representative democracy also increases the long-lasting difficulty of those on the fringes of society in receiving political representation of their interests.

In this respect, the path recently undertaken by the EU with the Pillar of social rights and the insertion of its new scoreboard of social indicators within the procedures of the European Semester deserves attention. Indeed, if it receives adequate implementation, there could be not only a rebalancing in

[146] L. FERRAJOLI, *L'uguaglianza e le sue garanzie*, in M. CARTABIA, T. VETTOR (Edited by), *Le ragioni dell'uguaglianza — Atti del VI Convegno della facoltà di giurisprudenza – Università degli Studi Milano – Bicocca 15-16 Maggio 2008*, Giuffré, Milan, 2009, p. 39.

[147] As stressed by A. GUAZZAROTTI, *Unione Europea e conflitti tra solidarietà*, in *www.costituzionalismo.it*, cit., p. 144, what also prevents the ECJ from delivering effective transnational social inclusion is the lack of mechanisms for compensation between Member States when inactive migrant citizens request access to social assistance.

[148] Borrowing the expression used by A. SOMEK, *The cosmopolitan constitution*, cit., p. 201.

respect of macroeconomic and macro-financial indicators, but also a broader political echo. In particular, as the European Semester has proved to be a valuable European instrument to detect and monitor Member States' imbalances, its simultaneous consideration of both economic and social indicators inevitably broadens the political perspective (and the connected name and shame) that, as such, will make it more difficult to overcome social concern for purely economic reasons.

In these multiple senses, the economic becomes social and the social becomes economic, implementing each other and standing against a common constitutional background made up of the fundamental values of equality and dignity for more effective social rights, as such delivering better social inclusion.

In these terms, social indicators also accomplish a democratic function.

Indeed, European commonly agreed social indicators give a homogenous 'voice' to vulnerable people within the EU by tracking the plastic effigy of the multifaceted challenges they are facing. Consequently, the rational and deliberative background involved in the development of these indicators needs to be continuously improved to increase their (input, output and throughput) legitimacy.

As for their rational background, our claim for an interdisciplinary dialogue between legal scholars and social scientists is at stake, well in line with the purpose to reorient the elaboration of social indicators towards the implied rights-driven perspective (and the presupposed constitutional values and principles of equality and human dignity).

As for their democratic and deliberative inputs need to be further implemented (see Part I of the present chapter, para. 5): on the one hand, the current practice of the Social Protection Committee to cooperate with nongovernmental organisations and social partners (pursuant to Article 2, para. 4 of the Council decision (EU) 2015/773) is welcomed as well as its cooperation with other committees of the Council within a more balanced stance (Economic and Financial Committee, Economic Policy Committee, Employment Committee); on the other hand, the follow-up of the ongoing claims contained in several recent European documents for more democratic legitimacy of the European economic governance framework[149] needs to be

[149] Indeed, the common denominator of most recent European documentation dealing with the way forward for the implementation of the Economic and Monetary Union is the call for more democratic accountability of the economic governance framework by means of an enhanced role for the European Parliament and national parliaments. See, inter alia, the recent Communication from the European Commission, COM(2017) 821 final of 6 December 2017, *Further steps towards completing Europe's economic and monetary union: A roadmap*, p. 13; or the Five Presidents' Report, *Completing Europe's economic monetary union*, p. 16 ff.; or the

carried out, either through the 'dialogue' with the European Parliament or the inter-parliamentary 'dialogue' with national parliaments, along a path that already takes place within the European Semester pursuant to existing European legislation[150].

As such, the normative, democratic and deliberative reliability of social indicators will receive improvement and the risk to miss the 'voice' of the people most in need when the judicial review fails to deliver effectiveness to their social rights leaving it to the discretion of policy-makers will be lessened.

Thus, as we wait for the real political 'big jump' within the EU that can overcome the current political deadlock, our call for an interdisciplinary dialogue could play a modest but concrete and relevant supporting role in pushing for more substantial equality within the EU governance system.

Reflection Paper of the European Commission on the *Deepening of the economic and monetary union*, COM(2017) 291 of 31 May 2017, p. 27.

[150] For the European legislative provisions that enshrine the involvement of the European Parliament or national parliaments within the European semester procedures, see note 45.

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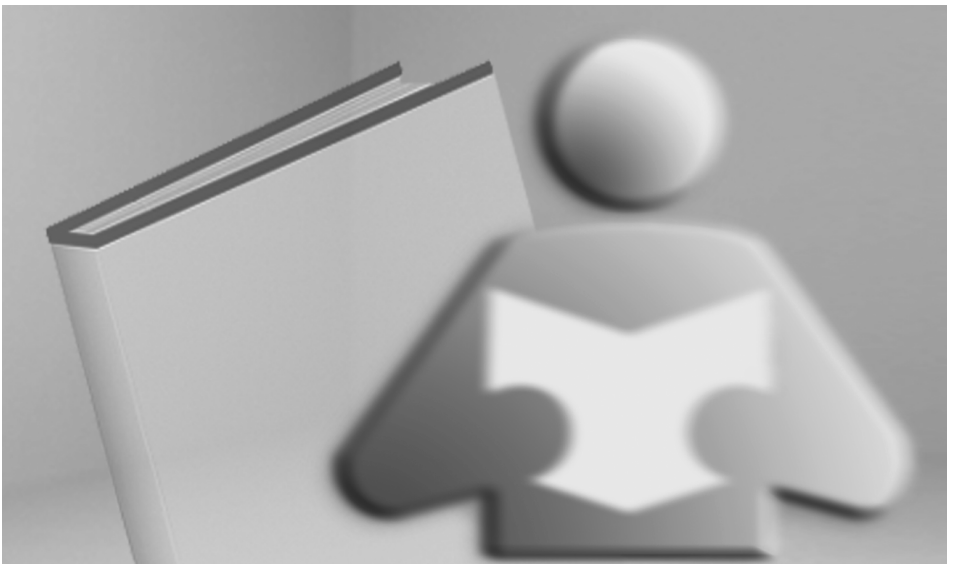

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Increasing inequalities, social exclusion and poverty within the EU (although at a different scale between States) prove that the effectiveness of social rights falls behind their formal entitlements and their judicial enforceability. Beyond the classical way followed by legal studies in dealing with the issue, the focus would shift to experimental ways better able to cope with the current multifaceted implications of social exclusion, poverty and inequalities for the purpose of effective and improved social inclusion. Indeed, legacies stemming from developments at the European level (recent and less recent) are relevant not only for policy-makers and social scientists but for legal scholars too. These latter are expected to pick up and underline the main aspects of constitutional relevance implied in the process and steer it towards being constitutionally consistent. Against this background, our claim for an interdisciplinary dialogue with social sciences focuses on the constitutional implications underlying the use of social indicators within the European governance framework.

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