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## Book

# Social policy in the European Union 1999-2019: the long and winding road

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# **Social policy in the European Union 1999-2019: the long and winding road**

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Edited by

**Bart Vanhercke, Dalila Ghailani and Slavina Spasova,  
with Philippe Pochet**



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with Philippe Pochet**

European Trade Union Institute (ETUI)  
European Social Observatory (OSE)

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Bart Vanhercke, Dalila Ghailani and Slavina Spasova

## Preface

This volume is the 20<sup>th</sup> anniversary edition of *Social policy in the EU: state of play*,<sup>1</sup> or *Bilan social*, its shorter name in French. Coordinated by Cécile Barbier and Philippe Pochet, the first edition covered the year 1999 and was published as a collaborative project between the European Social Observatory (OSE) and the European Trade Union Institute (ETUI) in 2000. Christophe Degryse took over as the lead editor of the *Bilan social* in 2000, mostly in tandem with Philippe Pochet. During the decade of his editorship, Christophe was always responsible for the book's annual chronology of key events. Cécile Barbier authored the chronology between 2010 and 2017, when Denis Bouget took over. Christophe was succeeded in 2010 by two co-editors: David Natali and Bart Vanhercke. Bart has been the lead editor since 2016, while Denis Bouget, Dalila Ghailani and Sebastiano Sabato were more occasional co-editors in the more recent period. For many years, Birgit Buggel-Asmus, Valérie Cotulelli, Eric Van Heymbeeck and Françoise Verri were in charge of formatting and producing the text, while Janet Altman (who died in 2012, before her time), Rachel Cowler, Richard Lomax and Edgar Szoc took care of editing and translations. We are grateful to these colleagues who have contributed with their wisdom, ideas and perseverance to making this anniversary edition possible. It has been a long and exciting trip.

Right from its inception, the aim of the *Bilan social* was to contribute to the debate on important developments in EU social policymaking between policymakers, social stakeholders and the research community, while providing accessible information and analysis for practitioners and, more largely, audiences interested in European integration from a social perspective. This anniversary edition looks back at the main developments in EU social policymaking over the past two decades. Key questions addressed in this volume include: *what was the place of the social dimension during the financial and economic crisis? Who has driven, and who has braked, EU social policymaking? Which instruments does the EU have at its disposal for 'market correcting' policies?* And last but not least, *what are the next steps in the further implementation of the EU's social dimension, especially in the context of the European Pillar of Social Rights?*

The first part of the book discusses some of the broader developments of the past decades, a) disentangling the main stages in the evolution of European social policy over the past 20 years; b) assessing the place of social policy within the institutional architecture

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1. The book was called *Social development in the European Union* until the 2014 edition, covering the year 2013.

and political regime of the EU; and c) analysing whether the Court of Justice of the EU has been able to balance social and economic rights. The book's second part analyses long-term developments in key EU social policy areas, including industrial relations, social protection and social inclusion, social security coordination and gender equality. It describes how key EU social policies have been handled by the EU through a variety of policy instruments: EU law, social dialogue, policy coordination and EU funding. The chronology by Boris Fronteddu and Denis Bouget summarises the key events of the past twenty years in the area of social, economic and – for the first time in this series of books – environmental policies. A separate chronology covering the year 2018 has been produced by the same authors and is available online.

In Chapter 1, Philippe Pochet analyses the contents of twenty editions of the *Bilan social*, providing an overview of two decades of EU social policymaking. He identifies three main periods in the evolution of European social policy in that period. The 'social period' (1997–2005) is characterised by a new approach to social issues, based on convergence towards best practices and no longer pushing for legislative harmonisation. The second period (2005–2015) is described as that in which the social dimension of the EU is put to question. The third period (2015–present) is characterised by the relaunch of the EU social dimension under the Juncker Commission and the introduction of the European Pillar of Social Rights.

Amy Verdun and Valerie D'Erman argue, in Chapter 2, that two decades of Economic and Monetary Union (EMU) have both helped and hindered social policymaking, an area overshadowed by the dominant economic paradigm of European integration. The sovereign debt crisis, which quickly developed into an economic and social crisis, reinforced the tensions between social and economic policymaking, even while raising the profile of social policies. The chapter goes on to discuss how recent trends – including the rise of nationalism, Brexit and the migrant crisis – are impacting the renewed discussion on 'Social Europe'. The chapter's conclusions look at future challenges and opportunities for the EU's social dimension.

The most important conflicts between social and economic rights (or the 'fundamental economic freedoms') in the case law of the Court of Justice of the EU are considered in Chapter 3 by Sacha Garben. While sympathetic to the argument that the case law in this area does not give sufficient protection to social rights and instead favours economic interests, the chapter ultimately proposes an alternative approach to conceptualizing and balancing economic and social interests in legal terms. At a fundamental level, it argues for a greater role to be assigned to the democratic decision-making process at EU and Member State levels in determining socio-economic issues, rather than for the (judicial) imposition of either more social or more economic outcomes as such.

In Chapter 4, Jean-Paul Tricart starts by describing the context in which the European Social Dialogue was established under the Delors Commissions (1985–1995). It goes on to examine how this dialogue has evolved over the last two decades, arguing that this happened in very uneven and often contradictory ways: progress has been made, but there have also been setbacks, and overall the dialogue has slowly deteriorated. This was very much the case under the Barroso Commissions (2005–2014), especially with

the onset of the Eurozone crisis in 2009. While the Juncker Commission (2015–2019) undoubtedly enabled social concertation to take place again at European level, the effects of this concertation and of the reorientation of EU policies are, to date, uncertain.

The Open Method of Coordination on Social Protection and Social Inclusion (Social OMC) is at the heart of Chapter 5. Bart Vanhercke distinguishes six stages in the development of this constantly metamorphosing policy instrument, starting with *experimenting* (the proliferation of OMCs, after the method was coined by the Lisbon European Council in 2000) and ending with *maturity*: the further ‘socialisation’ of the Semester under the Juncker Commission. The chapter concludes that whether the OMC will continue to play a significant role in the EU’s post-2020 socio-economic governance will ultimately depend not on its hardness or softness, but on whether key domestic and EU players continue to use it strategically to further their ambitions.

In Chapter 6, Roberta Guerrina explains that the introduction of gender mainstreaming (GM) in the Treaty of Amsterdam (1997) offered a space for ensuring that gender, equality and diversity were integrated into all policy fields. However, the failure of policymakers to deploy the most basic tools associated with this approach (e.g. gender impact assessments) in times of crisis highlights some of the limitations of GM. Nevertheless, the principle of gender equality has been incorporated into the EU’s public communication narrative and is now part of how the organisation presents itself. More than twenty years since the inclusion of this principle in the EU *acquis*, there is still little evidence that the EU has moved beyond the ‘add women and stir’ approach to equality.

The time horizon of Chapter 7 by Rob Cornelissen and Frederic De Wispelaere goes well beyond the temporal scope of this book: the authors discuss the achievements, controversies and challenges of 60 years of European social security coordination. The figures on the number of people benefiting from the European coordination regulations reveal a hidden ‘European welfare state’. Interestingly, in some aspects, the Coordination Regulations provide social protection going beyond mere coordination, creating certain rights which citizens would not otherwise have. However, over the past 20 years, and especially since the 2008 crisis, some of these provisions have been called into question due to fears of ‘welfare tourism’ and ‘social dumping’.

Paolo Graziano and Laura Polverari provide a critical review of the overall significance, economic impact and (direct) employment and social impact of the EU’s cohesion policy in Chapter 8. This policy can be considered the closest thing the Union has to an active employment and social policy. The authors argue that cohesion funds should become an important financial factor in the reorientation of EU policies towards a more ‘Social Europe’. For this purpose, more resources should be directed at social inclusion and poverty alleviation measures, further support should be provided to the administrative capacities of national and regional institutions, and more systematic efforts should be made to evaluate the policy’s social impacts.

In the concluding chapter, the editors provide an analytical chronology of the main developments of the EU’s social dimension over the past twenty years and summarise

the key messages put across by the authors of the book's chapters regarding key EU social policy areas. The chapter also discusses some of the recent debates on the EU's social agenda under the new von der Leyen European Commission, while providing policy recommendations drawing on the analyses presented in this book.

When Paul McCartney wrote his hit 'The long and winding road' in 1969, he obviously had other thoughts than European social policy in mind. But the metaphor is an appropriate description of the development of European social policy over the last twenty years, the subject of this 20<sup>th</sup> anniversary edition. It accurately reflects the twists and turns of a social policy paradigm permanently overshadowed by market and financial considerations. Despite many optimistic statements by the EU leaders, social policy remains a 'nice to have' (if and when the economic and political context allows for it), not a 'must have'.

At the mercy of changing player coalitions, the development of social policy happens through a variety of policy instruments discussed in this book. It is also shaped by ever-changing challenges: digitalisation, demographic change and, increasingly, climate change. Nevertheless, as charted by this book, progress and political struggles towards a genuine 'Social Europe' have been and continue to be on the agenda of various players. But as a lesson of the past, we should not expect progress to be quick or linear: the road is going to be long and winding. This book takes you on that exciting journey.

Bart Vanhercke, Dalila Ghailani, Slavina Spasova (all three OSE)  
and Philippe Pochet (ETUI)

## Chapter 1

# Twenty years of the publication 'Social policy in the European Union': what have we learned?

Philippe Pochet

## Introduction

This introduction to the 20<sup>th</sup> edition of *Social policy in the European Union: state of play* (often and hereafter referred to as the *Bilan social*, its shorter name in French) is a little unusual. It contains an analysis of the major developments in European social policy over the last 20 years and attempts to give a brief summary of these. When space is limited, as it is in this chapter, choices must of course be made as to which issues to cover and which chapters of the *Bilan social* to refer to.

I have developed an approach which highlights the main trends underlying the various stages of European social policy, emphasising the role of the players involved (Pochet 2005, see also Hemerijck 2014). This approach considers four factors: national political balances (left-right) and the related European situation, the main outlines (areas) of social policy in each period, the dominant mode of governance, and, finally, the diversity of social protection regimes. I updated this approach in a recent book (Pochet 2019), and the analysis in this introduction largely follows this structure. Interestingly, Wolfgang Streeck, starting out from a somewhat different analysis (placing greater emphasis on structural elements than on the players), divides the time period into very similar stages (Streeck 2018).

The *Bilan social* is an annual publication designed to present the social developments which have occurred over the past year. It is not intended to be a summary, but rather to take stock of various developments in the field of social affairs, with the inclusion of an annual chronology of the main events, written by Christophe Degryse from 2001 to 2009 and by Cécile Barbier from 2010 to 2017. Reading, or, in this case, re-reading all 19 editions provides an overview of past events, of what the editors considered to be important, and of the questions which were being asked when each edition was published. For example, we can see that since the 2008 crisis, economic governance became far more prominent, while with the Barroso Commission, which had no European social programme, articles on social affairs *stricto sensu* became less frequent. As well as providing valuable analyses, the *Bilan social* is also an indicator of European social policy development, in that the choice of priority issues made by its editors each year reflects what was considered important at the time.

This reading exercise is, of course, not entirely neutral for me, since I myself was one of the editors of the *Bilan social* and subsequently an attentive reader and backer. From



the very beginning, the *Bilan social* has been a joint publication of the European Social Observatory (OSE) and the European Trade Union Institute (ETUI).

Let us take, for example, the role of particular players, and in particular the tensions between social and economic ones. As in my own publications, an approach focusing on the key players or groups has always been important in the *Bilan social*. This rereading of the books, however, is not intended to merely repeat what has already been written (Pochet 2019). I hope that it will highlight not only shared analyses, but also differences of view. With regard to the role of the various players, more recently I have tried to place greater emphasis on the importance of political balances of power (at national and European levels) in order to understand the public policies followed at European level. Little is said in the *Bilan social* about this explanatory factor. Obviously, choices have been made, with which we can agree or not agree. For example, while the recent book by Amandine Crespy (2019) also looks at the role of the various players, she presents the main areas of European social policy somewhat differently, placing greater emphasis on the various impacts of the single market, and less on questions linked to occupational health and safety or equality between men and women.

This introductory chapter therefore has a dual purpose: to suggest a) a consistent overall reading of the last 20 years of EU social policy as well as a re-reading of 20 years of the *Bilan social*; and b) an attempt to create a dialogue between these two approaches. The rest of the chapter is divided into three parts, corresponding to three periods in time. These are very succinctly described below. In my analysis, three main stages in European social policy can be identified from the end of the 1990s.

The first of these, which I refer to as the ‘social period’, began with the Treaty of Amsterdam (1997) and the implementation of its employment chapter via the European Employment Strategy (EES). This ended in around 2005, with the revision of the Open Methods of Coordination (OMC). This was the date of the EU enlargement, and also a time when centre-right and right-wing governments dominated national politics. The aim in this period was to achieve convergence, rather than harmonisation, of legislation.

The second period was marked by an absence of European social policy, which gradually disappeared from the political agenda (for a quantitative analysis, see the annexed graph, Degryse and Pochet 2018). The 2008 crisis strengthened existing trends (see Pochet 2019) and, from 2010 onwards, a new form of economic governance was, with some difficulty, put in place. In a large majority of European countries, this resulted in a questioning of national social policies. It was a time of general austerity, in a political context dominated entirely by centre-right and right parties in the various European countries (see Table 1, annexed). This inevitably had an impact on support for European integration, which came in for increasing criticism (indirectly leading, also, to Brexit). National social programmes had to be unravelled and adjusted to the constraints of Economic and Monetary Union (EMU).

In this context, the new European Commission President, Jean-Claude Juncker (2014–2019), tried to relaunch European integration, particularly its social dimension. This third phase resulted, at the end of 2017, in the adoption of the European Pillar

of Social Rights (Pillar). We are still in this phase, and the work programme of the new Commission and the new European Parliament will show the extent to which this momentum will continue, gather speed or gradually fade away.

## **1. From the Treaty of Amsterdam to the Open Methods of Coordination: the 'social period' (1997–2005)**

What we could call the 'social period' (1997–2005) was the outcome of criticism levelled against the Maastricht Treaty. This entered into force in late 1993 and was seen by many (parties of the left, trade unions, NGOs, academics) as imbalanced, with too little weight given to employment and social policy, compared with the greater importance attached to aspects of monetary union. At the same time, social democratic and socialist parties were returning to power in the United Kingdom, France and then in Germany (1998). These political developments were part of a broader phenomenon in Europe. Between 1997 and 2003, social democratic or socialist governments, alone or in coalition with other parties, were largely dominant in Europe (Manow *et al.* 2004; see Table 1, annexed, for aggregated election results from 1995 to 2014). This resulted in an entirely new approach to social issues: convergence towards best practices, no longer a push for legislative harmonisation.

The victory, in 1997, of Tony Blair's New Labour party in the United Kingdom and of Lionel Jospin's Socialist Party in France made it possible to add an 'Employment' chapter to the Treaty of Amsterdam (inspired by the provisions of the EMU). The Maastricht Agreement on social policy was also included in the new treaty following the UK elections, as were a series of changes concerning qualified majority voting. There was a specific article on non-discrimination by sex, race, ethnic origin, religion or belief, disability, age or sexual orientation. One important factor helping us understand developments in the period 1997–2005 is that 1995 saw three countries (Austria, Finland and Sweden) joining the EU whose gross domestic product (GDP) was higher than the European average. They had highly-developed social models, as well as sophisticated collective bargaining systems with strong trade unions.

In the 1990s, and in a context of preparation for monetary union, a series of political, social and trade union players became aware of the risk that the function of social policies might change in the Eurozone, becoming an adjustment variable for economic shocks. They therefore attempted to develop a true social dimension for economic and monetary integration (Goetschy 2005; Pochet 2006). This explains why the first years of monetary integration (1995–2005) gave rise to unexpected social policy developments, particularly given the weight and cohesion of the economic group backing social deregulation (Serrano Pascual 2009). At European level, therefore, this social period began with the Treaty of Amsterdam (1997) and with the European Employment Strategy which it launched.

The first *Bilan social*, published 20 years ago, clearly shows the priority given to employment (Degryse and Pochet 2000) but also the new place for social protection on the European agenda: the role of 'soft law', as shown in the title of the chapter by

Caroline de la Porte (2000). But the *Bilan social* did not focus solely on these new developments, and there was a chapter by Christophe Degryse (2000) describing European social dialogue as a ‘mixed picture’. This regular and detailed stocktaking of interprofessional or sectoral European social dialogue is, indeed, one of the specificities of the various editions of the *Bilan social* (see below).

The Lisbon European Council (2000) was the key event of this period. It marked the launching of the Lisbon Strategy and the development of the Open Methods of Coordination<sup>1</sup> in a series of social policy areas (employment, poverty, pensions, healthcare, education, migration, etc.) (de la Porte and Pochet 2002; Dehousse 2004; Pochet 2005; Vanhercke 2016 and this volume). The questions addressed in the second volume of the *Bilan social* (2000) concern, in particular, the impact of the Lisbon European Council and of the OMC, this new method of governance. These reflections on the purpose and effects of the OMCs continue and develop in every *Bilan social* edition of the first half of the 2000s.

The scope of social policy, therefore, and the areas covered grew extraordinarily quickly: pensions, healthcare, poverty and exclusion, education etc. Before the arrival of the OMCs, there was general political and academic consensus that the functions at the heart of the welfare state – pension and healthcare systems, as well as education – were basic elements of the national social contract and could not be discussed in any depth at European level (apart from small-scale exchange programmes with merely symbolic budgets, such as the European ‘Poverty’ programmes). The issue of poverty and social inclusion was particularly closely followed by Ramón Peña-Casas in the *Bilan social*, in no less than four articles (2004, 2010, 2012, 2014<sup>2</sup>).

As Rita Baeten argues in the first chapter on healthcare, in the 2003 edition of the *Bilan social*, ‘[...] the Member States, traditionally very reserved about accepting European intervention in their national health care policies, are compelled to react to situations created by the application of the principles of the single market to the national health care services, and to react to developments in other fields, such as economic policies’ (Baeten 2003: 149). These not-always-positive developments, she adds, compelled the social affairs ministers to take action at European level. This is a good summary of the motivations of the social policy players: to counterbalance economic developments, rather than to form a shared social policy approach.

In this context, the next attempt to (re)define the European social dimension was the use of the Open Method of Coordination as a governance instrument. The aim was no longer, therefore, to create a (relatively consistent) set of European rules, applicable to all, but rather to promote interaction between the various levels. The OMC is based on the idea of diversity as a positive factor and as an opportunity to improve national standards and practices by promoting convergence towards the best results. It is an approach based on

- 
1. The Open Method of Coordination is a flexible way to try and reach quantified European targets, jointly established by the national ministers in their respective Council formations, via national plans, the results of which are evaluated using shared indicators. This is done with a view to achieving convergence in the social performance of Member States, by improving national policies through a process of on-going mutual learning.
  2. Chapter on ‘Towards a European minimum income?’, co-authored with Denis Bouget.

learning and the exchange of information and ideas to improve national public policies. There have been many academic publications on OMCs, looking at their potential and their limitations (for a summary, see de la Porte and Pochet 2012; Vanhercke 2016, and this volume). Almost 20 years since the method was first used, it is still difficult to draw any definitive conclusions as to its effectiveness.

Although almost all academic and political attention during this period was focused on the potential and limitations of the OMCs, other developments also occurred, which academics have tended to neglect (Pochet and Degryse 2017). For example, the EU Charter of Fundamental Rights was proclaimed in 2000 at the time of the adoption of the Treaty of Nice and was then integrated into the Lisbon Treaty (2009). Two non-discrimination directives were adopted unanimously in 2000, following the political events in Austria (the FPÖ, Jörg Haider's far-right party, joined the government). Some progress was also made in European sectoral social dialogue (the documents became more binding on the signatories), and interprofessional dialogue now resulted in so-called 'autonomous' agreements, i.e. agreements implemented by the national social partners. These related to teleworking and to stress and violence at the workplace (Dufresne *et al.* 2006). The *Bilan social* gave regular assessments of these developments, emphasising the progress made but also highlighting any gaps or risks relating to their implementation.

In 2008, Regulation 1408/71 on the coordination of social security schemes and free movement was revised and extended to non-community migrants, following several years of negotiations (see Cornelissen and De Wispelaere, this volume). In addition, the social policy topics dealt with in the 1960s and 1970s (health and safety, equality between men and women) were still on the European agenda (Ferrera 2005) but were no longer central concerns. Health and safety at work was sidelined in the social agenda, and the new 'gender mainstreaming' approach launched in 1997 was difficult to implement. The issue of gender equality was not addressed in the various earlier editions of the *Bilan social* (except in the section on Court of Justice judgments) and was only tackled, finally, by Dalila Ghailani in the 2013 *Bilan social* (Ghailani 2014; see also Guerrina, this volume).

Finally, as part of the debate on the role of wages in a monetary union, various forms of wage coordination emerged at European level. The Cologne process (involving the European Central Bank, the Commission, the Member States and the social partners), described by Anne Dufresne (2002) as 'Oskar Lafontaine's dream', was the first (and in fact the last) attempt of this kind at European level. In terms of interprofessional coordination, the European Trade Union Confederation (ETUC) set up a working group on wage coordination in 1999. At sectoral level, at the end of the 1990s, the European Metalworkers' Federation and the European Trade Union Federation for Textiles, Clothing and Leather adopted guidelines for national negotiators (EMF 1998). At cross-national level, the 'Doorn group', made up of trade unionists from Germany and the Benelux countries (and later joined by French unionists), held annual meetings to evaluate the outcomes of their national and sectoral collective bargaining rounds, with reference to an agreed formula: inflation + national productivity (Pochet 1999; Glassner

and Pochet 2011). Some authors regard this as the emergence of a multi-level industrial relations system (Marginson and Sisson 2004).

## **2. From the enlargement to the crisis: from no European social dimension to a questioning of European social policies (2005–2015)**

The year 2005 was the beginning of a new stage in European social policy: a time of standstill and of calling into question the progress made over the previous period (1995–2005). I have taken 2005 as the starting date for this period, since it was at around this time that a series of upheavals occurred: enlargement, a large majority of right-leaning governments, right-wing Commission, etc. (Pochet 2019). The financial crisis a few years later would speed up these changes and act as a window of opportunity for their implementation.

### **2.1. Three factors explaining the questioning of the EU's social dimension**

The period 2005–2015 was characterised by three main factors: a) EU enlargement to the countries of Central and Eastern Europe; b) the political shift towards centre-right or right-leaning governments; and c) the challenging by the Court of Justice of the European Union of one of these major principles.

#### **2.1.1. EU enlargement to Central and Eastern European countries**

A first factor was the three-stage enlargement (2004<sup>3</sup>, 2007<sup>4</sup> and 2013<sup>5</sup>) to thirteen new Member States, with no additional budget to ensure economic, social and territorial convergence. In parallel, the European Commission and the Employment and Social Affairs (EPSCO) Council announced the need for a 'pause' to give the new countries time to 'digest' the Community *acquis*. Already in 2001, Caroline de la Porte asked whether enough attention was being accorded to the social dimension in the enlargement process (de la Porte 2001). Five years later, the answer to the question was clearly 'no' – the social dimension was absent.

The governments of almost all the new Member States made it clear that they were not in favour of binding European social rules and standards. At national level, these countries (emerging from a communist system) lacked structured social partners, particularly on the employers' side. Their institutions, including tripartite institutions, were weak, or even mere facades (Ost 2000). Ten years after enlargement (2014), this was still the case (special edition of *Transfer* 2015/3). Moreover, their participation in soft law processes and in the various Open Methods of Coordination was relatively passive. After the 1990s, a decade of rapid transition to capitalism, the years 2000–2008 seemed to

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3. Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Czech Republic, Slovakia and Slovenia.

4. Bulgaria and Romania.

5. Croatia.

be a time of economic catching up, helped by large-scale foreign investment, essentially from Germany.

Spain and Portugal had viewed adoption of the European social model as a way to modernise, following years of dictatorship and authoritarian regimes; the countries emerging from forty years of communism, however, did not share this view or this wish for social modernisation, although the situation varied from country to country (Bohle and Greskovits 2012). There were no general political discussions, unlike at the time of the enlargement to Spain and Portugal (1985). The opening of markets, privatisation and a dominant market economy were assumed and were not offset by any large financial transfers from the EU budget. On the contrary, a ceiling was applied to these transfers, as a percentage of gross domestic product (GDP). Many western governments agreed to the enlargement reluctantly, had no overall vision, and did not view social issues as a priority. With no overall agreement, each country tried to maximise its own gains. Emigration became a new economic adjustment tool for some countries (the Baltic States, Poland, Romania and Bulgaria), thus heightening fears of social dumping (see the debate on the famous 'Polish plumber' in France) or of people shopping around for more generous welfare payments in the west (so-called 'social tourism') (Kvist 2004).<sup>6</sup> These countries vaunted the flexibility of their labour market and the simplicity of their tax systems (most had introduced a flat tax system for all types of levies and taxes).

As emphasised by Guglielmo Meardi (2012), the new countries constituted a challenge to the European social model. In his view, they were not just lacking individual aspects of the European social model; they were lacking any structure of this type. The trade unions left over from the communist era, or created during the transition, found it difficult to carve out a new role. Negotiations between social partners at sectoral or interprofessional levels, when these took place, were completely different from collective bargaining in western Europe; social protection offered no protection to workers and labour law was not properly applied. The same author later emphasized that '[w]orkers are left in a situation of maximum vulnerability and lack of voice. Growing inequality and democratic deficit are the results, hitherto obscured by the apparent economic success' (Meardi 2012: 10). Maybe one slight weakness of the *Bilan social* is that it said relatively little about the issues relating to enlargement (but see de la Porte 2001 and Ghailani 2006).

### 2.1.2. A political shift to the right

The second factor was the shift of almost all EU governments towards the centre-right or right. The year 2005 was a political turning point: Angela Merkel won the Federal elections in Germany, Silvio Berlusconi was in power in Italy and Jacques Chirac in France, soon to be replaced by Nicolas Sarkozy. More generally speaking, between 2005 and 2010 the balance of power clearly tipped towards right and centre-right parties, with Member States largely dominated by conservative, liberal, or nationalist governments

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6. During the run-up to the Brexit referendum, this issue was frequently raised by David Cameron's Conservative government in the UK, with regard to Bulgarian, Polish and Romanian nationals.



(see Table 1, annexed). The remaining social democratic parties were mostly very moderate, pursuing policies which could not really be described as social in nature.

In the 2004 European elections, the right-leaning parties grouped together in the European People's Party (EPP) gained a sweeping victory over the social democratic and socialist parties (S&D). The latter, which had gained 34.9% of the votes in 1994, saw their support fall to 27.3% in 2004, then to 25% in 2009. In the course of 15 years, the European socialists lost more than 10 percentage points. The liberal political parties, on the other hand, made great gains. The European Commission was led, from 2005, by a strong majority of centre-right commissioners, headed by Portugal's José Manuel Barroso.

### **2.1.3. Major change of direction, due to the Court of Justice**

The third factor was the challenging, by the Court of Justice of the EU (CJEU), of the principle of equal treatment of workers on the same territory (*Laval* and *Viking* judgments in 2007, *Rüffert* and *Luxembourg* in 2008). The Court of Justice called into question one of the fundamental principles underlying European social policy: that of equal treatment of national and European workers in each country (on the political role of the CJEU, see Garben, this volume). This was also the objective of the proposed services directive, the so-called 'Bolkestein' directive (European Commission 2006) on free movement of services (see Van den Abeele 2007; Crespy 2019). The *Bilan social* analysed the issues raised by the free movement of services, considering its impact on healthcare (see Baeten 2007).

This principle of equal treatment had been established at a time when migrants tended to settle definitively in their host countries. From the 1980s onwards, a different type of temporary migration had become increasingly frequent: the posting of workers to another Member State to carry out a specific task under a service or sub-contracting contract. In 1996, following a Court of Justice judgment on Portuguese workers working on the construction of the West of France high-speed railway line before the opening of the borders to Spanish and Portuguese workers (the 1990 *Rush Portuguesa* judgment), the European Union had adopted a directive setting mandatory rules applicable to posted workers. These mandatory rules applied to all, or most, workers (for an analysis of this complex question, see Picard and Pochet 2018). Some countries, such as Denmark, Sweden, Finland, Italy, Austria and Germany (although the German situation changed in 2015), had no minimum wage, either statutory or based on collective agreements extended *erga omnes*. Companies employing posted workers in these countries, therefore, were not obliged to respect any minimum wage.

Subtle legal analyses can be made of these judgments, but the essential point, it seems, is that the Court of Justice of the EU, in its various judgments – *Laval* (2007), *Viking* (2007), *Rüffert* (2008), *Luxembourg* (2008) – accepted the existence of competing social standards (pay, working time, working conditions, etc.) in the same territory (see Ghailani 2008, 2009; Garben, this volume). In other words, it allowed social dumping, not between countries with differing standards and levels of protection, but within a country, between workers of different nationalities and statuses. The most blatant

abuses were addressed by the Council agreement of December 2013, allowing Member States to supervise more closely the working conditions of posted workers. Many governments (in Belgium and France, for example) decided that this was not enough, and the discussions continued (see below). As illustrated by these judgments, social (or non-social) policy has often been made by the judges in Luxembourg, which is why the case law of the CJEU has been systematically tracked by Dalila Ghailani since the 2001 edition of the *Bilan social* (see also Garben, this volume).

From an institutional viewpoint, the Lisbon Treaty (2009) did not reset the balance and contained very little in terms of setting the course of EU social policy. The social rhetoric was stepped up, to some extent, by reference to the existence of a social market economy and by a cross-cutting social clause (never really applied), while the social dialogue from then on had to be officially supported by all the institutions, no longer just by the Commission. These provisions, however, did not have strong enough backing to give them real force. The EU Charter of Fundamental Rights, already proclaimed in Nice in 2000 (see below) was again proclaimed on adoption of the Lisbon Treaty (2009), but with strong misgivings from the British and Polish governments which wished, at all costs, to avoid the Charter having any impact on national situations.

## 2.2. The economic and financial crisis: moving towards a paradigm shift

All these elements were the soil in which the crisis would grow, and would then engender radical national reforms. As we saw in the 2008 issue of the *Bilan social*, the 2007 crisis suggested the need for a change of paradigm. In our introduction (Degryse and Pochet 2008), we identified two major crises. On the one hand, there was a fundamental questioning of our modes of production, transport and consumption, triggered by the new work done by the Intergovernmental Panel on Climate Change (IPCC). Secondly, there was the failure of the economic-financial system and mode of governance, and the increase in inequalities, with GDP growth no longer resulting in an increase in collective well-being (see also van Ypersele 2008 and Begg 2008). These considerations were a factor leading to the suggestion by the OSE and ETUI that future editions of the *Bilan social* should emphasise a link between social and environmental issues (see, for example, the 2013 *Bilan social* on GDP: Feigl *et al.* 2013). In 2018, there was an article on degrowth and eco-social policies in Europe (Koch 2018). The book was a pioneer in this area, since these concerns only really came to the fore in the 2019 EP elections.

The 2008 financial and economic crisis, moreover, relaunched national social policy debates, albeit for a short period. The countries with structured collective bargaining institutions linked to employment/unemployment systems (such as Belgium and Germany) were able, thanks to mechanisms for paid reductions in working hours, to reduce the impact of the crisis and limit increases in unemployment. Nevertheless, reading through the 2008–2015 editions of the *Bilan social*, one can see social policy becoming less and less prominent. David Natali investigated the possible disappearance of the social model (2012), while his co-editor Bart Vanhercke (2011) wondered whether 'the social dimension of the Europe 2020 strategy' was an 'oxymoron'. In subsequent years, the Europe 2020 strategy disappeared from the list of topics addressed. The



main area of concern at European level and in the *Bilan social* editions was, from then on, economic governance, its limitations and weaknesses but, above all, its social implications. The Europe 2020 strategy only reappeared five years later, in 2015, in a chapter entitled ‘Economic governance in Europe 2020: socialising the European Semester against the odds?’ (Zeitlin and Vanhercke 2015; we shall return to this in more detail in the next section).

With regard to the political situation, the balance between left and right deteriorated. In 2011, left-leaning parties became a tiny minority, only present in six national governments. In early spring 2012, just three of the 27 Member States were governed by the left (Austria, Cyprus and Denmark), and one, Belgium, by a left-right coalition headed by a socialist prime minister (see Table 1, annexed). The S&D suffered a historic defeat in the 2009 elections to the European Parliament, and the second Barroso Commission was disproportionately right-leaning, with only six social democratic Commissioners out of 27.

In 2010, the banking crisis became a sovereign debt crisis. Economic and monetary governance, as implemented up to that point in the eurozone, was criticised. The urgent need to avoid the collapse of the eurozone took the place of a policy, as the German government refused to countenance significant changes until radical social and budgetary measures were taken by the governments of the countries in difficulties. In this context, one important player emerged with a key role in rescuing the euro: the European Central Bank (ECB). The Troika, made up of the Commission, the ECB and the International Monetary Fund (IMF), imposed its conditions on countries at risk of bankruptcy (Greece, Portugal, Spain, Ireland, Cyprus, see Degryse 2012). Less reported in the media were the cases of Latvia and Hungary and the conditional support given to help them re-establish their balance of payments. A new type of governance was thus put in place, viewed by some as non-democratic, even anti-democratic (Scharpf 2014; Streeck 2014). The *Bilan social* also changed. Originally, its intention was to provide a detailed report on European social policies; it became clear, however, that these were vanishing, and therefore the *Bilan social* concentrated, between 2010 and 2015, on major macro-economic issues. Already in the 2012 edition, Christophe Degryse and Philippe Pochet (2012) wrote of the worrying trends in European governance. The attention paid to EMU governance issues and their social implications has since become one of the trademarks of the *Bilan social*, with a chapter on these issues almost every year.

### 2.3. The new economic governance and the missing social dimension

In the chaotic implementation of the new economic governance (Degryse 2012) addressing the limitations of monetary union as set out in the Maastricht Treaty (1992), the main problem was the absence of a social dimension (no direct transfers, no basic framework for unemployment insurance, etc.), as well as the lack of debt-pooling. For those countries receiving financial assistance from the EU, this governance led to a series of reductions in social standards and a questioning of the role of the unions and of existing collective bargaining structures (Degryse and Pochet 2012; Degryse *et al.*

2013). In the eyes of the ECB, social policy, and, in particular, national wages, should act as an adjustment variable for a monetary union without its own budget, and, above all, lacking in solidarity (in the form of European unemployment insurance or Eurobonds, for example). This was highlighted by Müller and Schulten (2013) in the 2012 *Bilan social* with reference to wages; Fichtner (2014) explored the idea of a European unemployment insurance scheme the following year. The European Union was divided in two: on the one hand there were countries coping relatively well with the crisis and where few changes were taking place (Germany, Austria, Benelux, the Scandinavian countries, Poland), and, on the other, those with rocketing unemployment which were adopting radical reforms (or being strongly recommended to do so by the Commission, the ECB or the Council). As well as Greece, this latter group included Portugal, Spain, Ireland, Italy, the Baltic States, Romania and Bulgaria.

Another outcome of the change in the political scene from 2005 onwards was the rebalancing, followed by the gradual abandonment, of the OMCs. The 'social' dynamic of the OMCs was called into question, particularly with the publication of the Kok report entitled 'Jobs, Jobs, Jobs' (2004), produced at the request of the Commission. This report refocused the entire discussion on growth, competitiveness and flexibilization. The various Open Methods of Coordination were firstly streamlined into two main categories: the economic and employment OMCs on the one hand, and the Social Protection OMC on the other (pensions, healthcare, poverty). Finally, they were merged into ten guidelines and seven flagship initiatives in the new Europe 2020 strategy. This strategy, however, never really came into its own; it remained a marginal exercise in the European Semester system highlighting the need to make wages more flexible and to increase the retirement age (linking it to life expectancy).

Compared to the previous period, another upheaval was that the European social dialogue had broken down; no further agreements were signed between the European social partners in the period 2010–2016 (see Tricart, this volume).

As of 2005, Europe no longer had a central social policy paradigm. Indeed, it began to question some of the fundamental principles underlying the various social policy versions, particularly in relation to the equal treatment of workers in the same territory. Moreover, in the early years of European integration there had been a sort of implicit division of tasks: market efficiency at European level, and redistribution at national level. This division of tasks was summarised by David Natali (2012): 'Adam Smith at European level and Keynes at national level'. Now, however, the situation was looking more like Adam Smith, or even Hayek, at all levels (Höpner and Schäfer 2012; on this point see also Streeck 2018).

As indicated by Brigitte Favarel and Odile Quintin,<sup>7</sup> '[...] the range of possibilities has grown and...there is no political will or clear vision of the form which Community social policy should take' (2007: 166).<sup>8</sup> European social policy was in a crisis, partly because of

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7. Former Director General in DG Employment from 2000 to 2005.

8. Source text : '[...] l'éventail des moyens s'est élargi et...il manque à la fois la volonté politique et une vision claire de ce que doit être la politique sociale communautaire'.

the lack of a new overarching concept to replace the OMC model of flexible convergence, the outcomes of which had not lived up to the expectations of those who supported this new approach (de la Porte and Pochet 2012).

There was just one positive point: the Youth Guarantee created in 2013. The purpose of this scheme, with a budget of six billion euros, was to provide guaranteed offers of placements, training or work after six months of unemployment. This was an acknowledgement that the crisis, in the vast majority of countries, had disproportionately affected young people. Many countries, particularly southern nations (Greece, Spain, Italy), had a worrying number of young people with no job and not in education or training.

In parallel, from 2013 onwards, the left-right balance started to improve. The left won elections in France, Italy and Denmark, and a left-right coalition government was formed in Germany in 2014. But this did not mean, as could be seen in France, a radical change in the social policy agenda. In this context, a number of new important strands emerged after the 2014 European elections and the setting up of a new Commission chaired by the Luxembourgger Jean-Claude Juncker.

### **3. A new start for the EU's social dimension? (2015–present)**

From 2015, the political situation was heavily overshadowed by the discussions on Brexit and by the June 2016 referendum in which British voters, by a small majority, voted to leave the EU. For the first time in its history, the EU might be going to shrink, rather than expand. The Brexit vote was also a vote rejecting non-social Europe and the free movement rules, which were viewed as too lax. From this angle, the shrinkage of the EU was indeed linked to its enlargement (Clegg 2017).

The populist vote against both the EU and migrants grew and grew. Some populist parties joined governments, as in Austria or Italy. In Central Europe, Lech Kaczyński's PiS party in Poland was anti-European and anti-migrant with no respect for liberal democracy, but it nonetheless emphasized social aspects, at least for nationals. This was a new phenomenon: many populist, far-right movements became pro-social, at least in their rhetoric. The migration crisis again highlighted a strong division within the EU (Krastev 2018). While the media focused mainly on the refusal by the Central and Eastern European countries to take their share of refugees, these countries were far from alone (see, for example, France or Denmark).

In national politics, an unprecedented collapse of social democracy was now taking place, particularly in Germany, Austria, France, Italy, the Netherlands and in Czechia. At the time of writing, only the Portuguese socialists and the British Labour party are doing somewhat better.

At European level, the European Commission under Jean-Claude Juncker was still imbalanced, with only eight social democratic Commissioners out of 28. As for the European Parliament, the EPP won the 2014 elections and remained the largest political group, although losing many seats. The S&D reached an all-time low. By contrast, the

anti-European parties grew in popularity. In a political context which had not changed fundamentally (a majority of right-leaning governments), doubts arose and fears multiplied as to the future of European integration. This led the Commission President, Jean-Claude Juncker, to launch (and to spread) the idea of a 'Triple A' social Europe, to show that the Barroso era and blind austerity were well and truly over.

The paradoxical outcome of this particularly difficult situation was the relaunching of discussions on the future of Europe, and in particular on its social situation. In 2018, the Commission published various scenarios and five documents on various aspects (social, monetary, military, cohesion, financing). This was not at all a structured plan to develop a strong social dimension; rather, it was a plan assessing the risk that the European project might collapse without a social dimension and evaluating the damage done to its public image by the years of austerity and the national social backtracking (which could also be measured in terms of votes for the populist parties). Initially, this planned Pillar was not supported by the whole Commission, nor by many governments, apart from as a symbolic act at European level (i.e. with no consequences nationally).

From 2017 onwards, the very pro-European words of the new French President Emmanuel Macron broke with a long tradition of blaming the EU for all problems. He presented a positive vision of greater integration, although he was unable to create a general pro-European atmosphere. Nevertheless, a higher turn-out at the European elections, as well as greater public support for European integration, could be indications of a possible change. One thing is certain: the previous stage, described by Richard Hyman in the *Bilan social* as the period of 'austeritarianism' (Hyman 2015), was now over, and discussions began on the nature of this 'beyond-austerity' period (Crespy and Schmidt 2017).

Unlike previous attempts to launch a European social debate, this discussion so far is confused, not clearly structured and, above all, lacking a central overarching concept. The notion of 'social investment' is being pushed in the public debate. This idea was partially adopted by the Commission in 2013, with its Social Investment package. It has been promoted and supported by a series of intellectuals close to centre-left think tanks, such as Anton Hemerijck, Bruno Palier, Frank Vandenbroucke and Gosta Esping-Andersen (for a general overview, see Hemerijck 2017). Nevertheless, reading through all 20 years of the *Bilan social*, there have been only three chapters dealing partially with social investment (Hemerijck 2014; Vandenbroucke *et al.* 2011; Sabato and Corti 2018). One of the key ideas is that social policy is an investment, particularly if its measures seek to prevent problems occurring rather than remedying them. The most typical example is that of early childhood: large-scale investments in this area could increase human capital, as well as reducing inequalities and interpersonal violence.

We are seeing, therefore, political initiatives taking very different approaches. As there is no guiding overarching principle, these are a series of rather inconsistent developments, summarised in the following paragraphs.

The first milestone in this relaunching of the social policy debate was the adoption, in November 2017, of a European Pillar of Social Rights bringing together a series of rights

and principles, grouped into three chapters (Sabato and Corti 2018; Ferrera 2018). In the words of the Commission, ‘the Pillar of Social Rights is about delivering new and more effective rights for citizens’. It is built upon 20 key principles clustered around three main themes: equal opportunities and access to the labour market; fair working conditions; social protection and inclusion. It contains all sorts of ideas, and refers to fifteen or so documents which are not well prioritised and are rather unclear.

There have been some proposals for directives, such as that on work-life balance or on transparent and predictable working conditions, a proposal for a regulation establishing a European Labour Authority, and a proposal for a recommendation on access to social protection; these constitute the outline of a work programme (Clauwaert 2018). The directive on transparent and predictable working conditions and the recommendation on access to social protection could be understood as measures aiming to guarantee certain minimum rights for workers – particularly, but not exclusively – in the digital economy. At any rate, these are initial attempts to consider the situation of work and working contracts in a digital economy which makes frequent use of bogus self-employment.

The Juncker Commission, moreover, decided to present an amended proposal for a directive on posted workers. This proposal generated strong tensions between some Member States who wished to see only minor changes and others more in favour of improvements. Finally, to general surprise, an amended directive responding to most of the criticisms made was adopted in June 2018 (Picard and Pochet 2018).

One second, maybe less positive, aspect of the situation was the position of European social dialogue (see also Tricart, this volume). The Commission and the Council have stated that they wish to relaunch this dialogue. In March 2015, a high-level conference entitled ‘A new start for Social Dialogue’ took place in Brussels, leading, a few months later, to the adoption of a quadripartite relaunch document (from the social partners, Commission and Council). The European social partners were able to sign an autonomous agreement on active ageing and an inter-generational approach, but this has received little public attention.

However, BusinessEurope’s refusal to negotiate in good faith the main Commission proposals (see above) with reference to the European Pillar of Social Rights<sup>9</sup> brought the negotiations between the social partners to an end. The ETUC then decided to put pressure on the Commission to proceed with as much legislation as possible by the end of the legislature (May 2019). This enabled it to influence several proposals, while the employers’ radical attitude left them completely sidelined in the discussions on implementing the European Pillar of Social Rights.

Sectoral social dialogue, however, has produced ever fewer texts, with even those which it did produce not binding. Moreover, the framework agreement on the protection of occupational health and safety in the hairdressing sector (2012 and 2016) and the

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9. BusinessEurope even claimed that the proposal for a parental leave directive could jeopardise national public finances to such an extent as to prevent them from respecting the Stability and Growth Pact.

agreement on information and consultation rights for central government administrations (2015) were not put to the Council for an *erga omnes* extension (i.e. to be converted into directives applicable to all, both employers and employees in the sector). In May 2018, the European Federation of Public Service Unions (EPSU) filed a formal complaint with the EU General Court against the Commission for its refusal to bring forward the sectoral social partners' agreement for implementation as legislation (see Tricart 2019).<sup>10</sup>

The issue of free movement, in terms of labour mobility, became highly topical (even before the waves of refugees arriving in summer 2015). In this context, the Commission proposed several directives on seasonal workers, on skilled workers (green card), and on people working in multinational groups. Clearly, labour mobility was regarded as one of the possible solutions to the employment crisis. Highlighting the differences of approach and vision between Member States, the issue that really split Europe, though, was the failure to achieve a European policy for accepting refugees and migrants. Various chapters in the *Bilan social* have addressed the issue of migration (Hassel and Wagner 2017; Ghailani 2017).

Finally, the issue of health and safety seems to have come back in from the cold, as highlighted by Laurent Vogel (2018), as has the issue of equality between men and women, or, rather, persistent disparities in pay and pensions.

One thing is clear: legislative proposals with social content are again being put forward, with most adopted during the first half of 2019. For this reason, the Juncker Commission is claiming that it has been one of the most, if not the most, socially-minded Commissions since the early 1990s.

The other area for action concerns the social issues linked to economic integration, with attempts being made to influence the rules on EMU. This is to be accomplished via a social scoreboard (covering 12 areas and aimed at giving the EMU more of a social aspect). Nevertheless, the social scoreboard proposed is, ultimately, nothing but a fifth set of indicators, following on from the Europe 2020 indicators, the indicators linked to the Macro-economic Imbalance Procedure (MIP), the employment indicators and the social protection indicators (exclusion, pensions, health). It is difficult, in these circumstances, to gain a clear idea of the impact of this new proposal (ETUI 2017). More generally, there has certainly been a 'socialisation' of the European Semester (to use the concept coined by Jonathan Zeitlin and Bart Vanhercke (2015), i.e. the Semester is being given greater social content). As indicated in the introduction, the OSE has always paid close attention to the players involved. Already in 2012, Bart Vanhercke (2013) described, in the *Bilan social*, a certain amount of 'under the radar' social policy activity, i.e. initiatives brought into the institutions, and in particular into the Commission, by European officials. This was the first article highlighting the gradual return of social issues in a period still largely dominated by austerity.

In addition, an intentionally ambitious European investment plan was adopted in 2015 and subsequently extended. Aside from the positive message which the Commission

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10. GC, *EPSU and Willem Goudriaan v. Commission*, case T-310/18.



wished to send, it remains unclear *in fine* whether this was ‘real’ new investment; see, for example, point 81 of the special report from the European Court of Auditors (2019). Moreover, the countries which needed it the least are those which have benefited the most (Myant 2015).

## Conclusion

This re-read of 20 years of European social policy has highlighted various stages. The current stage (since 2015) is still difficult to interpret: while a series of social policy initiatives have been adopted, there is no overall plan. Maybe the European Pillar of Social Rights could become the intellectual and strategic framework for a new phase of progress in EU social policy (Vanhercke *et al.* 2018). However, it seems a fairly poor candidate for this role, given its complexity and the mix of binding, non-binding, indicative and financial initiatives, as well as the jargon partially linked to the technical nature of the issues addressed and partially to the way in which it was presented by the European ‘bubble’.

The other potential overarching concept could be that of social investment; however, even after ten years of trying it has been difficult to spread this concept beyond the circle of a few convinced supporters.

One idea suggested by the author of this introduction is to adjust and rethink the social dimension, adapting it to the climate and digital transformations. This could become the new dominant paradigm, and the idea of ensuring a fair transition, particularly by reducing inequalities, could perhaps become the overarching idea for future policy. However, all this remains relatively vague, and it is not easy to clearly identify a coalition of players able to bring about such change (Pochet 2019).

We have also shown that European social policy is linked to national political situations and the left-right balance, even if the difference between these two extremes sometimes seems less clear. This basic element of political science has often been forgotten or sidelined in studies of European social policies. The fact that, in 2019, national governments are almost equally split between conservatives, liberals and socialists has clear implications for the allocation of posts (in the Commission, the Parliament, the European Council and the ECB). But it will also have an impact on the nature of any European social policies which may or may not be developed during this new legislature. The most significant conclusion, however, is that the purpose of the *Bilan social* has always been to accurately chart events which took place during the previous year, and thus to create a cumulative record and understanding of the various social and economic dynamics at play. It has succeeded in this. This re-reading of 20 years of the *Bilan social* shows the wealth of the material accumulated and the importance of reading it, or re-reading it, to obtain a historical and dynamic understanding of European social developments.<sup>11</sup>

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11. All the articles in the collection are available on the website of the European Trade Union Institute.

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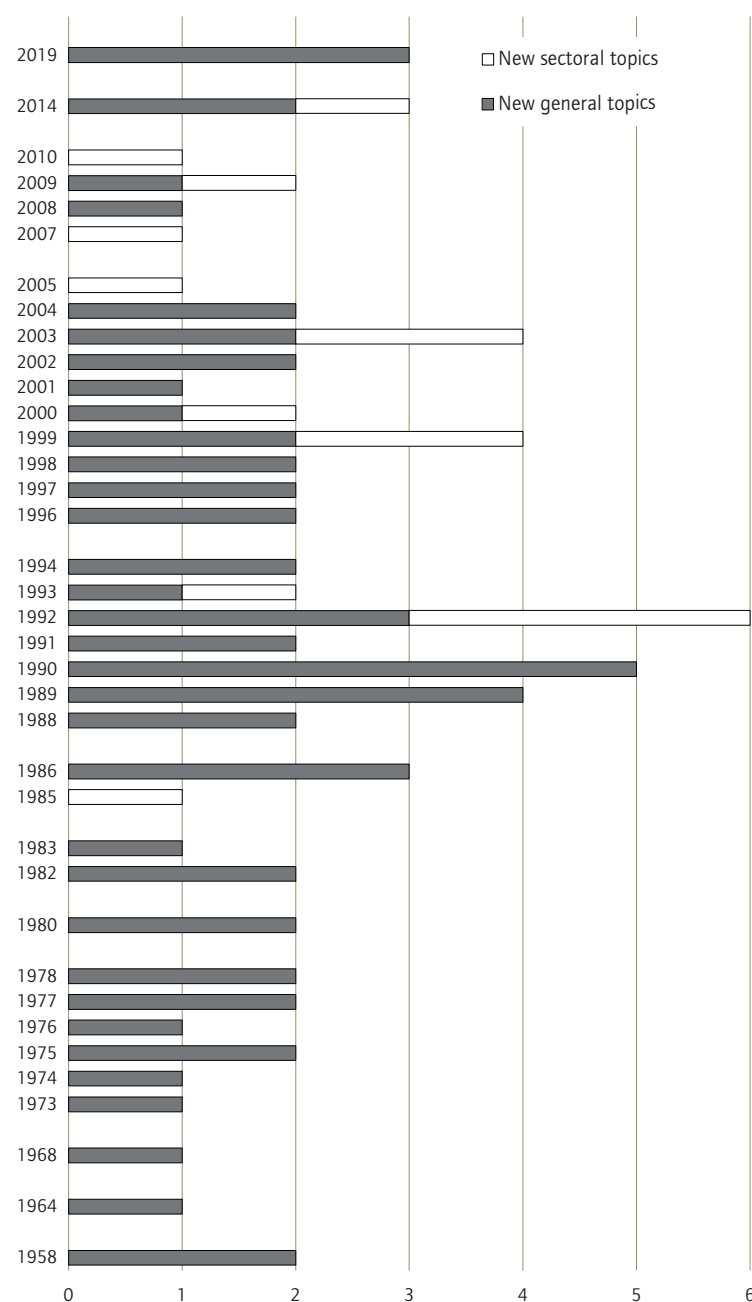
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## Annex

Figure 1 Comparison between new general directives and new sectoral directives



Source: Degryse 2020.

**Table 1** Number of centre-left governments (in March of each year) between 1994 and 2014, and number of EU Member States

Year	Centre-left governments	Total EU Member States
1995	7	15
1996	7	15
1997	6*	15
1998	8	15
1999	11	15
2000	9	15
2001	9	15
2002	7	15
2003	4	15
2004	9	15
2005	9	25
2006	9	25
2007	10	25
2008	10	27
2009	9	27
2010	9	27
2011	6**	27
2012	4***	27
2013	8	27
2014	11	28

Notes: \* The UK and France gained left-leaning governments in April and May; \*\* Austria, Cyprus, Spain, Greece, Portugal, Slovenia; \*\*\*Austria, Belgium, Denmark, Cyprus  
Source: Pochet 2019.



## **Chapter 2**

# **Two decades of change in Europe: post-crisis social policymaking in the EU**

**Amy Verdun and Valerie D'Erman**

### **Introduction**

The European Union's contextualization of 'social policy' is contained within the realm of employment and social affairs. As such, social policymaking is fundamentally intertwined with the employment opportunities and prospects for people living and working in the Member States (Cram 1993, 1997; Hantrais 2007; Daly 2019). This understanding of social policy – which emphatically links social rights to education, training and labour market opportunities – is partly the result of the mixed competences of the EU in this area, with Member States responsible for most archetypal social welfare policies such as providing social assistance, unemployment benefits, pensions, health care and education. The EU, by contrast, is mostly involved in those dimensions of social policy that have an impact on the functioning of the single market, namely in the realm of employment (Gold 1993; Rhodes 2010). These dimensions include health and safety at work, coordination of social security systems, and the rights of mobile workers within a mobile labour market, all of which were driven first by the push for market integration and later by the need to build a common foundation to support the free movement of workers in an expanding single market (Falkner 1998; Anderson 2015).

Whereas this broad division of competences between the national and EU levels largely left the more visible applications of social policy – i.e. those to do with direct benefits or services – with Member States, the interaction between domestic and supranational levels of competence became increasingly fuzzy with the onset of deeper integration triggered by EMU (Economic and Monetary Union). National fiscal policies, which critically highlight taxation and spending decisions, have come under increased scrutiny as the EU has developed new forms of economic governance in the aftermath of the financial crisis (Verdun 2015; Chang 2016). The new era of EU economic governance sees supranational institutions (European Commission, Council of the EU and European Council, European Central Bank) being given increased powers of scrutiny and the ability to make recommendations on national budgets, as well as to issue stricter warnings and penalties to EMU members in breach of the debt and deficit levels set by the Stability and Growth Pact (SGP) (Savage and Verdun 2016; Savage and Howarth 2018). The effects of EMU are thus indirect but potent: while supranational prescriptions for national budgetary decisions have the purpose of maintaining the stability of the euro, domestic political debates on how to achieve compliance with SGP criteria almost always involve deliberations over where public spending should



be reduced, with social welfare policies a frequent source of contestation (Heipertz and Verdun 2010; Blyth 2013; Schiek 2013).<sup>1</sup>

The scope of the EU's social policy was initially strictly limited (Collins 1975). The designers of European integration, largely concerned with post-war reconstruction, assumed that social progress and steady increases in the standard of living could be achieved through supranational economic cooperation (Vandenbroucke and Vanhercke 2004). Article 2 of the Treaty establishing the European Economic Community (EEC) saw social policy as a by-product of economic integration with its twin purposes of maintaining a level playing field for employers and avoiding social dumping. The decisions taken within the EEC set in motion institutional precedents for the social dimension in European integration that have since proven difficult to adjust (Falkner 2013). The assumption was that economic growth would lead to social cohesion, with regulations at Community level spurring harmonization of social policies concerning working conditions for the purpose of establishing a cohesive labour market. At the same time, the tangible tools of direct social benefit payments and benefit conditions were to be left firmly under domestic control. This approach to social policy-making has essentially stayed the course over the years, with the result that EU governance has amassed a sizable set of regulations and directives, while Member States continue to display a great deal of variance, both in terms of welfare state systems and the application of EU social legislation (Hemerijck 2002; Scharpf 2002).

However, since the introduction of the euro as the Eurozone's single currency and the 1999 establishment of a single monetary policy governed by the European Central Bank (ECB), the incomplete federal character of the EU as a governing polity has become increasingly apparent.<sup>2</sup> This is largely the result of the 'asymmetrical' nature of EMU (Verdun 1996, 2000, 2003, 2013a), where monetary policy is the competence of the supranational level, while fiscal policy remains the competence of Member States, and where economic policies are fuzzily positioned between the two. The inherent tension of this asymmetry came to the fore during and after the financial crisis. Eurozone governments, while entirely responsible for fiscal policy decisions on taxation, public spending and welfare state benefits, have no control over monetary policy, leading to contestation over whose expertise has the most weight in decisions surrounding domestic debt and deficit levels. ECB recommendations for financial austerity frequently clash with domestic needs for higher levels of public spending on social programmes. In this sense, it is reasonable to suggest that monetary policy has certainly become one of the more visible, and politicized, areas interconnecting the two dimensions of economic and social policy (Scharpf 2009).

1. Even in the years prior to the financial crisis, the SGP and its excessive deficit procedure were a major source of contention (see Heipertz and Verdun 2004).
2. The federal character of the EU has been long-debated by scholars and politicians: while some assert that the EU's scope of policymaking and the clear partitioning of responsibilities between community and national levels is essentially a federal design in an unconventional political form (Burgess 2000; Kelemen 2003; Verdun 2016), others argue that the Member States are still legal states within the international state system and that the EU does not hold exclusive competence over key policy areas (such as security and defence) normally the purview of central government in a federation. As such, the labelling of the EU as 'federal' is less accurate and more political in its characterization of what the EU is than what it ought to be (Burgess 2000; Kelemen 2003; Verdun 2016).

The evolution of social policy within the context of European integration has been examined by scholars through various theoretical lenses. A neo-functionalist perspective, which holds that the pressures of existing successful integration efforts encourage spillover into other areas, argues that developments in the EU social dimension are largely the product of necessity, as social issues become increasingly difficult to avoid in a single market (Leibfried and Pierson 1992; Jensen 2000). An intergovernmentalist approach, by contrast, identifies the national level as the locus for social policy decision-making, making developments at supranational level the product of deliberate bargaining and negotiation rather than the result of spillover. This perspective is fundamentally at odds with the neo-functionalist tenet that integration could develop into a fully-fledged European federation – or, a full-blown EU welfare state (Cram 1993; Streeck 1995; Graziano and Hartlapp 2019). In addition, EU social policy has been portrayed as only partially understood through those two lenses, with a need to supplement them by a cognitive dimension (Falkner 1998) – something that, among others, the founding fathers of neofunctionalism had already advocated (Haas 1964; Lindberg and Scheingold 1970).

Taking this into account, EU social policy is also the result of new ideas gaining prominence in international issue areas. In the realm of EU social policy, social partnership – the treaty-based institutionalized cooperation between peak EU associations of unions and businesses – is a critical component. Further institutionalised under the Delors Commission, European social dialogue now encompasses a tripartite dialogue involving public authorities as well as a bipartite dialogue between employers and trade unions at both sectoral and cross-industry levels (for a critical discussion of the state of play of European social dialogue, see Tricart, this volume). These dialogues are backed by a treaty-based competence to adopt agreements which are then given binding effect via legislation on or relating to industrial relations, but have little instrumental effect to date on issues pertaining to more general social protection at supranational level (Ferrera 2003). In the EU context, social policy is penetrating national areas of competence through ‘new modes of governance’, which include steering instruments (such as the Open Method of Coordination (OMC), which relies on the sharing of best practices and the diffusion of knowledge through the systematic publication and evaluation of policy results) and interpretative and decisional instruments which can be generalized as a form of quasi-legal setting of benchmarks without legally-binding force (de la Porte and Pochet 2002; Jacobsson 2004; Trubek and Trubek 2005; Dawson 2009; MacRae and Wood 2018).

To some extent, many scholars view EU social policy as lacking progress, whether because European integration is dominated by market-based incentives, because of the institutional limitations of EU governance with its divided and mixed competences, or because assessments compare (even if unwittingly) the EU’s social *acquis* with established welfare states (Cram 1994; de la Porte *et al.* 2001; Daly 2006; Daly 2012; Vanhercke *et al.* 2017). In addition, persistent criticism of the EU’s technocratic character (Radaelli 1999) and perceived democratic deficits (Schmitter 2000; Hurrelmann 2018) have at times reinforced political arguments among different stakeholders as to whether the supranational level even ought to be considered the appropriate forum for assessing developments in the social realm and applying solutions (Crum 2015). In addition

to analyses of the strengths and weaknesses of EU governance on the development of supranational social policies and regulations pertaining to the social dimension, other factors influencing social policy development include issues common to many parts of the world: demographic change (falling birth rates, aging populations, greater migration), labour market changes (a decline in manufacturing jobs, an increase in service jobs, and the digitalization of the economy), and changes in industrial relations (union membership going down throughout the industrialized world). All of these factors simultaneously underscore the need for comprehensive social policies while exacerbating the economic pressures undermining them.

Particular to the EU in the past twenty years, various kinds of ‘crises’ have impacted the durability and character of European integration. A wealth of literature expounds on the oft-quoted Jean Monnet statement that Europe will be forged in response to crisis, whether because a crisis presents a political window of opportunity for building upon existing mechanisms of integration or because of the shared view that a supranational structure offers a viable solution to the risk at hand (D’Erman and Verdun 2018). In particular, work on specific events labelled as crises illustrates the social constructions at work at both national and supranational levels in shaping the perception of risk (whether environmental, economic, political, security, etc.) and its potential impact on EU Member States. This body of work includes not just the more recent sovereign debt crisis resulting from the 2007 global financial crisis and the migrant crisis which reached its height in 2015 (D’Erman and Verdun 2018; Fabbrini 2016), but also the earlier ‘Empty Chair Crisis’ of 1965, or the crisis of the failed Constitutional Treaty of 2005 (Ludlow 1999; De Witte 2005).

Bringing the ‘crisis’ context into the discussion on ‘Social Europe’, the remainder of this chapter outlines the effects of recent crises on the institutional landscape of social policymaking in the EU with a view to highlighting how the social domain is simultaneously intertwined with, and subservient to, the forces of EU economic governance. Section 1 provides an overview of social policymaking in the EU. This includes a synopsis of the major institutions and players in the social domain as well as a discussion of the impact of the Eurozone crisis on social policy issues and its role in shaping the institutional decision-making landscape within European governance. Section 2 offers a summary of more recent changes to EU economic governance for the purpose of illustrating how the social domain is situated in the institutional framework. Section 3 discusses challenges to Social Europe, including the multi-fold crises facing the EU. The conclusion offers tentative prescriptions on how the social profile of the EU might be better leveraged in the existing institutional framework.

## **1. Social policymaking in the EU: key steps and debates**

The origins and evolution of social policy at European level are rooted in the notion of market correction, as illustrated by the following three examples of treaty articles. First, Article 2 of the 1957 Treaty establishing the European Economic Community, or the Treaty of Rome, framed the goal of ‘social progress’ as a by-product of economic policies – both in the sense of the need to reduce barriers to economic integration,

and in the sense of market growth facilitating higher standards of living. The concrete measures that resulted from the EEC Treaty in the field of social policy dealt only with avoiding social dumping caused by disparate national labour standards, and promoting the free movement of workers and non-discrimination measures (Hoskyns 1996).<sup>3</sup> While Member States retained control of their domestic welfare state policies, the European level was assigned responsibility for coordinating and harmonizing workforce-related incompatibilities for the sake of market integration (Collins 1975; see also Cornelissen and De Wispelaere, this volume, for a discussion of 60 years of social security coordination). Second, the Jacques Delors Commission produced the 1989 Social Charter and the 1992 Agreement on Social Policy, both of which were annexed to the Protocol on Social Policy of the 1992 Maastricht Treaty that came into force in November 1993. These developments marked the first instances of social policy being pursued independently of economic integration. Moreover, although the Social Charter initially remained non-binding, its incorporation into the Maastricht Treaty gave social policy a stronger legal foundation (MacRae and Wood 2018). Third, the Lisbon Treaty as it came into force in 2009 extended the EU's social dimension in scope and objectives, though it still assigned jurisdiction for most policies to Member States. The Treaty (see Article 6) gave the Charter of Fundamental Rights the legal backing needed to ensure that social rights are upheld by national judges and established the requirement for EU policies and activities to correspond with the overarching goals of high employment, the guarantee of adequate social protection, social inclusion and high levels of training, education, and health (TFEU 2007). Examples of directives proposed by the social partners in their treaty-based roles include (but are not limited to) directives on working-time, equal pay for equal work, non-discrimination of workers, workplace health and safety requirements, parental leave, and the right to the information and consultation of workers (MacRae 2010; Bekker 2014; Dawson 2015).

More recently, the Juncker Commission proposed the European Pillar of Social Rights in April 2017, a non-binding framework of 20 principles related to effective rights for citizens in the areas of equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. Proclaimed by the European Council and the European Parliament in November 2017, the stated aim of the Pillar was to put the discussion on the future of Social Europe at the centre of the Commission's broader White Paper on the Future of Europe with a view to developing a cohesive collective response to the transformation of European societies and the worlds of work (European Commission 2018). Nevertheless, the motivation for the Pillar is still within the paradigm of economic growth: 'The social dimension of the EMU is seen as a technicality much more than as a founding value and principle of the European Union, in particular when it comes to achieving social progress, full employment and a high level of protection. The Commission's words are clear: the Pillar is an economic necessity (and not a political or social imperative!)' (Lörcher and Schömann 2016: 6).

While the core institutions play a key role in designing and legislating on the EU's social dimension – i.e. where directives and enforcement reinforce the policy at hand

3. See also Guerrina (this volume), who refers to the market rationalities for integrating the principle of equality in European law.

– much of its non-legislative side is handled by societal players and within frameworks of steering instruments (Senden 2005). The Commission, Council, and Parliament, as well as the committees and groups embedded within each of the institutions dealing with social affairs and employment, are all key players in proposing and formulating policies, along with the national and regional governments of EU Member States. The Court of Justice of the EU has also played a significant role in clarifying and enforcing social legislation (Leibfried 2010; see also Garben, this volume; Cornelissen and De Wispelaere, this volume), as seen in the fields of non-discrimination (Conant 2002; Cichowski 2009), labour law (Ashiagbor 2001), the mobility of social rights such as health insurance and pensions (Greer 2008), and the rights of employees and employers for cross-border collective action (Feenstra 2017). However, the field of social policy has brought to the fore other modes of governance to address issues for which the EU either does not have direct competence or is not directly involved (Tömmel and Verdun 2008). Embedded at both EU and Member State levels, the social partners, comprising unions (or other groups representing employees) and business or employer organizations and associations, have both sector-specific and cross-sectoral characteristics. The Treaty of Maastricht established a strong procedural role for the EU-level social partners through the formalization of EU-level social dialogue, a role utilized by the social partners to advance issues and further build a strong social policy community (Falkner 1998; for a critical appraisal of EU social dialogue, see Tricart, this volume).

The somewhat indirect approach towards developing the social dimension in support of the larger project of European integration has instigated important forms of soft governance, which advance social policy developments through benchmarking and best practice mechanisms. These include the OMC and its predecessor, the European Employment Strategy (EES), the effectiveness of both of which is unclear as they rely on systems of self-reporting and ‘naming and shaming’ (Pochet 2005; Zeitlin 2010; de la Porte and Pochet 2012; Copeland and ter Haar 2013). Though the contribution of social dialogue and the OMC towards inserting the social dimension into economic policymaking is important and cannot be understated, the utility of such approaches is arguably undermined by the lack of formal mechanisms for monitoring and enforcing many issues. As such, social policy integration has often been labelled a ‘laggard’, due to the fact that issues not directly related to employment or labour markets are still largely in the competence of Member States (Falkner 1998: 198; Anderson 2015).

The sovereign debt crisis of EMU members which emerged in late 2008 in the wake of the 2007 global financial crisis led to European politicians and policymakers focusing their attention on economic stability and crisis management. The crisis caused increasing levels of unemployment, poverty, and social exclusion (Schimmelfennig 2018), leading to mounting pressure on social spending in several countries. The crisis thus became, albeit indirectly, a secondary crisis of social policy. The EU faced a twofold challenge: *did the crisis present an opportunity to embark on a more ambitious goal for Social Europe, with more comprehensive integration and development of social welfare policies across the community? Or did the crisis necessitate a stark re-evaluation and restructuring of the Eurozone with an eye to maintaining economic competitiveness and financial stability in a competitive global market?* Some research has identified the crisis as not only having been negative about the prospect of developing a stronger Social

Europe, but also in having downgraded the existing level of social rights for workers and citizens (Crespy 2015; Crespy and Menz 2015a, 2015b, 2015c; de la Porte and Heins 2016; for a different view, see Bekker 2014). Others point to pre-existing flagship initiatives as helping to derail the possibility of a progressive post-crisis embracing of Social Europe because non-legislative instruments, such as Europe 2020, were already in place and could easily be incorporated into new coordinating mechanisms aimed at strengthening EU economic governance (Armstrong 2012). One prominent example (cf. Chung *et al.* 2012) was the issue of youth employment in increasingly flexible labour markets, where the authors found that the supply-driven policies of the Europe 2020 strategy served the purpose of meeting the EU's job-creating measures but had little impact on the high levels of social exclusion experienced by youth trying to find first-time or long-term employment in an economic climate of reduced state support.

Taken together, a general assessment of the scholarly work on the post-crisis nature of the EU's social dimension reflects a longstanding concern in the literature that EMU would lead to social dumping and a race to the bottom in social welfare standards (Verdun 2000). The immediate austerity-driven policy mandates prescribed to Member States receiving bailouts reinforced this concern, as well as a broader perception of the EU's 'neoliberal' agenda (Blyth 2013; Verdun 2013b). To date, studies analysing the role of EMU in potentially supporting or undermining the social dimension of the EU focus mostly on the prescriptions made within the new coordinating mechanism of the European Semester (discussed in Section 2 below) and are nuanced in their findings. This body of research does *not* show that the EU and its institutions are imposing a more market-oriented approach in an undifferentiated manner on all Member States. Indeed, many recommendations entail structural reforms related to social spending levels and social inclusion goals. At the same time, this research also does not find any newer emphasis or ambition at the supranational level to seize the opportunity for a strong commitment to the EU's social dimension (Crespy and Vanheuverzwijn 2019; Estathiou and Wolff 2018; D'Erman *et al.* 2019; Haas *et al.* 2020).

## **2. The institutional architecture of the EU after 20 years of EMU**

Broadly speaking, the institutional architecture of the EU has undergone significant changes in the past 20 years (Enderlein and Verdun 2010; Verdun 2018; Howarth and Verdun 2019). This contribution concentrates solely on regime changes related to EMU and the Eurozone at large, illustrating how developments in the realm of economic integration necessarily impact the character of the EU's social domain. While there are numerous possibilities for analysis in this respect, we outline here the development of the European Stability Mechanism (ESM), the European Semester (ES), and the respective roles of the Directorate Generals (DGs) for Economic and Financial Affairs (ECFIN) and Employment, Social Affairs and Inclusion (EMPL). These three facets of the current institutional architecture of the EU offer insight into how the role of social policymaking in the EU is secondary or subservient to the still dominant economic paradigm.



In 2010, the European Council approved an emergency financial assistance package for those Eurozone Member States in financial difficulties. Called the European Financial Stability Facility (EFSF), this special-purpose vehicle was initially designed as a temporary mechanism against the background of a potential Greek default and was modelled on the financial support programme known as the Greek Loan Facility agreed in May 2010 (Verdun 2015). In 2011, the European Stability Mechanism (ESM) was introduced as a permanent institution to replace the EFSF while continuing to provide financial assistance to Member States. Firmly positioned outside the EU treaties, this intergovernmental treaty was ratified by Eurozone Member States in 2012 as a permanent firewall, where necessary providing bailouts to Eurozone members. The ESM reflects the consistent EU history of players taking piecemeal steps to deeper integration in response to crisis. It also reflects the ability of Member States to reach consensus on strategic yet contentious issues while still maintaining intergovernmental authority. The ESM institutionalizes the competence of national governments for financial decisions, rather than delegating competence to the Commission or other supranational institutions. Similar in style to the juxtaposition of a single monetary policy being delegated to the supranational level while fiscal policies remain firmly entrenched at domestic level, the development of the ESM reflects the same twin forces of deeper integration and strengthened national competence over public finances. For the purposes of the EU's social dimension, this style of response to crisis, where divergent preferences lead to lowest common denominator solutions maintaining the probability of future crises – what Jones *et al.* (2016) describe as a process of ‘failing forward’ – has important implications for explaining the development of social policies, particularly when considering the social aspect of labour (e.g., non-discrimination, working time, health and safety) versus other forms of social protections (e.g., healthcare, old-age pensions).

The European Semester, instead, in its overarching orientation, bears a certain resemblance to the use of OMC and best-practice benchmarking in its effort to better coordinate fiscal and economic practices among Member States (Verdun and Zeitlin 2018). Formalized in 2011 as a key component of the Europe 2020 strategy, the Semester is a coordinating mechanism used to provide regular macro-economic, budgetary and structural policy recommendations to Member States. It also incorporates tools to monitor responses to recommendations. While the Semester's tools and monitoring capacity are arguably more developed (a central example here being the annual Country-specific Recommendations (CSRs) issued by the Commission to Member States and ultimately adopted by the Council of the EU)<sup>4</sup> than the ‘soft law’ approach inherent in the OMC, the two mechanisms are similar in their emphasis on prescription and in their distance from direct authority. Such regulatory approaches highlight the use of national contexts in responding to recommendations for a uniform scheme of adoption (de Búrca and Scott 2006). While the fiscal and economic prescriptions are undoubtedly the Semester's dominant ones, the CSRs also include prescriptions for social policies, for instance for pensions, healthcare, unemployment support, active labour market policies, childcare, education, long-term care, and increased protections for the most vulnerable.

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4. This includes tools related to the Macroeconomic Imbalance Procedure: *inter alia* alert mechanisms, scoreboards, and the Excessive Deficit Procedure with its possibility to levy sanctions or fines.

Whether the Semester is an example of a ‘socialised’ macro-economic tool (Zeitlin and Vanhercke 2018) or simply an example of economic integration by stealth (Schmidt 2016) is up for debate. Aside from this debate, the emphasis in both the Semester and the OMC on voluntary national reporting and self-directed accountability to an EU-level perception of best practices is such that the design of the Semester seemingly institutionalizes the EU’s less prescriptive approach to social policy regulation, even in such sensitive areas as healthcare (Dawson 2015). This emphasis on voluntary self-reporting also highlights EU efforts to combat a public or political perception of the Semester as being overly centralized and bureaucratic through stressing its ‘ownership’ by Member States (Vanheuverzwijn and Crespy 2018). However, early research on the European Semester and the prescriptive CSRs suggests that, despite the breadth of policy recommendations and the attention paid to the social dimension, in most cases it is the recommendations on the budgetary policies of Member States that carry the most weight (Copeland and Daly 2018). This offers a further avenue of comparison for the above discussion on recent crises affecting the EU. The call for communal action instigated by Member States in response to the financial crisis differed enormously from the more self-protectionist responses to the migrant crisis (Schimmelfennig 2018). While it might be overly simplistic to state that these responses are simply the product of the pressures inherent to a global capitalist system, it remains a worthwhile observation that the migrant crisis did not compel the same volume and urgency of reactions at either the national or supranational level that the euro sovereign debt crisis did.

A third assessment of the impact of the EU’s institutional architecture on the social domain is the composition and status of various DGs within the European Commission. The notion of certain policy portfolios being considered more important than others is familiar practice within Member States themselves. Comparing the changes in DGs – particularly in the contrast between ECFIN and EMPL – over the past 20 years underscores the impact of the EU’s institutional behaviour on the abilities of decision-makers to make social affairs more visible. Both ECFIN and EMPL gained surveillance capacities during and after the sovereign debt crisis; moreover, both were assigned more staff, revamped their organizational structures and deepened their horizontal and vertical coordination efforts with other DGs (Savage and Verdun 2016). Looking at the *amount* of change and growth, one might conclude that EMPL gained more in terms of its growth in enhanced surveillance responsibilities (*ibid.*). While true in quantity, the substantive changes in capacity point to an intentional redesign of EMPL (along with other DGs) undertaken in support of the overarching macroeconomic coordinating procedures within the European Semester; i.e. while the volume of changes in EMPL is notable, the bulk of these changes sought to make EMPL more relevant for and compatible with macroeconomic objectives. ECFIN remains the preeminent Commission department for Eurozone oversight, budgetary affairs and economic stability, and as such was centrally positioned to expand surveillance activities in response to crisis. The initiation of the European Semester presented EMPL with country desks tasked with the monitoring and surveillance of all matters relating to employment and social affairs (Savage and Verdun 2016). The core motivation for this change was, however, to address the financial crisis and establish systems to prevent (or at least better manage) future economic instability.



### 3. Ongoing challenges to 'Social Europe'

While social policy has always been at the nexus of EU policies and developments, events of the past ten years have spurred a large amount of work on the character of particular crises, their effects on EU policies and Member State compliance, and the ideological underpinnings of European integration (Börzel 2016; Dinan *et al.* 2016; Vandenbroucke *et al.* 2017). These events include the financial crisis, the migrant crisis, Brexit and the rise of nationalist sentiment in many Member States. Below, we offer a quick summary of each event with a view to outlining the challenges – and, in some cases, the opportunities – for the EU's existing social policy framework.

The global financial crisis that began in 2007–2008 and quickly developed into a sovereign debt crisis in many EU Member States is arguably one of the more visible and important large-scale events influencing the existing institutional framework of the EU's social dimension. That this crisis had that kind of effect was in part due to the longstanding emphasis on economic integration as one of the founding pillars of the European Community, to a very large extent due to the specific features of the single market and the consequences of EMU. Once the effects of the financial crisis hit EU countries, the entire Eurozone was at risk. It quickly became apparent that the supranational level – despite the authority and leadership of the ECB and the reality of a common monetary policy – did not have ready-made tools to tackle the crisis, or even to stop its contagion. Instead, the Member States collectively, via the Council of the EU (along with the ECB and the IMF), initiated stopgap measures to prevent the short-term bankruptcy of Member States, Greece in particular. The ECB reverted to monetary easing and to declaring that it would do 'whatever it takes' to support the euro (Verdun 2015). In the longer term, the EU developed new tools at the supranational level which, while not fundamentally tackling the asymmetry of EMU, at least provided more comprehensive coordinating mechanisms to prevent a recurrence of the more severe financial imbalances that left the Eurozone so vulnerable in 2007. In its own way, the EU expanded the role of supranational economic coordination somewhat with the development of the European Semester, the European Stability Mechanism and the Banking Union (Bauer and Becker 2014; Savage and Verdun 2016).

The effects of the sovereign debt crisis on social policy were threefold. First, the austerity measures prescribed by the troika of decision-makers triggered public and political reactions against the perceived economic dominance and technocratic character of Eurozone governance. Prescribed for those countries subject to an Economic Adjustment Programme, these measures saw a retrenchment of social protections, along with sharp drops in employment rates which were particularly severe in Greece and Spain. The ability of the EU level to prescribe the quality of domestic public spending (which in some cases involved the prescription of austerity) through financial rescue packages, and the willingness of Member States to attempt to enact them, underscores the shared perception of the importance of maintaining the credibility of the euro (and, by proxy, the key role of economic integration), even at the cost of key domestic social welfare benefits. Second, at the same time that austerity measures were taking place, the EU initiated the European Semester (ES) as a coordinating mechanism monitoring the economies of EU Member States. Indeed, the ES now also monitors national spending on social policies

(see Graziano and Polverari, this volume). This spending includes contributions to pensions and healthcare as well as measures addressing social inclusion. The third result of the Eurozone's financial instability is most visible when contrasting it with the migrant crisis: the collective response of EU members was, in hindsight, relatively quick and unified, recognizing the dangers of the crisis and displaying a willingness to respond through community measures (Lavenex 2018; Schimmelfennig 2018).

The influx of refugees from the Middle East via the Mediterranean and overland gained a crisis label when the sheer numbers entering the EU in 2015 reflected a 100-800% increase in asylum applications over the previous year (Eurostat 2016). The free movement of people within the Schengen Area meant that those entering the EU were free to move on from the country of asylum processing. Perceptions of crisis, the labelling of 'migrants' versus 'refugees' and potential responses to the situation varied enormously among Member States. Some EU countries were more welcoming to refugees and migrants than others, à la Chancellor Merkel's '*Wir schaffen das*' statement in 2015 (Mushaben 2017), some were in support of the Commission's proposal to introduce a quota system for redistributing the high numbers of asylum-seekers, while others were quick to respond with the re-instatement of national border protections. These varied reactions exemplify the inextricable linkage between economic and humanitarian concerns, and the politicization of multiple perspectives on potential responses to these concerns.

Put simplistically, one perspective on the migrant crisis highlighted the economic cost to Member States of accommodating the high volume of migrants (Poddar 2016). This reality put domestic social policies at the forefront of any argumentation about the cost and benefit of hosting migrants (especially asylum-seekers), particularly in states such as Greece where public spending had already been heavily retrenched due to austerity measures. The political argument related to this line of thinking was that taking in refugees put a strain on welfare state services, reinforcing the notion of social protections and social services being a national competence. By contrast, some Member States recognized the advantages of gaining a supply of young workers to help tackle the growing shortages of labour at home, while a more humanitarian perspective indirectly attended to social policy by highlighting the concept of basic social responsibility and social conditions for people on European soil. Another effect of the migrant crisis indirectly related to the EU's social domain has been the spurring of nationalist political debate, either via identity politics or via anti-EU sentiment as a result of the proposed quota system.

To what degree the rise of nationalist politics and populist strategies constitutes a crisis, as opposed to a short-lived electoral trend, remains unclear (Copeland 2015; Müller 2016; Zielonka 2017). Whatever the case, a notable feature of many present-day nationalist and far-right political parties in EU Member States is their upholding of a strong welfare state. In contrast to the more conventional centre-right conservative parties, many nationalist far-right parties have aggressively pursued platforms promising enhanced social benefits and rejecting austerity measures, while frequently

declaring that welfare state deliverables should only be given to those 'belonging' to the country.<sup>5</sup>

Irrespective of the devastation it might produce in the short and medium term, Brexit – which at the time of writing remains unrealized – could produce opportunities both for the UK and the EU (Cini and Verdun 2018). The longstanding role of the UK as the eurosceptic Member State – as evidenced for instance by the social policy opt-out in the period between the 1992 Treaty of Maastricht and the 1997 Treaty of Amsterdam as well as its rejection of the single currency – served as a useful shield for other countries which resisted political integration while applauding heightened economic integration. Often considered a crisis, the Brexit vote might be more aptly portrayed as a shock, as the 2016 referendum provided the first major blow to enlargement in the history of post-war European integration (Cini and Verdun 2018). Depending on the timing and conditions of the UK's ultimate exit, opportunities for changes in the style and substance of supranational governance could arguably result. With regard to social policy, where the UK long offered consistent resistance to EU regulations on working time and other areas of governance related to employment and social affairs, Brexit possibly holds relevance for the possibilities for political negotiation after the UK's divorce from the EU (Hantrais *et al.* 2019). At the very least, Brexit has served to highlight the social roots of political discontent with the EU (Clegg 2017). Going forward, if Brexit does finally take place, it may also have unforeseen implications for social policy developments in the EU, the EU Member States and the UK (Hantrais 2019). In fact, at the time of writing, there are early reports<sup>6</sup> that a Conservative government, despite promises, might downgrade social standards in the UK soon after leaving the EU (*Financial Times* 2019).

Taken together, the above events are each frequently labelled as 'crises' but might be more accurately portrayed historically as 'critical junctures'<sup>7</sup> for the wider direction and scope of European integration at large (Natali and Vanhercke 2013; D'Erman and Verdun 2018). In the context of the EU's social dimension, which has largely encompassed only those policies most relevant to the single market (i.e. those touched upon by factors affecting the free movement of labour), these critical junctures highlight the association of 'social' with 'political' for many EU players. This was particularly visible in the aftermath of the sovereign debt crisis, where the question of public social spending became politicized with discussions of austerity measures, but is also relevant for the debates surrounding the acceptance and integration of migrants and the far-right nationalist projection of what constitutes a social community. It has raised the question of what kind of union the EU ought to become, as well as making the question of social investment feature more prominently in academic writing on European integration (Vandenbroucke *et al.* 2011; European Commission 2013; de la Porte and Natali 2018). EU-level responses to

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5. Research on the idea of 'welfare state chauvinism' is relevant here; for example, see Finnsdottir and Hallgrímsdóttir (2019) on the Danish People's Party, the Norwegian Progress Party and the Swedish Democrats.
  6. One of these reports is a leaked paper entitled 'Update to EPSG on level playing field negotiations', which, according to the *Financial Times*, states that the UK 'was open to significant divergence' (*Financial Times* 2019).
  7. This term comes from the historical institutionalist approach to political development. Political stakeholders are embedded in institutionalist paths as a product of historical circumstances and the notion of increasing returns. Crucial moments, whether unexpected or foreseen, can sometimes serve to point institutional paths in unintended directions (Pierson 2000).

crises were all (to some degree) designed as piecemeal tools in response to the most salient aspects of different crises. The lack of political integration, whether due to the non-existence of financial union, a lack of shared perceptions on the question of asylum-seekers or the lack of a cohesive understanding of the position of social policies within the EU's regulatory scope of authority, has important implications for the development of the social domain in the overall institutional architecture of the EU.

## Conclusion

The past 20 years have brought new challenges for social policy and policymaking in an EU still dominated by economic considerations. EMU, the expansion of the Eurozone and the sovereign debt crisis have accelerated the formation of new institutional structures both reinforcing some areas of existing intergovernmental architecture and creating new competences at supranational level. However, these developments did not include a fuller experiment with a European Social Model – even though this had been expected and advocated by scholars, unions and policymakers concerned about the EU's weak social footprint (see among many Verdun 2000; Magnusson and Stråth 2001; Martin and Ross 2004; Jepsen and Serrano Pascual 2005; Vandenbroucke 2013; Schiek 2013). Especially given the very visible effects of the financial crisis and austerity measures on unemployment levels and public services in those EMU Member States hardest hit by the sovereign debt crisis, some of these advocates were hoping for more forceful action on the part of the EU to invest in and further develop the European Social Model. However, the new institutional frameworks set up during the crisis, notably the European Semester's surveillance and prescription procedures, necessarily brought more areas of social policy to the fore, particularly those to do with social inclusion, labour market participation and the adequacy of social protection benefits. These changes were largely made for the purpose of maintaining the strength of the EU single market and asserting financial credibility to global markets. By contrast, the migrant crisis of 2015 did not spur a similar set of institutional changes to the same degree, nor did it significantly raise the profile of social inclusion within the Commission or other decision-making bodies. Other recent challenges to the EU, such as Brexit and rising nationalist sentiment in political debates, are set to have a mixed impact on the social dimension of EU decision-making, as the degree to which either challenge might portend deeper discussion is intertwined with the tensions inherent in the EU's style of governance. If the UK does indeed leave the EU, then a historically strong opposing voice will leave the Union as well. This situation may make it easier to conjure up social packages acceptable to all.

Prospects for the EU's social dimension depend, as always, on the political negotiations and developments underlying integration (Bailey 2017). As welfare state policies vary widely between Member States, proposals for deeper integration in the social realm (for example, a 'European Social Union') require deliberate political action (Ferrera 2018; Hemerijck 2018). Despite the advocacy and utility of a social dialogue between EU-level social partners in supporting the social dimension of policymaking, the sovereign debt crisis resulted in new mechanisms designed for financial stability but without corresponding growth in status or responsibility for social partnership (Pochet and

Degryse 2013). The origins and evolution of EU social policy demonstrate that economic integration has frequently, if not always, been the motivation behind successful policy developments – with the emphasis on harmonizing employment opportunities and labour markets across the single market. It might be reasonable to suggest that prospects for the EU's social dimension are currently dependent on the future course of EMU, Eurozone integration and the outcome of Brexit. A change in political leadership opens the door to a change in the political agenda and a stronger commitment to achieving some daring goals. The EU has typically required leadership from the Franco-German tandem as well as from the European Commission. Crisis response mechanisms have illustrated that the need to maintain the financial stability of the single currency may necessarily lead to structural policies (including social policies) in Member States focused more on deeper economic integration. The social dimension of EMU has thus always been, and continues to be to this day, an important driver of the future course of social policy. The next years will prove to be important for what kind of EU the polity wishes to become and whether this vision will include more or less Social Europe. For those of us keen to see Europe's Social Union further developed, we hope that, as the EU enters a new legislature, with a new Commission, a new Parliament and a French leader willing to push forward a strong integrationist agenda, Social Europe initiatives may develop faster and further in the years to come.

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## Chapter 3

# Balancing fundamental social and economic rights in the EU: in search of a better method

Sacha Garben

### Introduction

Social rights are in fashion. In November 2017, the presidents of the European institutions solemnly proclaimed the European Pillar of Social Rights (EPSR). Several legislative acts, including a directive on predictable and fair working conditions and one on work-life balance, have already been adopted as part of the ongoing implementation of the EPSR (Garben 2019a, Sabato *et al.* 2018). Far from dissipating, the momentum behind a Europe of social rights continues to build. In her speech to the European Parliament, the new president of the European Commission Ursula von der Leyen announced her ‘action plan to bring our Pillar of Social Rights to life’, including a minimum wage, an unemployment benefit reinsurance scheme, a child guarantee and investment in education (von der Leyen 2019).

While social rights may be a current political buzzword in Brussels and beyond, they are of course not new in the EU legal order. Twenty years ago, at the time the first edition of *Social developments in the European Union* (Degryse and Pochet 2000) was published, the EU legal order featured a charter with by and large the same social rights as those recently restated in the EPSR, to which by that time all Member States had signed up: the Community Charter of the Fundamental Social Rights of Workers (hereafter referred to as ‘Community Charter’).<sup>1</sup> Similar to the EPSR, the Community Charter was not legally binding and thereby did not *per se* provide any actionable rights for individuals. Instead, it constituted an action plan that led to the adoption of a range of legislative measures giving workers concrete social rights. A large part of the current social *acquis* results from the Community Charter and its action programme: the directives on occupational health and safety, written statements, posted workers, working time, pregnant workers and younger workers. In many ways, the EPSR can be seen as repeating the successful formula of the Community Charter, with the aim of reinvigorating the social dimension of European integration.

One may question whether a further restatement of social rights was needed to reignite Social Europe, considering that, with the still relatively recent Lisbon Treaty, social rights had gained an even more prominent place in the European legal construct as part of the binding Charter of Fundamental Rights of the EU (hereafter referred to

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1. The Community Charter was adopted in 1989, but initially without the UK, which signed up in 1997 following a change in government.

as the ‘EU Charter’), which has the same legal status as the Treaties.<sup>2</sup> However, the period between the Lisbon Treaty and the EPSR was dominated by a grave economic and financial crisis, with harsh austerity measures deeply affecting the social situation of millions of European citizens. Coming out of the crisis, Europe needed to rebuild its social credentials, and the EPSR provides a suitable political platform to do so. But it is not just politics; through the EPSR’s ‘implementation measures’ such as the aforementioned new social directives, it has concrete added value in legal terms (Garben 2019a; Clauwaert 2018).

Though the EU Charter is legally binding and has primary law status, it applies primarily to the EU institutions and only to the Member States when they act within the scope of EU law; i.e., the social rights contained therein in reality need EU legislative measures for them to be really useful to workers in their daily lives. The EPSR can be seen as a catalyst for the adoption of such measures ‘implementing’ the social rights contained in the EU Charter (and the EPSR itself).

Even if for the most part already contained in the Community Charter and the EU Charter (not to mention a range of international instruments; see further Garben 2018), I therefore consider the EPSR’s restatement of social rights a useful addition to EU social law and policy. The EPSR does not, however, resolve one fundamental problem that has arisen in the EU legal order concerning social rights, namely the question of how to balance them against economic rights in cases where they clash. The tension between the internal market freedoms on the one hand and social rights on the other has become a major protagonist in the story of Social Europe of the past decade, with the *Viking* and *Laval* judgments enjoying a notoriety extending far beyond traditional EU law circles. More recently, the right to conduct a business as featured in the EU Charter has revealed itself as another challenger of social rights. Section 1 of this chapter considers the most important conflicts between social and economic rights in the case law of the Court of Justice of the EU (CJEU). While sympathetic to the argument that these judgments do not give sufficient protection to social rights and instead favour economic interests, the chapter ultimately proposes an alternative approach to conceptualizing and balancing economic and social interests in legal terms, with a greater focus on the democratic decision-making process at EU and Member State level (Section 2), rather than on imposing a more social outcome as such. The final section concludes and looks ahead.

## **1. ‘Social sore spots’: where social and economic rights clash**

### **1.1 The internal market and social rights**

As is well-known, over the course of the European integration process – and thereby significantly furthering it – the CJEU has given a very broad interpretation to the internal market freedoms, defining as a restriction basically any national rule that hinders,

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2. The EU Charter was originally adopted in Nice in December 2000 but was devoid of legal effect until the Lisbon Treaty.

whether actually or potentially, cross-border economic activity. Such restrictions may be upheld when they are considered justified by the pursuit of a legitimate public interest, but only when they are limited to what is necessary to achieve that objective. Within this framework, economic freedom is posited as the rule and any other public interest, including fundamental social rights, as the exception. The wider the reach of the internal market freedoms, the more extensive the conflict becomes, as they potentially ‘catch’ any national rule protecting workers. Such conflicts are, of course, not always resolved in favour of these very broadly construed economic rights. Many national measures pursuing social goals were, and still are, upheld as justified. But the game-changing CJEU judgments in *Viking*, *Laval* and *Rüffert*<sup>3</sup> fundamentally altered the balance, to the detriment of social rights.

*Laval* concerned a Latvian construction firm that won a government contract to renovate a school in Sweden, where it posted some of its Latvian workers. The Swedish construction union started negotiations with Laval’s Swedish subsidiary to extend the sectoral collective agreement to the posted workers and to negotiate their wages. When Laval refused to agree, the union blockaded Laval’s building sites, leading to the subsidiary’s bankruptcy. The CJEU held that the Posted Workers Directive 96/71/EC did not authorize the imposition on a foreign service provider of the obligation to conduct on-site negotiations with the trade unions to determine rates of pay, nor did it allow trade unions to force a foreign service provider to accept better conditions than the bare minimum standard allowed by the Directive and regulated by the State. It basically considered that the freedom to provide services (Article 56 TFEU) applied to the actions of the trade unions. While the CJEU, citing the EU Charter (which was non-binding at the time), held that the right to strike was a general principle of EU law, it also considered that its exercise could be subject to restrictions. As Hinarejos (2008: 717) stated:

This led the Court to reaffirm its previous position on fundamental rights and EC fundamental freedoms: the protection of fundamental rights is a legitimate interest that can justify a restriction of the obligations imposed by Community law. The exercise of the fundamental right at issue must however ‘be reconciled with requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality’. The right to collective action does, therefore, have a place in EC law and it may provide for an exception to it, but it needs to be properly justified.

The Court, however, went on to state that the union’s attempt to make Laval accept working conditions (other than pay) of a standard exceeding the minimum set out in the Posted Workers Directive could not be justified with regard to the objective of protecting workers, since the Directive already served this purpose sufficiently. As regarded the negotiations on pay, the Court reasoned that if a Member State wanted to protect workers, all it had to do was impose a minimum rate of pay through legislation

3. Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809 ; C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772 ; Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, ECLI:EU:C:2008:189.



or a universal collective agreement. The strike action was thus unlawful, exposing the trade union to punitive damages.

In *Viking*, the case concerned the ferry ship *Rosella* operating between Finland and Estonia under Finnish flag. Viking owned the *Rosella*, which was operating at a loss. This was ostensibly due to the fact that Viking had to pay Finnish wages, while competing Estonian ferries had lower wage costs. Viking wanted to re-flag the ferry to Estonia in order to be able to pay lower wages. The Finnish Seamen's Union, of which the *Rosella*'s crew were members, joined forces with the International Transport Workers' Federation, which, in an action against flags of convenience, issued a circular ordering all its affiliates not to negotiate with Viking, thus preventing the company from acquiring an Estonian crew. In its ruling, the CJEU confirmed its position in *Laval* that the internal market provisions (this time on freedom of establishment) could be invoked directly against a private party, such as a trade union. While in contrast to *Laval* it left it up to the national courts to decide whether the objectives pursued by the unions by means of the collective action 'concerned the protection of workers', it also indicated that such action could no longer be considered as coming under the objective of protecting workers if it could be shown that the jobs or conditions of employment at issue were not under serious threat (such as when the employer gave a binding undertaking that the current crew would keep their jobs and terms of employment). Furthermore, the national courts would have to check whether the union had no means at its disposal other than restricting freedom of establishment, and whether the union had exhausted those means beforehand. As regarded the International Transport Workers' Federation's policy against flags of convenience, the CJEU held it could not be justified, since the restriction on freedom of establishment was blanket, in that it would apply even if the ferry were to be re-flagged in a Member State that offered better employment standards to its workers.

The *Laval* and *Viking* rulings were followed, and their effects strengthened, by a third landmark case. In *Rüffert*, the Court held that EU law precluded Member States from requiring that, in public procurement, contractors pay their employees the remuneration prescribed by the collective agreement in force at the place where those services are performed. The Court's reasoning was especially striking as regards the possible justification on grounds of worker protection: to require a level of remuneration exceeding the minimum rate of pay applicable pursuant to national legislation cannot be necessary for the protection of workers. Otherwise, the same rate of pay would be required nationally or for the whole sector. These three judgments thereby simultaneously widened the already broad definition of potential restrictions on the free movement provisions, seemingly embracing a full 'market without rules' approach that qualifies all national legislation applicable to foreign companies (as well as collective agreements and collective action by workers aimed at procuring such agreements) as *prima facie* restrictions, while also narrowing the scope for justification on social grounds (Barnard 2009).

Libraries have been filled with critical commentaries on the judgments (Joerges and Rodl 2009; De Schutter 2011; Bücken and Warneck 2011; Davies 2008). Pointing to the horizontal application of internal market provisions to organized labour, the wide

definition of restrictions to economic freedom and the priority accorded to this freedom over the right to take collective action and to strike, the majority of commentators agree that in these judgments the CJEU gave precedence to market freedoms over social objectives. Before these judgments, the CJEU had already held that social standards, such as certain labour rules, could imply a restriction on companies' free movement rights. However, the CJEU had previously conducted a relatively relaxed proportionality review, upholding most measures as justified. Similarly, where it held that the freedom of assembly could constrain the internal market, it held the national authorities and not the individual protesters responsible, while according a margin of appreciation to those national authorities.<sup>4</sup> This changed with the *Laval*, *Viking* and *Rüffert* rulings, with the CJEU fundamentally shifting the balance between economic and social rights – with real and non-negligible consequences.

These cases were game-changers. The judgments influenced the Commission's subsequent infringement actions not only against the country to which the judgment related, but also against other Member States, as well as influencing national courts and authorities which adapted their actions accordingly in the affected areas and beyond. This means that these few judgments have become the hard norm on all pay standards in public procurement across Europe, on all labour standards imposed in (potential) temporary cross-border service provision, and on all collective actions undertaken against companies' market freedoms. At European level, these judgments have changed the terms of the argument about the market-social balance, providing one side of the argument with significant leverage over the other within and between the EU institutions and *vis-à-vis* national players. Economic players have sought to exploit this new legal landscape to the fullest by bringing new claims to national courts, inviting the further market-favouring expansion of these doctrines (Scharpf 2010).

Perhaps in response to the criticism levelled at its hardened stance towards labour standards,<sup>5</sup> the CJEU has readjusted its position to the benefit of national social regulatory autonomy in two more recent rulings. In *Elektrobudowa*,<sup>6</sup> it was again asked to interpret the Posting of Workers Directive. The case concerned 186 Polish workers posted to Finland who considered that they had not received sufficient wages. They assigned their claims to a Finnish trade union, which seized a national court, which in turn asked the CJEU for guidance on what the employer could be obliged to pay the workers under host State rules. The Court sided with the trade union, giving a broad interpretation of what host States could consider as constituting the mandatory 'minimum rates of pay' under Article 3(1) of the Directive. Contrary to the Advocate General, the Court held that the minimum wage could be calculated by categorising workers into pay groups based on criteria such as qualifications, training, experience and type of work (if this is done transparently), and that it could include a posting-specific, flat-rate daily allowance applicable for the entire duration of the posting and

4. C-112/00, *Eugen Schmidberger v Austria* [2003] ECR I-5659.

5. Another factor may have been that, in *Elektrobudowa*, the posted workers themselves brought the claim, in contrast to *Laval* where the protection of workers was invoked generally but not necessarily with the agreement or in the interest of the posted workers. In *Elektrobudowa*, the Finnish and Polish workers stood together in solidarity, possibly making the CJEU more receptive to the trade union's arguments.

6. Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, ECLI:EU:C:2015:86.



a reimbursement for daily travelling time. The Court also considered that the cost of accommodation provided by the employer and meal vouchers could not be deducted from the minimum rates of pay payable to the workers. This important shift was followed up in the *Regiopost* ruling.<sup>7</sup> Contrary to the position of the Commission, the Court held that the award of public contracts may be made subject, by law, to a minimum wage. As could also be seen from the different stances taken by the Advocate General and the European Commission, full application of the *Laval* and *Rüffert* doctrines would have suggested a harsher outcome than that reached by the CJEU. But while these later judgments resolve some important social concerns concerning public procurement and posted workers, they do not alter the point of principle in *Viking* and *Laval* that collective action undertaken by workers has to respect the free movement rights of companies in the internal market.

## 1.2 The freedom to conduct a business vs. the social protection of workers

Article 16 of the EU Charter recognizes '[t]he freedom to conduct a business in accordance with Union law and national laws and practices'. The wording indicates that this freedom is inherently relative and can be limited by both regulations and practices, suggesting it is one of the weaker rights in the EU Charter (Groussot *et al.* 2017) and could be considered a principle rather than a right (Veneziani 2019; Deakin 2019). The EU Fundamental Rights Agency (2015: 3) considers it 'one of the less traditional rights', not generally protected in international human rights instruments and not traditionally universally present in the national constitutional law of the Member States, many of which have only recognized versions of this right very recently and some not as an (enforceable) constitutional right at all.<sup>8</sup> Where the freedom to conduct a business is recognized in national constitutional law, it tends to allow a relatively wide scope of limitation in the public interest and is generally conceived of as a right of individuals to set up an economic activity or join a profession rather than concerning the general exercise of economic activity.

The EU Fundamental Rights Agency (2015: 7) considers that the 'freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development', thus linking it to the EU's current political growth agenda. Under general constitutional democratic theory (Tully 2002), it could be said that the constitutional dimension of human rights is to ensure the necessary pre-conditions and well-functioning of a robust democracy (Gearty 2004), and to correct majoritarian outcomes in exceptional cases where these outcomes unjustly harm the essence of human dignity, equality and liberty. This means that the (protected) content of human rights should be interpreted for these purposes. The freedom to conduct a business has a role in ensuring a robust democracy, to the extent that it helps to empower individuals – especially

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7. Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau*, ECLI:EU:C:2015:760.

8. In Belgium, Greece, Latvia and the Netherlands, the constitutions contain only general or vague references. In Malta, freedom to conduct a business is not a right enforceable by courts. The UK, which does not have a written constitution does not feature this constitutional right: For an overview, see European Union Agency for Fundamental Rights, 2015: 27.

those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize social inequalities. This would suggest a reading where the right is about fostering the possibility of individual entrepreneurship, in the sense of enabling citizens to set up an economic activity or join a profession, within a broader picture of creating more socioeconomic progress and equality in society. This human right would not, in such a constitutional democratic reading, provide a ‘sword’ for companies in the operation of their business against workers, citizens and general public interest standards.

Over time, however, the CJEU seems to be developing a much stronger interpretation of the freedom to conduct a business. As the EU’s Fundamental Rights Agency (2015: 9) notes:

With the Charter becoming legally binding in 2009, the right has come to occupy a more prominent role. It is being used more forcefully to balance other rights and underpin proportionality tests of various intrusive measures. [...] The CJEU has even used Article 16 to balance workers’ rights.

The CJEU’s judgments in *Alemo-Herron*<sup>9</sup> and *AGET*<sup>10</sup> are crucial developments in this regard. In *Alemo-Herron*, the CJEU was asked to interpret Article 3 of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, which provides that the transferor’s rights and obligations arising from an employment relationship existing on the date of a transfer shall be transferred to the transferee. The Directive constitutes a minimum harmonization in the sense that it does not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees (Article 8). The case concerned the question whether dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee. The Court acknowledged that such clauses are more favourable to employees (para. 24) but that the Directive did not aim solely to safeguard the interests of employees, but rather to ensure a fair balance between the interests of employees and employers (para. 25). The dynamic clauses were not considered a fair balance, as they ‘limit considerably the room for manoeuvre necessary for a private transferee to make ... adjustments and changes’ after the transfer. The Court then extensively interpreted and forcefully applied the freedom to conduct a business as laid down in Article 16 EU Charter, stating that it covers, *inter alia*, the freedom of contract, a freedom that it considered to be seriously reduced by the dynamic clauses ‘to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business’ (para. 35). The upshot is that under this minimum harmonization directive, Article 16 of the Charter cancelled Member States’ right to take measures more favourable to employees.

9. Case C-426/11, *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

10. Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

The judgment has been the subject of criticism (Prassl 2013; Groussout *et al.* 2017). On the socioeconomic balancing itself, the Court ‘failed seriously, in this case, to view fundamental rights “in relation to their social function”’ (Prassl 2013). The Court accords a very high level of protection to the non-traditional, supposedly weak, freedom to conduct a business, while failing to properly weigh the social interest of high levels of worker protection (Groussout *et al.* 2017). Furthermore, on the scope of application of Article 16 EU Charter, it could be argued that, as the rules in question were not covered by the Directive (they were national rules setting higher levels of worker protection than laid down in the EU minimum harmonization), they were not in the scope of EU law and thus the Charter would not apply. If the scope of EU law in question was considered to be the internal market, a *prima facie* restriction of one of the internal market rights should have been established, which the Court did not do. This raises profound constitutional problems concerning the nature of minimum harmonization in relation to the scope of EU law and applicability of the Charter, especially in light of the principle of conferral that entails that the EU has to act within the powers attributed to it.

Similarly controversial is the *AGET* judgment concerning Greece’s legislation on collective redundancies. This held that the Greek protections concerning collective redundancies, which entailed that prior authorisation had to be obtained from a Greek authority before executing such redundancies, were contrary to the freedom of establishment laid down in Article 49 TFEU, interpreted in light of Article 16 of the Charter. After having established a *prima facie* restriction on the freedom of establishment, the Court considered the possibility of an objective justification of the national rules on grounds of worker protection and the protection of employment – which was in principle possible ‘[s]ince the European Union ... has not only an economic but also a social purpose’ (para. 77). It saw an interference with Article 16 of the Charter. While recognizing that Article 16 could be limited and noting that ‘the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities that may limit the exercise of economic activity in the public interest’ (paras. 85 and 86), the Court held that the details of the Greek arrangement infringed proportionality and thus both Article 49 TFEU and Article 16 of the Charter. The national authority charged with considering the planned collective redundancy had too much discretion to interpret the ‘situation of the undertaking’ and the ‘conditions in the labour market’ as reasons for opposing the redundancies.

This judgment again may be considered as favouring economic over social interests. While the Court’s tone in *AGET* is more conciliatory than in *Viking*, *Laval*, *Rüffert* and even *Alemo-Herron* (Markakis 2017), the fact remains that once again precedence is given to the economic freedom of companies over a system protecting workers from collective redundancies. This can be considered politically controversial considering a) Greece’s overall crisis context; and b) the fact that these rules applied without distinction to domestic and EU companies. While it is true that the Court gives directions as to how a national system reviewing planned collective redundancies could comply with EU law,<sup>11</sup> it is difficult to see how a system compliant with the criteria of the Court can

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11. The Court considers that the grounds for refusing a collective redundancy cannot include ‘interests of the national economy’, and that while such grounds may be the ‘situation of the undertaking’ and the ‘conditions in

be as protective as the Greek system that was condemned. While that outcome could arguably be considered a necessary compromise between social and economic rights – the result of a balancing – the legal basis for the application of these economic rights to this situation is legally contestable in the first place. Applied without discrimination, the rules do not in any way place any additional burden on foreign companies and do not even disadvantage ‘new’ operators over established ones. It is thus uncertain whether the freedom of establishment as laid down in Article 49 TFEU should apply. Secondly, as regards Article 16 EU Charter, while the Court may be using softer language, it is nevertheless applying a hard-core interpretation to a traditionally weak right. The very text of Article 16 EU Charter states that this freedom (not right) is conditional on compliance with Union law and national laws and practices: it is thus not a right that can be limited by Union law and national laws and practices but is only recognized as a freedom to the extent that it is in accordance with Union law and national laws and practices. It is thus highly questionable whether it is an actionable right in the first place, and secondly, it suggests a much wider scope for public interest mitigation than the CJEU allows.

## 2. Towards a better balancing of fundamental social and economic rights

The focus of the foregoing assessment, as well as of the CJEU itself and of commentators generally, has been on the balance between social and economic rights and the interests of workers and employers as such. Thus, the assessment of whether the balance has been struck correctly uses the yardstick of whether the outcomes are sufficiently ‘social’ or whether the balance between workers and employers is sufficiently ‘fair’. I argue that this focus needs to be shifted in two important ways.

Firstly, it needs to be more clearly recognized that the substantive question of the appropriate balance between social and economic values is inherently political and subjective, contestable and controversial. As such, it should not primarily fall to the judiciary to strike this balance substantively, but instead to the legislator. Indeed, it could be argued that the fundamental problem with *Viking* and *Laval*, and the CJEU’s case law on the internal market more generally, is not the outcome as such or whether it is sufficiently social, but that the problem lies in the democratic deficit that it entails (Garben 2017). This case law makes highly sensitive political choices on socioeconomic issues that should be the bread and butter of European, as well as national, politics and thus be decided through the legislative process. While arguably in any system of constitutional democracy majoritarian decision-making should be circumscribed by certain constitutional values, such as *par excellence* fundamental rights, to be upheld by the judiciary through judicial review, such review should be as deferential as possible and only circumscribe democracy – not replace it with judicial legislation. Over the past decades, both economic and social concerns have perhaps become too firmly entrenched in European constitutionalism. Instead of the core political-ideological battlefields that

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the labour market’, there need to be clearer rules indicating to companies how these criteria will be applied by the authority in question. See paras. 96 – 102 of the judgment.

they once were, they have become ‘fundamental rights’ that are not within the purview of democratic decision-making but instead are the basis for judicial review. While these social and economic rights are also protected in the constitutional law of many Member States, within domestic legal orders the judiciary tends to leave more room for the legislative process to limit these rights in the public interest, especially where they need to be balanced against other fundamental rights.

Secondly, and relatedly, in the highly sensitive process of judicial review, the judiciary should be guided not only by an approach of deference but also by a clear normative framework within which the fundamental values that it is mandated to uphold are to be accommodated and, importantly, which states how these fundamental values relate to one another, especially in cases of conflict. This would make the adjudication of these values and rights more predictable (a cornerstone of the rule of law) and would provide a more legitimate framework for balancing than one guided by what can never be anything but a subjective view of socioeconomic justice. In other words, an ideological meta-framework is needed for constitutional adjudication in the EU legal order, but it should not be an ideology of political economy but of constitutional democracy. Ideally, the CJEU, as the EU’s constitutional court, would develop such a theory, even if only implicitly, as for instance done by the German Constitutional Court. EU primary law contains sufficient meta-values to anchor such an approach (see further Garben 2019b).

On the basis of constitutional democratic theory, we could design some principles to guide us in the question of how the judiciary should interpret the minimum standards of the economic and social rights in question when reviewing national and European legislation. The core idea is that fundamental rights are there primarily to guarantee the necessary conditions of a robust and long-term democracy, thus ensuring equality (through social mobility, inclusion and emancipation, as well as non-discrimination and the correction of power asymmetries), and to correct grave cases of majoritarian injustice, thus ensuring individual dignity and liberty. Using such a framework, we can develop more concretely how each fundamental right should be interpreted, how it relates to other fundamental rights and to what extent it should be enforced by the judiciary.

The following four points are a first, tentative attempt in this regard, intended to stimulate further debate along these lines of thinking (see further Garben 2019b).

(a) As stated above, the freedom to conduct a business has a role to play in ensuring a robust democracy, to the extent that it helps to empower individuals – especially those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize societal asymmetries. As a human right it should not, under such a constitutional democratic reading, provide a ‘sword’ for companies in the operation of their business against workers, citizens and general public interest standards; that would be counterproductive.

(b) The internal market rights serve the purpose, within this constitutional democratic perspective, of compensating for the failures of national democracies to take due account of the impact of their decisions across borders, or of their deliberate decision

to negatively impact other jurisdictions to the benefit of their own, and should thus be interpreted as focused specifically on reviewing direct and clear indirect discrimination – and not on the general economic freedom of companies. In this review, a clash between the internal market's 'transnational equality rights' on the one hand and fundamental social rights on the other needs to be considered with deference to the democratic process either at national or EU level.

(c) Workers' rights or interests, such as the right to be protected against collective dismissal and the negative repercussions of restructuring, are primarily for the democratic process to flesh out, and it would seem that here there is scope for significant counterbalancing with other rights and interests such as those of the employer or the economy. Strong protection would need to be provided against unjust dismissal generally, as the lack of such protection would undermine the enforcement of any other right in an employment context and would entrench an unacceptable power asymmetry between the employer and the worker which cannot be justified in a democratic society. But the scope for (collective) dismissal for economic reasons is not something that should *a priori* be determined by the judiciary or the constitution, but instead is a main battleground for the political process.

(d) The rights to strike and bargain collectively have an important role to play in creating and maintaining the conditions for a robust democracy. They are procedural rights rather than rights establishing certain socio-economic outcomes. As the UN Special Rapporteur put it:

protecting the right to strike is not simply about States fulfilling their legal obligations. It is also about them creating democratic and equitable societies that are sustainable in the long run. The concentration of power in one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power (Kiai 2017).

This right should therefore, in principle, be forcefully protected by the judiciary.

It should be clear that the current approach under EU law does not correspond to this proposed way of interpreting, balancing and enforcing fundamental rights. Coming back to the four cases discussed in this chapter, many will agree that in *Viking* and *Laval*, fundamental economic rights were taken too far. The above principles would support that criticism, pointing out that the right to strike should receive a forceful interpretation while the internal market provisions should be about combating unjustified (indirect) discrimination, which does not seem to have been the case in *Viking* and *Laval*. While the social interest at stake in *Alemo-Herron* and *AGET* should, following the above interpretation principles, be open to significant (economic) counterbalancing, it is the political process that should have decided on the balance in this case, because the counter-interest of 'conducting a business' should equally be a weaker right open to significant (social) counterbalancing. The EU legislator had not, in the Directives at stake, decided on that balance as regards the cases at hand – they fell outside the scope of the Directives. Thus, it should have been left to the national



democratic process: the UK and Greek rules in question should have been upheld until the European legislator had acted to establish a different balance at EU level on these specific questions. Instead, the EU judiciary gave an overly forceful interpretation to the freedom to conduct a business, thereby constitutionalizing a certain view on the right socioeconomic balance that it was not necessary to establish for a democratic society.

## Conclusion and outlook

Over the past 20 years, the balance between ‘the market’ and ‘the social’ in the EU legal and political order has become an increasingly controversial question in both political and legal terms. This chapter has argued that the way the judiciary balances fundamental social and economic rights in the EU legal order is a key element in determining that balance. However, the chapter has also argued that we need to move beyond a narrow focus that analyses the EU on the basis of whether it is sufficiently in balance, appropriately or overly ‘social’ or ‘economic’ in its policy output and constitutional configuration: the answer inevitably lies in the eyes of the beholder and is therefore too political and subjective to be meaningful in analytical terms. Instead, the European legal community should start a deeper reflection process, moving beyond the current battle of fundamental rights to consider critically what the position of rights and the judiciary should be more generally – especially in relation to democracy. Importantly, this could provide the CJEU with a more legitimate framework to adjudicate the inevitably thorny situations where fundamental social and economic rights seem at odds, prioritizing neither the economic nor the social over the democratic.

While it may be tempting for both scholars and practitioners of EU social law to now devote their time and thought to the exciting new developments concerning social rights in the wake of the EPSR, there is some important groundwork to be done as well. The new legal measures fleshing out social rights adopted as implementation of the Pillar will inevitably have to be interpreted by the CJEU at some point, and new situations of conflict between social and economic rights and interests will certainly arise. Going forward, we need a better compass and roadmap to guide us. This should be defined, as a first step, through scholarly and public thinking and debate. *What is the role of social rights in the EU? What is the role of economic rights? How fundamental are they and should they be, and, relatedly, what are the respective roles of the judiciary and the legislator in determining their content, their enforcement and their interaction?* While we may never find conclusive answers to these constitutional questions that are also subject to perennial debate at national level, it is important to at least define the terms of the argument.

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All links were checked on 24 November 2019.

## Chapter 4

# Once upon a time there was the European social dialogue

Jean-Paul Tricart

‘We no longer believe that truth remains truth when the veil is withdrawn from it.’  
Friedrich Nietzsche, *The Gay Science*, preface to the second edition (1887).

### Introduction<sup>1</sup>

This chapter concerns the so-called ‘European social dialogue’: the institutional arrangements and system of actions and relationships via which European-level employer organisations, trade unions and European institutions interact to set labour standards and come up with policies and initiatives linked to economic and social developments in the European Union. This interaction can be tripartite or bipartite, formal or informal, and can take the form of concertation, negotiations or joint action (European Commission 2012).

This volume of *Social policy in the European Union: state of play* (hereafter *Bilan social*) aims to provide an overview of 20 years of Social Europe. As its contribution to this project, this chapter takes a historical approach. It begins by describing the context in which the European social dialogue was established, the issues it was intended to address, and the aims behind it. It then examines how it has evolved over the last two decades with reference to these contexts, issues and aims.

Such an approach requires me to divide up the analysis into time-periods. I have decided to examine the evolution of the European social dialogue with reference to the successive stages in European integration represented by the various European Commissions since 1985. Though purely indicative, such sequencing does have its own logic: it reflects the fundamentally tripartite nature of the European social dialogue as it was established, i.e. a joint invention of the European Commission (hereafter referred to as ‘the Commission’) and the cross-sector European social partners. Though the latter have, over time, developed bipartite and sectoral forms of social dialogue, it is the tripartite cross-sectoral social dialogue which has given the European social dialogue its distinctive features enabling it to be institutionalised in the European treaties. Within this European social dialogue, the Commission has played a key role: first – and widely acknowledged (Didry and Mias 2005) – on its inception under the Delors Commissions (1985–1995), but also later on, because social concertation involves both the social

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1. This text is part of wider research into changes in European social policy over the period 1985–2020. It reflects solely the views of its author, and not those of the institutions in which he previously worked, in particular the European Commission. The author would like to thank the various experts in European social policy, particularly the researchers at the European Social Observatory and the European Trade Union Institute, who agreed to comment on the initial versions of this text and thus helped to improve it. He would also like to thank in advance any readers who might wish to send in their comments and criticisms (jptricart@gmail.com).

partners and the Commission and because the institutional European integration process is largely centred on the Commission's power of initiative.

My decision to structure this presentation of the history of the European social dialogue with reference to the successive European Commissions in no way means that I underestimate the power of the social partners to be proactive in developing their own initiatives. Neither does it mean that I will only describe the momentum given to this dialogue by these successive Commissions. The Commissions, rather, are used to reflect the various phases of the European integration process, with their key paradigms reflecting both the political balances in the Union at the time and the major issues helping to explain each of these stages in political development.

Essentially, the European social dialogue was 'invented' at a time when the European integration process was being relaunched with a focus on the prospect of completing the single market, as endorsed by the Delors Commissions. In view of this prospect, a political need was seen to give the single market a 'social dimension', making it acceptable and possible. The invention of the European social dialogue – itself a symbolic concept<sup>2</sup> – made it possible to involve the social partners in the European integration process, especially by establishing arrangements for social concertation and by creating a space for contractual relations at European level. This tripartite cooperation process continued, although its development was far from linear, through the Santer (1995–1999) and Prodi (1999–2004) Commissions.

Over the last twenty years, the European social dialogue has developed in very uneven and often contradictory ways: progress has been made, but there have also been setbacks, and overall the dialogue has slowly deteriorated in two main stages. At the beginning of the 2000s, while the political need to develop the 'social dimension' of European integration was still widely recognised and still had its champions and sources of support, new paradigms gradually emerged in the fields of social and employment policy. These turned their back on legislation as a way to bring about change, instead promoting flexible forms of political coordination (see Vanhercke, this volume). Despite these developments, the European social dialogue was able to maintain its social concertation role. However, its role as regards collective bargaining, linked in the past to mechanisms enabling the adoption of legislation implementing the collective agreements reached, suffered as social legislation fell out of favour, although it could still develop other types of agreements – the so-called 'autonomous' agreements.

However, under the Barroso Commissions (2005–2014), and particularly with the onset of the Eurozone crisis in 2009, there was a clear deterioration of European social dialogue as a whole, since it then no longer fitted easily into the European economic

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2. Traditionally, the social sciences have used an 'industrial relations' analytical framework to examine relations between employers' and workers' organisations, and between these organisations and the public authorities. The concept of 'social dialogue' does not come from this analytical tradition; rather, it is related to those political, normative or prescriptive approaches which tend to favour consensus-based, more peaceful relations and which downplay their conflictual side, or refer to it merely euphemistically. The notion of 'European social dialogue' first appeared in the official vocabulary of the European institutions in 1984. It was then systematically used by the Delors Commissions and those which followed.

and social policies and governance. This was a time when the Union was developing the austerity policies it deemed necessary under its interpretation of the causes of the crisis, was strengthening European coordination of budgetary policies and structural reforms, and was firmly encouraging the decentralisation of social dialogue to company level; meanwhile, social concertation at European level on the economic and social developments taking place increasingly became a dialogue of the deaf.<sup>3</sup> And the very essence of European collective negotiations was challenged by the distrust, even growing hostility, of the Commission towards the progress of social legislation resulting from agreements between the European social partner<sup>4</sup> (Bandasz 2014; Degryse 2015; Dorssemont *et al.* 2018; Vogel 2018; Tricart 2019).

Recognition of this deterioration led the Juncker Commission (2015–2019), from the very beginning of its mandate, to ‘relaunch’ the European social dialogue as part of its stated aim to restore the social dimension of EU policies. By so doing, it undoubtedly set the scene, once more, for social concertation to take place at European level, although the effects of this concertation and of the reorientation of EU policies are, to date, uncertain. Even so, the Juncker Commission continued the approach followed by the second Barroso Commission, discouraging the legislative implementation of agreements reached by collective bargaining at European level. This approach caused the European Public Service Union (EPSU) to bring an action to the Court of Justice of the European Union (CJEU),<sup>5</sup> tarnishing the record of the relaunch of the European social dialogue in 2015.

At the end of his book on the European social dialogue in the period 1985–2003, Jean Lapeyre asks the following question: ‘Should we be nostalgic about this period spent constructing the European social dialogue?’ (Lapeyre 2017: 249). This question is often asked by participants in or observers of the European social dialogue, particularly given that the years when this European social dialogue was invented are generally considered to be its ‘golden age’ (Pochet and Degryse 2016).

The existence of this ‘golden age’ notion shows that the history of the European social dialogue is made up of both a factual history of actual stages in its development and a story accompanying these facts; a real history and a mythical story. This mythical story is encouraged both by the European social partner organisations and by the European institutions, especially the Commission: between 1993 and 2004, the Commission produced five communications on the European social dialogue (European Commission 1993, 1996, 1998, 2002 and 2004) and regularly organised commemorative events with

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3. While Presidents Delors and Santer held regular ‘social dialogue summits’ between the social partners and the Commission, high-level informal European social concertation also involving the Council presidency was established in 1997. This informal concertation was institutionalised in 2003, in the form of a ‘Tripartite social summit for growth and employment’ (TSS). Under the second Barroso Commission, the TSS meetings became highly confrontational and extremely tense.
  4. In the 2010s, the European sectoral social dialogue resulted in the conclusion of several agreements which the signatories wished to see implemented in legislation. The Commission, busy with an ambitious programme to simplify and cut back on European legislation, including social legislation, was very reticent in its reaction to these demands, even hostile at times; this led to growing tensions with the signatories to the agreements.
  5. Case T-310/18. This action was brought by the European Public Service Union (EPSU) following the Commission decision, in March 2018, not to submit a proposal to the Council for legislative implementation of an agreement concluded in December 2015 between the social partners in the central administration sector.

the European social partners, recalling key moments in its history. In 2015, moreover, when the Juncker Commission wished to relaunch the European social dialogue, it referenced the ‘golden age’ story by linking the initiative to a commemoration of the meeting organised by President Delors in 1985 to found the European social dialogue<sup>6</sup>. This story, with its mythical dimension, is an integral part of the history which is examined in this chapter.

## **1. The Delors Commissions (1985–1995): creation of a contractual relations area at European level**

The relaunch of the European integration process driven by the Delors Commissions (1985–1995) gained much of its momentum from the emphasis on completion of the single market (1992), and then from the preparations for the Economic and Monetary Union (EMU). This required, however, support from as broad a range as possible of pro-European political, economic and social forces. For while the prospect of the single market was attractive to Member States as a way to help drag the Community out its lethargy, its precise content was the subject of much disagreement and opposition, threatening to undermine the whole project. Political powers were divided as to the nature and desired extent of European integration; business circles and the trade unions disagreed on how to manage the economic and social consequences of opening up the markets. President Delors was convinced that the single market could not be completed without a strengthening of social cohesion and that support from the employers and unions was essential if the project was to succeed.<sup>7</sup> For this reason, the Delors Commissions made ongoing efforts to involve the social partners in the moves towards greater European integration; the strategy was to support the economic transformation process inherent to the single market project by offering first the trade unions, but also the employers, the prospect of a ‘social dimension’ to be developed jointly with them (Commission of the European Communities 1988; Venturini 1988). In this way, the creation of the social dialogue was both one of the components of the ‘social dimension of the internal market’ and a way to develop this dimension further: the social dimension was both a specific programme for the promotion of certain social rights and policies which were European in nature and scope, and a piece of political rhetoric to give legitimacy to the European integration process – just like, at the time, the concept or ‘story’ of ‘Social Europe’ or the ‘European social model’. Adoption of the Community Charter of the Fundamental Social Rights of Workers (1989) and the Commission’s presentation of an ambitious programme to implement this Charter<sup>8</sup> were tangible evidence of this emphasis on the social dimension (Commission of the European Communities 1989).

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6. Meeting of 31 January 1985, Château de Val Duchesse (in the Brussels-Capital Region).

7. See, for example, the personal account given by J.-M. Baer, an advisor to J. Delors, quoted by Lapeyre (2017: 30).

8. This action programme contained 47 initiatives, including 18 legislative initiatives (labour law, working conditions, and occupational health and safety).

The invention of the European social dialogue and the efforts made to promote the social dimension of the single market in the years 1985–1995 can be seen as a slow process of developing, negotiating and implementing a form of ongoing cooperation and interaction between the Commission – and, via the Commission, the European institutions and Member States involved in constructing the single market – and the social partners, employers and unions. At the time, the latter two had not yet achieved a high degree of organisation at European level, and their interests and views on Europe diverged in many ways, although in general they were in favour of further European integration. This form of cooperation was also a political ‘deal’ between the Commission, the employers and the unions. It was not necessarily presented as such, and its elaboration and conclusion were instead developed over a period of several years, including times of tension and uncertainty; nevertheless, this was the deal which ensured that the social partners, particularly the unions, would support the single market project.<sup>9</sup>

The need for such a deal on the social dimension of the single market was due, above all, to the misgivings and potential resistance of the trade union side, particularly among organisations active in those sectors which would be hardest hit by the prospect of the single market. These were the energy, rail and air transport, and postal services sectors, and, more broadly, all those sectors threatened by privatisation and whose workers perceived their public servant status to be at risk; they were also sectors with high rates of union membership and strong potential for collective resistance via large-scale social movements. The Commission, therefore, saw the need to only open up these sectors to competition in a gradual and negotiated fashion and above all to make it clear to all trade unions, via specific initiatives, that, in the integration process, it intended to consider the social consequences of opening up the markets, the rights of workers and social dialogue (Mias 2004; Didry and Mias 2005).

The years 1985–1995, therefore, were the period when this deal between political, economic and social forces was developed, negotiated and implemented. Throughout these years, the stakeholders involved identified the social issues linked to the single market and to European integration and discussed the institutional mechanisms and policies needed to respond to these social issues (a long process, as this triggered differences of opinion, while the results of the confrontations were often uncertain). During the same period, the social partner organisations were developing structurally, merging and forming alliances at European level – both on the employer and on the union side (this also took time and gave rise to conflicts). And little by little throughout the period, the divergent expectations regarding the European social dialogue came closer, a process in which the Commission played a vital role: in general, the unions wanted the social dialogue to lead to a recognition of social rights at European level, thus forming a framework for implementing these in the Member States, while the employers wished the European social dialogue to be merely a forum for consultation and exchange, not resulting in binding obligations. It is therefore hardly surprising that the participants in this process of inventing the social dialogue speak, in their accounts,

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9. A good example of how the union movement came around to the prospect of the single market is the changing attitude of the UK's Trade Union Congress (TUC) as of 1988 (Lapeyre 2017: 55–59).

of a ‘social innovation’ (Lapeyre 2017), emphasising the tenacity needed to engage in these political battles throughout these years.

On taking up his post in January 1985, President Delors invited the leaders of the national social partner organisations to a concertation meeting on the single market. This was referred to as the ‘Val Duchesse social dialogue’, named after the place where the meeting was held. But although it was, first and foremost, a *concertation* meeting between the Commission and the social partners, the Val Duchesse dialogue was far more significant than this. After all, there were already social concertation bodies at European level (which had had, incidentally, very varying degrees of success, though for the most part were rather disappointing) (Lapeyre 2017: 19–23). Also, and most importantly, President Delors had already, in previous declarations, spoken of the prospect of a ‘space for contractual relations at European level’,<sup>10</sup> a prospect reflecting the expectations of the European Trade Union Confederation (ETUC) but not at all attractive to the employers, represented in particular by the Union of Industrial and Employers’ Confederations of Europe (UNICE<sup>11</sup>).<sup>12</sup>

This prospect emerged clearly in the text of Article 118b of the Single European Act, which the Delors Commission proposed a few months later, specifically to support the implementation of the single market project. This Act, adopted in 1986, stated that ‘the Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement’. While the wording is very cautious and gives the social partners the freedom to choose whether or not to develop relations based on agreement, it clearly points to one way in which the European social dialogue could develop. At the same time, again extremely prudently, this wording does not specify the potential outcome of these relations (i.e. agreements) and does not indicate what status these would have. Nevertheless, it does open up the possibility of such contractual relations.

In practice, one result of the Single European Act was that the European social partners drafted ‘joint opinions’, though these remained very general in scope. The prospect of an area for contractual relations at European level gradually took hold – i.e. among the employers, as the unions were already in favour – though only because the Commission and the Council clearly stated, particularly in the 1989 Charter and the action programme for its implementation, their wish to promote social legislation and to recognise workers’ rights at European level. The employers therefore considered that the European social dialogue could help them to ensure that the future legislative changes envisaged were

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10. In his speech to the European Parliament on 14 January 1985, President Delors asked: ‘When will we see the first European collective agreement?’ (Didry and Mias 2005; Lapeyre 2017).

11. UNICE became BusinessEurope in 2007.

12. The other employers’ organisation involved in the development of the European social dialogue was the European Centre of Enterprises with Public Participation (CEEP), directly concerned by the prospect of the single market and the opening to competition of the sectors largely dominated by its members, which held monopoly positions. The European Association of Craft, Small and Medium-sized Enterprises (UEAPME) refused to be involved in setting up the European social dialogue and later brought an action before the Court of Justice of the EU. This was rejected, and the association later joined the European social dialogue as part of the UNICE delegation.



as much as possible to their liking.<sup>13</sup> One key event was the conclusion of the Agreement of 31 October 1991 by the ETUC, UNICE and CEEP, drawn up with active help from the Commission departments; this constituted the contribution of the European social partners to the Intergovernmental Conference tasked with preparing the Maastricht Treaty. This Agreement is rightly considered to be one of the most important (maybe the most important) of the founding texts of the European social dialogue. The incorporation of its provisions into the Agreement on Social Policy (ASP) attached to the Maastricht Treaty marked the recognition of European-level collective bargaining and of the power of the social partners to conclude agreements at that level. Such agreements, moreover, could be transposed, if the social partners so requested and on a Commission proposal, into European legislation (the preferred form of implementation at the time), or could be implemented by their affiliated organisations in accordance with national practices.<sup>14</sup>

Although the United Kingdom distanced itself from the ASP, these new treaty provisions on European collective negotiation emphasised the role that the social partners could play, as fully-fledged participants and not just as lobbyists or pressure groups, in the development and implementation of social policy and European social legislation.<sup>15</sup>

The Commission involved the European social partners in working out the implementation arrangements for the new treaty provisions taken from their 1991 Agreement. The process of incorporating this Agreement into the treaties and into the Commission's legislative practice confirmed that the European social dialogue was the result of converging initiatives from the European social partners – both employers and trade unions – and the Commission (and, through it, the Council and Member States). This should really be described as a form of joint action: although there was no deliberate or explicit coordination between the various players at each point of their interaction, there was a collective history and *de facto* cooperation via the successive adjustments to the positions and initiatives of the various parties. The European social dialogue has been described as a 'marker' of European identity (Pochet and Degryse 2016), precisely because it was a product of this collective history and this *de facto* cooperation between the Commission and the European social partners, a cooperation characterised by trust between the various players and maintained by a constant striving to find arrangements on which all could agree.

The setting up of the European social dialogue under the Delors Commissions, then, reflected the trust placed by the European institutions of that time in the legitimacy, accountability and capacity of the social partners to help build Europe by means of collective negotiation, to combine fairness and efficiency in the modernisation of the labour market, and, more generally, to help forge the Union's social dimension (Degimbe

13. For a long time, the need for unanimity within the Council for the adoption of social legislation enabled the employers and liberal governments (particularly the UK government) to hold up such legislation. The shift to qualified majority voting in this area changed the whole situation and required the employers to prepare for the extension of social legislation.

14. This other, 'autonomous' implementation process was added to the Agreement of 31 October 1991 at the request of the Danish social partners. This mechanism was not used in interprofessional social dialogue until 2002. The employers proposed its use during the negotiations on telework: the scope of its provisions was reinterpreted for this purpose (Lapeyre 2017; Tricart 2019).

15. On the terms 'lobbyist' and 'pressure group', see Lapeyre (2017), chapter 4 'From lobbyists to active players'.

1999). This expression of the Commission's trust in the social partners was echoed in a message of trust from these partners to the European institutions, precisely as the task of the European Commission was, after all, to promote the European social dialogue, to provide balanced support to the two sides of industry, and thus to take account of both economic and social interests in its initiatives relating to European integration.

This trust was, naturally, not blind trust – neither for the social partners nor for the Commission. Each party was aware of differing views, differing responsibilities, and even of the 'red lines' which could, at any time, obstruct the relations between them.<sup>16</sup> However, the very way in which the European social dialogue was conceived shows that all the parties involved trusted in the added value it could provide as an instrument of governance and a tool to manage changes related to European integration. And since this mutual trust had become firmly established during the Delors years, each of the parties had been able to develop structures for involvement in this system of interaction between the Commission and the European social partners. The organisations' European secretariats began to structure their work to take advantage of the opportunities for contractual relations now available at European level; the Commission departments developed expertise and know-how in promoting the European social dialogue and gradually evolved practical arrangements for the provision of Commission logistical and financial support to this dialogue.

## **2. The Santer and Prodi Commissions (1995–2004): affirmation of the European social dialogue by collective negotiation and high-level concertation**

The momentum generated under the Delors Commissions would be consolidated and diversified under the Commissions headed by Jacques Santer (1995–1999) and Romano Prodi (1999–2004), thus helping to forge the idea of a 'golden age' of European social dialogue. However, this dialogue came up against various difficulties during the period 1995–2004. The golden age was also a time of uncertainties, sometimes of disillusionment.

I shall begin by listing developments which show the momentum behind the European social dialogue in the period 1995–2004. Firstly, there was the implementation of the consultation and negotiation arrangements set out in the ASP attached to the Maastricht Treaty. These resulted in the conclusion of three major agreements by the cross-sector social partners: on parental leave (1995), on part-time work (1997) and on fixed-term contracts (1999), three agreements which were later transposed into European directives (Council of the EU 1996, 1997 and 1999). The rapid success of the negotiation on parental leave, and the equally speedy legislative implementation of the agreement concluded, show that at that time there was a very broad consensus between the European social partners and the European institutions: all parties wished to show evidence of the added value of the ASP provisions, thus encouraging their incorporation

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16. These 'red lines' were particularly important for the employers, especially with regard to issues linked to the management of industrial restructuring and the information and consultation of workers.

into the text, then under preparation, of the Amsterdam Treaty. The conclusion of the two other negotiations consolidated this form of involvement of the social partners in the production of European social legislation, demonstrating their capacity to address and regulate flexible and atypical forms of employment.

The Commission's 1998 Communication on social dialogue confirmed this broad consensus and the Commission's wish to strongly encourage collective negotiations at European level (European Commission 1998). It was accompanied by a decision setting out a new formal framework for the development of sectoral social dialogue (*ibid.*). This was then given significant support, as shown by the setting up of new sectoral committees, and by the uneven but significant success of the negotiations concerning sectoral working time agreements in some transport sectors (agreements later implemented by legislation).

In the ten-year period 1995–2004, European social dialogue developed not only via the formal consultation and negotiation procedures set out in the treaty but also in the form of various technical or political concertation meetings related to the economic and social policies adopted. The sectoral social dialogue committees<sup>17</sup> were the main forum for concertation on the Commission's sectoral policies, particularly on their effects on jobs and working conditions. Since 1992, cross-industry social concertation has mostly taken place in the Social Dialogue Committee, which meets three times a year, with the Commission and representatives of the national and European social partner organisations taking part. Other forms of technical concertation also developed, such as the macro-economic dialogue, in which the European social partners could discuss wage moderation and questions linked to EMU preparation. The fora for concertation varied, as did the outcomes, i.e. the documents agreed on by the social partners during these meetings or through their bipartite relations. To clarify the terminology used in relation to these documents, and to encourage their recording and follow-up, the Commission proposed a typology of the various documents produced by the European social dialogue.<sup>18</sup>

The ten-year period 1995–2004 was, all in all, a time of progress on Social Europe. This was particularly true after 1997, when Tony Blair came to power in the UK and Lionel Jospin in France and when the Union gained Sweden, Finland and Austria as new members – three countries with long-standing, strong social models often held up as examples. At the end of the 1990s, two-thirds of the then fifteen EU Member States were led by social democratic governments or centre-left coalitions: the Council

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17. These committees are created by the Commission on the basis of a joint request from the European social partners in these sectors, once the representativeness of these partners has been verified. In 2019 there were 43 sectoral committees, with sectoral social dialogue covering more than 80% of employees in Europe. For an overview, see European Commission (2010).

18. In 2002, the Commission emphasised in a Communication the need to clarify the terms used to describe the nature and scope of the texts agreed on by the social partners, particularly the term 'agreement' (European Commission 2002). In 2004, the Commission proposed, in another Communication, a typology to be used to classify the various texts emerging from the European social dialogue in a database (European Commission 2004). Between 2000 and 2014, the Commission presented a biannual Report on Industrial Relations in Europe, including a chapter describing recent developments in the European social dialogue. (From 2015, this biannual report was replaced by a chapter on the topic in the annual report 'Employment and Social Developments in Europe').

was thus in favour of striking a new, more social balance in European policy and of considering how to modernise European social policy. In fact, 1997 saw the adoption of the Amsterdam Treaty, which incorporated the provisions of the Maastricht Treaty's Social Policy Agreement and which enhanced the Union's capacity to act in the areas of employment and discrimination. In 1999, following the successful establishment of the European Employment Strategy in 1997, European cooperation in the areas of social protection and tackling social exclusion, until then limited and sometimes controversial, received a new impulse<sup>19</sup>: the work which had begun in this context with the Member States fed directly into the preparation of the Lisbon Strategy, which the European Council adopted in 2000.

This Lisbon Strategy reflected the new balance just mentioned. It also gave formal status to the Open Method of Coordination, a flexible way of coordinating national policies on employment, social protection and the combating of social exclusion, based on the setting of shared objectives and the monitoring of indicators.<sup>20</sup> The Committees established to manage this flexible coordination essentially involved the national authorities, though a role was assigned to the European social partners.

Moreover, because the Open Method of Coordination became so important in European social policy, the Commission began work on the future of the traditional social policy instruments. In particular, expert groups began working on the future of European labour law and of industrial relations.<sup>21</sup>

In 1997, in light of these various developments, the Commission and the successive Council presidencies had begun the practice of holding a high-level, informal meeting with a delegation from the European social partners once every six months, just before meetings of the European Council. As part of the European Council's follow-up of the Lisbon Strategy, and particularly when it was decided that the spring European Council meeting should be used to discuss this follow-up, the question of the formalisation of this top-level concertation between the European institutions and the European social partners was raised.

On 13 December 2001, the European social partners submitted their Laeken Declaration to the European Council. It contained proposals as to their role in the new forms of governance resulting from the European Employment Strategy and the Lisbon Strategy (ETUC *et al.* 2001). These proposals from the social partners led to the formal decision to hold a regular Tripartite Social Summit for Growth and Employment (TSS) on the

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19. In 1992, the Council adopted a Recommendation on the convergence of social protection objectives and policies (Council of the European Union 1992). During the 1990s, this cooperation was limited, in practical terms, to analytical, rather than political, documents produced by the Commission (the biannual report 'Social protection in Europe' and the Commission communications concerning the future of social protection in the EU; see European Commission 1995 and 1997). The political context at the end of the 1990s enabled considerable momentum to be given to this cooperation on social protection, and a working group was set up within the Council, tasked with preparing cooperation arrangements inspired by the European Employment Strategy.

20. For more information, see Vanhercke (2016).

21. See the report prepared under Alain Supiot (1999) and the report of the high-level group chaired by Maria João Rodrigues (Rodrigues *et al.* 2002). The 2002 Commission Communication on social dialogue was based on the latter report, as well as on the European social partners' Laeken Declaration (ETUC *et al.* 2001).

basis of a 2002 Commission proposal and a 2003 Council Decision.<sup>22</sup> For the social partners, this institutionalisation of the TSS was an acknowledgement by the European institutions of the active social partner involvement in the design and monitoring of economic and social policy – as long as, of course, their proposals were heard and taken into account in the TSS. The setting up of this top-level concertation also reflected the wish of those involved – the European institutions and the social partners – to conclude ‘pacts’ with a view to achieving common objectives, a practice already existing in some Member States. This high-level concertation also seemed to be a guarantee that social partner participation in the more technical concertation fora would result in genuine consideration of their proposals.

The preparation of the draft constitutional treaty, from 2003, was a chance to reaffirm the importance which the Union wished to give to the European social dialogue. However, as well as these expressions of the dynamism of the European social dialogue, signs also began to emerge, in the years 1995–2004, of its fragility, stemming from differences of opinion between the players involved. Also, from the end of the 1990s, there were signs that the dialogue was beginning to run out of steam after its initial momentum: in many ways, the golden age was very short, or, rather, it was not free from disappointments.

The European social dialogue, as established under the Delors Commissions, was closer to the trade unions’ expectations than to those of the employers: the latter had never hidden the fact that they would have preferred the European social dialogue to be essentially a forum for discussions on changes in the labour market, with no capacity to set standards or affect legislation.

It was not, therefore, surprising that the employers had always been highly circumspect and selective when choosing whether to engage in the negotiation of agreements to be transposed into legislation. Some subjects were too sensitive for the employers for agreement to be possible (the ‘red lines’ mentioned earlier, such as the information and consultation of workers, or the management of industrial restructuring). More generally, the national employer organisations were aware of their members’ reactions to past negotiations and were therefore hesitant to engage in new negotiations if their members had previously criticised these. The negotiations on temporary agency work, for example, which started up after much hesitation, ended in failure (2001). Even more importantly, the employers, from the time these difficulties arose in the late 1990s, distanced themselves from the very idea of negotiating agreements to be implemented through legislation. In 2001, during discussions with the unions on the issue of telework, they therefore proposed the negotiation of a ‘voluntary’ agreement, i.e. a solemn commitment which would not be legally binding but would be monitored by their members. They also suggested that this was a possible interpretation of the option to implement agreements ‘in accordance with national practices’, described in

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22. Institutionalisation of the TSS was proposed by the social partners in Laeken (2001) and was addressed in a Commission proposal (2002). The Council adopted the Decision formally establishing the TSS on 6 March 2003. It was planned to introduce a reference to the TSS on the occasion of the revision of the treaties, and such a reference was contained in the draft constitutional treaty; as the latter failed to be ratified, however, the reference to the TSS was only formally enshrined in 2007, with the Lisbon Treaty.

the social partners' Agreement of 31 October, and included as such in the very text of the treaty (now Article 155 TFEU). This was a total reinterpretation of this provision, which originally meant something quite different. But the trade unions agreed to it on a trial basis, basically as a way to salvage the telework negotiations.

After telework (2002), the European social partners concluded another autonomous agreement, this time on stress (2004). The employers wished to avoid legislation on this topic at all costs, as they feared that doubts surrounding the definition of stress could lead to legal uncertainty. By negotiating an autonomous agreement, they avoided such legislation and also managed to avoid any binding commitments. Once again, the unions accepted this form of agreement, as they were not sure that they could obtain more protection from a Commission legislative initiative. Of course, not all discussions between the social partners resulted in agreements, even autonomous agreements, because of the sensitivity of the subjects (for example, restructuring has been a 'no go' throughout the history of European social dialogue).

The employers' usual misgivings concerning social legislation were reinforced by the development of new European social policy paradigms at the end of the 1990s and the beginning of the new century. Under the growing influence of neoliberal theories, even in social democratic circles, the emerging paradigm of choice was to shape social policy as a 'productive factor', prioritising measures which could be seen as incentives to 'adapt' and 'activate' the 'European social model', and encouraging so-called 'integrated' policies, in the hope that these would allow 'mutual reinforcement' of economic and social objectives. Priority was also given to 'soft' instruments, incentives rather than obligations, and governance by targets rather than governance by legislation. By taking this approach, the Commission sent out a clear message which encouraged the employers – and Member States – to be circumspect as to European social legislation.

European trade unions' acceptance to conclude autonomous agreements was probably due to the fact that such agreements were preferable to no negotiations at all (and because without negotiations, they did not expect, or no longer expected, the Commission to submit ambitious legislative proposals). But it was also because, at the end of the 1990s, they wished to examine with the employers the possibility of adopting 'autonomous work programmes', i.e. work programmes separate from Commission initiatives (although they could, of course, complement such initiatives).

This affirmation of the autonomy of the European social partners, expressed, *inter alia*, in their Laeken Declaration (ETUC *et al.* 2001), can be interpreted in various ways. It obviously reflected the social dialogue situation in many Member States, where 'bipartite' dialogue was often as well-developed as, or more than, 'tripartite' dialogue. It also reflected the social partners' wish to distance themselves from the priorities set by the Commission, and, even more so, to free themselves from the Commission's supervisory role and guardianship, now that the social dialogue had reached adulthood.<sup>23</sup>

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<sup>23</sup>. Luca Visentini, General Secretary of the ETUC, emphasises the results obtained by means of the autonomous social dialogue, in the form of autonomous framework agreements, action frameworks and social dialogue work programmes established 'by the social partners and for the social partners' (Lapeyre 2017: 253-255).



The Declaration also reflected a concern to maintain, as far as possible, the potential of European-level collective bargaining at a time when European social policy was shifting towards ‘soft’ instruments and when the Commission’s support for legislative initiatives was less certain. But given the misgivings of most employers as to the development of a substantial autonomous programme and their unwillingness to make credible commitments concerning the effective implementation of these autonomous agreements, the union attitude was in some ways a retreat from their initial ambitions, at the risk of accepting, *de facto*, a less far-reaching European social dialogue.

In practice, the shift of the European social dialogue towards texts implemented autonomously did not result in any outcome as significant as the agreements transposed into legislation. This was not because the autonomous agreements were of lesser quality but, rather, because their implementation was often partial, uneven or limited. Sometimes there could even be unexpected side-effects. The existence of an autonomous agreement on a particular issue could give the impression that the issue had been resolved at European level, giving the European institutions (and the employers) an argument to do no more and to reject any legislative initiative, despite the fact that there was still no guarantee that the minimum protection expected from this agreement would be implemented throughout the Union; indeed, there was nothing to stop certain national organisations stubbornly refusing to implement an agreement. This would at times result in disappointments and disillusionment, especially after the enlargements of 2004 and 2007: it was particularly in the new Member States that the autonomous agreements concluded at European level would scarcely be applied or, when it was, applied very unevenly.<sup>24</sup>

The European social dialogue experienced other difficulties during this period – the failure, for example, of the European Centre for Industrial Relations (ECIR) at the end of the 1990s, highlighting the limited support shown by the European Parliament to the European social dialogue.<sup>25</sup> It is noteworthy, however, that the various problems listed above have not affected the overall positive image of this period in the eyes of the participants. As well as the failures, there were major successes in their view throughout this period, both for the social dialogue and for European social policy. These included the Amsterdam Treaty, the directives based on the cross-sector agreements between the social partners (see above), the Lisbon Strategy, the promotion of ‘integrated’ policies, the institutionalisation of the TSS, and European social policy progress on the issues of employment, social protection and discrimination.

Outside observers of the social dialogue, however, have voiced doubts and critical comments, as suggested, for example, by the titles of the chapters in the *Bilan social* examining the social dialogue: ‘breathlessness and hesitation’ in 2002 (Degryse 2002) and ‘transition or stagnation?’ in 2004 (Degryse 2004).

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24. The Commission’s evaluations of the telework and stress agreements highlighted the uneven implementation of these agreements (European Commission 2008 and 2011). This was due, in particular, to weaknesses in the social partner organisations in some countries, notably certain new Member States, and because the employers frequently perceived the autonomous agreements as agreements which they were not obliged to implement.

25. The aim of the ECIR was to promote the same European social dialogue culture within the national employer and union organisations. The national organisations were not really convinced by this idea, and the European Parliament required the ECIR to become self-funding within a short period of time, which turned out to be impossible.



### **3. The Barroso Commissions (2005–2014): first tensions, then exasperation**

Compared to what is still considered to be the golden age of the European social dialogue, the years 2005–2014 appear as a time of growing tension. Participants in the European social dialogue and observers of its development seem, moreover, to pass rapid judgment on this period. On the union side, Jean Lapeyre describes the Barroso years as a ‘catastrophe’ (Lapeyre 2017: 195), while the title of the social dialogue chapter in the 2012 *Bilan social* (Degryse and Clauwaert 2012) is ‘Taking stock of European social dialogue: will it fade away or be transformed?’ As for the Commission, President Juncker’s announcement at the end of 2014 that he intended to ‘relaunch’ the European social dialogue seemed to be, at the very least, an implicit admission from the highest level of the Commission of the serious deterioration of that European social dialogue during his predecessor’s terms of office.

One should not, however, accept this entirely black picture of these years: during the period 2005–2014, the European social dialogue achieved some results, leading to a number of agreements which showed that it still had significant potential. These achievements are particularly noteworthy since, for the Union and the European social partners, this period was one of major challenges. The first of these was the general transformation of the Union following its enlargement first to 25, then to 27 Member States. The next was the international economic crisis, followed by the Eurozone crisis and then by controversies related to the political responses to these crises. With the return of right-leaning or centre-right coalitions in most of the Member States, most countries reacted to the crises with neo-liberal-inspired policies. Over this whole period, however, the consensual European social dialogue process seemed to be running out of steam, to be replaced by an increasingly confrontational approach.

In the initial years of the first Barroso Commission (2005–2009), the earlier, consensus-based dynamic retained the upper hand, as reflected in the Lisbon Strategy and its Social Agenda, and, in terms of cross-sector social dialogue, the establishment of autonomous work programmes. During this time, the European social partners carried out a joint analysis of changes in the labour market (2007) and agreed to explore together how the flexicurity principles proposed by the Commission and Council could be applied.<sup>26</sup> Also, during the first phase of the international economic crisis in 2007–2008, the European social partners backed the recovery and employment support plans involving the use of flexible work arrangements within companies.

The situation regarding European cross-sector collective bargaining remained broadly similar; as discussed above, its emphasis had shifted, at the beginning of the 2000s, towards autonomous agreements, largely due to the attitude of the employers. This shift led to the conclusion of autonomous agreements on harassment and violence at work

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26. Following on from a Commission communication on ‘flexicurity’, the Council adopted ‘common principles’ (European Commission 2007; Council of the EU 2007). The European social partners presented their joint analysis of European labour markets (ETUC *et al.* 2007a) and carried out a joint study on the implementation of these common principles and on the role of the social dialogue in the new context of the crisis (see ERC 2011; Voss *et al.* 2011).

(2007), then on inclusive labour markets (2010); also, after much hesitation, a new agreement was negotiated on parental leave (which, by its very nature, could only be implemented via legislation).<sup>27</sup> In the meantime, a dynamic of negotiations developed in the sectoral social dialogue – a sign of the maturity of the sectors involved – resulting in agreements negotiated with a view to legislative implementation: on adapting European labour law to the International Labour Organisation’s (ILO) Maritime Labour Convention (2008) and on occupational health and safety in hospitals (2009).<sup>28</sup>

These developments, however, took place almost entirely in the early years of the first Barroso Commission, before the Eurozone crisis. From the very beginning of this crisis, which highlighted the weaknesses of the original Eurozone architecture and which raised the question of the sustainability of sovereign debt, differences of view and tensions grew between the employers and the unions, and between the European social partners and the European institutions. These tensions would intensify under the second Barroso Commission.

The tensions first emerged in relation to the responses to the Eurozone crisis. They were sparked, in particular, by the guidelines adopted by the European Council and by the Commission recommendations on economic governance, budgetary discipline and structural reforms, and by the conditions and financial assistance arrangements granted to the most vulnerable Eurozone countries. While the employers generally supported the guidelines adopted, many of which reflected their long-held wishes, the unions were very critical of what seemed to them to be austerity measures exacerbating unemployment and inequalities, imposed under a technocratic and financial logic. They called for the Union’s social dimension to be considered, particularly the social dimension of the Economic and Monetary Union. The unions also opposed the role of the ‘Troika’ (made up of the European Central Bank, the International Monetary Fund and the Commission) and that of the Commission within this Troika; they were unhappy with the policies imposed on the countries receiving assistance and with the undermining of social partner autonomy in collective negotiations, including collective bargaining on pay (on these last points, the criticisms voiced by the trade unions were echoed by the employers who were always careful to defend the autonomy of collective bargaining).<sup>29</sup>

These criticisms were voiced insistently in the various European social dialogue bodies, particularly at the TSS meetings attended by the highest-level representatives of the European social partners and European institutions. The unions also took these complaints to the bodies in the ILO and the Council of Europe responsible for monitoring labour standards. However, their appeals did not result in any significant change to the policies followed, except for some minor formal adjustments made to

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27. In its 2004 communication on European social dialogue, the Commission indicated that autonomous agreements should not be used to revise an existing directive (European Commission 2004).

28. The agreement of May 2008 on maritime transport was implemented by Council Directive 2009/13/EC. The July 2009 agreement on injuries from sharp objects in hospitals was implemented by Directive 2010/32/EU (Council of the EU 2009 and 2010).

29. Financial assistance was made dependent on a vast programme of structural and public finance reforms, steered and monitored by a ‘Troika’ which was criticised for its ‘lack of democratic legitimacy’ and ‘indifference to the social consequences’ (see, for example, Papadakis and Ghellab 2012).

protect the Commission from condemnation by these international bodies.<sup>30</sup> In the same way, the TSS lost its role as a forum for effective social concertation at the highest level, becoming an arena for a ‘dialogue of the deaf’ repeated every semester. For the purposes of external communication, however, appearances of concertation were kept up.

Some of the Commission’s employment initiatives were well received by the social partners, especially those targeting the young (the Youth Employment Initiative, the Youth Guarantee and support for apprenticeships). But these initiatives were not enough to convince the trade unions of the Commission’s continued commitment to promoting the Union’s social dimension: this dimension was not taken into account in the various reforms made to the Eurozone structure, and the Commission only presented a communication on this aspect very late in the day, in 2013.<sup>31</sup> Moreover, the structural reform policies encouraged by the Council and the Commission were explicitly liberal in tone; this undermined union participation in their discussion, thus also weakening some of the initiatives launched by the European social partners under their common work programme, such as the difficult joint work on flexicurity principles. As European proposals or recommendations began to insist on greater flexibility in the labour markets and to turn their back on measures safeguarding career paths, the concept of ‘flexicurity’ was revealed as mere rhetorical window-dressing of traditional flexibility measures – and thus lost all credibility. The unions therefore *de facto* withdrew from the flexicurity agenda. The Commission would repeatedly reproach the European social partners, particularly the unions, for not having ‘shouldered their responsibilities’ to promote flexicurity.

In the same way, following the collapse of the cross-sector negotiations on working time (2012), the Commission criticised the European social partners for not doing their bit to promote the structural reforms which it deemed necessary. The social partners obviously refuted this criticism, recalling that the failure to revise the working time directive was, first and foremost, a failure of the Council and the European Parliament, which had been unable to agree on a final text in the mid-2000s.

Another reason for the exceedingly hostile relations between the Commission and the trade unions under the second Barroso Commission concerned the disputes surrounding the Commission initiatives to simplify and streamline European legislation, including social legislation. The most controversial initiatives were the so-called REFIT<sup>32</sup> and ‘Smart Regulation’ programmes, the suspension of legislative initiatives on occupational health and safety pending prior evaluation of the ‘acquis’, and then the Commission’s increasing opposition to legislative implementation of

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30. Because of its role in the Troika, the Commission was accused of not respecting the Charter of Fundamental Rights or the European Social Charter and of undermining the autonomy of the social partners of the countries receiving assistance. When President Juncker took up his post, he underscored the need to replace the Troika with a ‘more democratic’ mechanism and to carry out a prior analysis of the social impact of the reforms imposed.

31. The ETUC proposals (2012) and the work done by experts on the social dimension of the EMU were not taken into account in the so-called ‘Six-Pack’ and ‘Two-Pack’ reforms. However, in 2013, after many calls for such a measure, the Commission presented a communication aimed at strengthening the social dimension of the EMU, by the establishment, in particular, of a ‘Social Scoreboard’ as part of the European Semester (European Commission 2013a).

32. Regulatory fitness and performance (REFIT) programme.

social partner agreements, particularly those concluded in the sectoral social dialogue. From 2012, these agreements were subject to long and suspicious impact assessments; the time needed to transpose them into legislation increased from around six months to around thirty months. Sometimes the agreements even became completely bogged down, against a backdrop of distrust and hostility (Tricart 2019).

The trade unions also took the disputes resulting from these developments to the European social concertation bodies, particularly the TSS. Although the disagreements essentially affected the sectoral organisations, they also helped poison the atmosphere of discussions in the concertation bodies, where there were often stormy debates, particularly on the occupational health and safety agreement in the hairdressing sector, which thus became a symbol of Commission hostility to agreements emerging from the sectoral social dialogue (Vogel 2018).

There was deep-seated hurt behind this deterioration of social concertation into a shouting-match. These disputes reflected the erosion of the mutual trust which had previously characterised the tripartite European social dialogue: the Commission's trust in the responsibility and legitimacy of the social partners and the trust of the social partners in the Commission and in its eagerness to promote both economic and social progress.

This breakdown in trust, or, more specifically, this emergence of *distrust*, was also the result of changes in the social and cultural system which had helped make the European social dialogue possible. Previously, between and within the Commission 'Cabinets' (private offices) and departments, and the European social partner organisations, there had been a wealth of accumulated knowledge, a collective memory and a series of individuals, networks and information channels enabling the parties to relate informally, to explore possible agreed ways forward, to pre-empt and prevent conflicts or manage them effectively, to preserve some forms of communication even on sensitive issues, and to maintain trust throughout this process.<sup>33</sup> This social and cultural infrastructure, this collective memory and know-how, were gradually diluted during this period – within the social partner organisations, partly as a result of enlargement, but also within the Commission, as a new generation with new profiles came to the fore, and, above all, with the reorganisation of the Commission departments and the handling of staff mobility.<sup>34</sup>

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33. For the European social partners, the social dialogue was largely managed by a few hundred individuals who had developed collective know-how, networks for discussion and cooperation, and a European negotiating culture which enabled them to act together and link the national and European levels (with the successive enlargements, however, it became clear that much 'capacity-building' work was needed, to encourage the participation of the newcomers and ensure that their interests were considered). Within the Commission and its departments, support for the European social dialogue was provided by a few individuals, their collective know-how, their institutional memory, the tending of long-term relationships of trust, and the development of effective arrangements for formal and informal communication.

34. The Commission adopted a policy of staff rejuvenation and mobility which made it more difficult for experience to be built up and passed on. It also undermined the institutional memory and networks vital to promoting the European social dialogue. Changes in the arrangements for the political coordination of the Commission departments, with, in particular, a growing role assigned to the Secretariat-General, were also partially responsible for these changes.

Although the second Barroso Commission took certain initiatives able to contribute to restoring positive relations with the European social partners (for example, proposing, rather late, in 2013 to include a ‘social scoreboard’ in the European Semester), it ended in an atmosphere of mutual exasperation between the social partners and the Commission. The latter accused the social partners, particularly the unions, of failing to shoulder their responsibilities and of neglecting to help with the implementation of the labour market reforms needed to restore the competitiveness of the EU economy. The social partners accused the Commission of trying to use them and of dictating a reform agenda without respecting their autonomy (while the trade unions criticised the Commission even more for having opted for unjust and socially destructive neoliberal policies).

#### **4. The Juncker Commission (2014–2019): uncertain times – expectations, hopes and disappointments**

Given the situation of the European social dialogue at the end of the second Barroso Commission, it is not surprising that participants and observers initially saw the installation of the Juncker Commission as very good news. They maybe even perceived it as the ‘last chance Commission’, as President Juncker himself described it at the beginning of his mandate, emphasising people’s disenchantment with the European integration project. It was maybe also perceived as an opportunity for the European social dialogue to shake off the paralysis into which it had gradually fallen and for the European social partners to escape, when wishing to implement their agreements, the more-or-less overt hostility from the Commission, or at least from some of its departments.

One of the first measures announced by President Juncker was the ‘relaunch’ of the European social dialogue<sup>35</sup> (which was a way of acknowledging the deterioration which had taken place). He also gave new momentum to the idea of Social Europe (a concept which was, at the time, very rarely heard at that level), emphasising the notions of fairness, a ‘social triple A rating’ and even social rights. This was clearly a break with the previous Commission and a return to the basic principles behind the foundation of the European social dialogue under Delors; it was even a rehabilitation of those Delors years, which, under Barroso, the higher levels of the European administration were happy to denigrate or relegate to an obsolete past. President Juncker, however, had lived through that time and appreciated it.<sup>36</sup> This attitude also reflected a wish to respond to the loss of confidence among the general public and more specifically among workers in the European integration process. The Commission wished to counter the ‘populist’ moods (a concept which is surely more polemical than objective) by emphasising social

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35. See the first speech made by J.C. Juncker as Candidate for President- of the Commission: ‘A new start for Europe’ (Juncker 2014).

36. President Barroso never valued the social achievements of the Delors Commissions. Informal discussions with Commission officials confirm that, under the Barroso Commissions, the general line was to consider the themes and ‘language’ from that time as obsolete. President Juncker, however, spoke openly of his past cooperation with J. Delors and his Commissions. He reinstated some of the vocabulary used then, such as the concept of a basic pillar.

cohesion – although the composition of the Juncker Commission suggested that not all its members necessarily shared the social aims stated by its President.

Incidentally, when the Juncker Commission, in March 2015, organised the conference intended to mark the ‘new start’ for the European social dialogue, it was under the aegis of the 30<sup>th</sup> anniversary of the European social dialogue meeting organised in 1985 by President Delors at Val Duchesse. Preparations for the conference did not include a detailed analysis of the reasons why the Commission felt it necessary to relaunch the European social dialogue, and to do so by means of a Commission initiative, thus favouring a tripartite approach. Such an analysis would have required the Commission to look critically at its own actions and to acknowledge the part played by its past policies or attitudes in the deterioration of relations between the social partners and the European institutions. This is not common practice within the Commission.<sup>37</sup> The conference was really a political relations exercise. For the Juncker Commission, its purpose was first and foremost to convince the European social partners that times had changed with the end of the second Barroso Commission and that the Commission now intended to invest more in the social dialogue and to adopt an economic and social policy which showed greater concern for social ‘fairness’. It thereby hoped to regain the trust of the European and national social partners at cross-sector and sectoral levels, and thus to win their support for the governance instruments of this economic and social policy, particularly the European Semester.<sup>38</sup>

The conference was a success and resulted in some specific changes to the functioning of the concertation bodies between the Commission and the European social partners, particularly the TSS. It was also followed by an extension of the areas for consultation with the social partners, beyond social policy and employment. The conference also involved the Council and Member States in the initiatives to relaunch the European social dialogue, particularly in the preparation of a Quadripartite Statement to be issued by the cross-sector social partners, the Commission and the Council.<sup>39</sup> As is often the case, this statement was above all a list of good intentions. But it certainly encouraged greater consultation of the national social partners concerning the implementation, at national level, of the European Semester (Sabato *et al.* 2017). It also sent out the consensual message that the various players were willing to cooperate under the new Commission and beyond.

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37. The Commission rarely criticises its own actions in public. It may at times say that mistakes were made, though without acknowledging that the institution itself might have been behind these mistakes or actively involved in them. In his speech, mentioned above, ‘A new start for Europe’, President Juncker refers to past errors, but without mentioning or examining the involvement or possible responsibility of those preparing or implementing these policies.

38. Today, the major challenge faced by the Union is how to coordinate national policies, particularly economic and budgetary policies. The main tool for doing so is the European Semester. In parallel, the Commission wishes to reduce law-making in the Union, including social legislation. For this reason, it is now encouraging the social partners to become involved essentially through social concertation. Yet there is no incentive for the social partners to surrender their power to intervene in the legislative process in exchange for an expansion of the concertation arrangements linked to the European Semester (the effects of which on national economic and social policies also reduce the potential and scope of collective bargaining).

39. See European Commission 2016.



There was one cloud in the Commission's sky: the statement contained very little support from the European social partners for the guidelines set out in its 'Better Regulation' programme, presented a few months previously – guidelines which expressed its wish to only legislate, in the future, on a restrictive and selective basis, thus continuing the approach developed under the second Barroso Commission. This approach involved a (unilateral) reinterpretation of the provisions in Articles 154 and 155 TFEU concerning the European social dialogue, particularly the provisions relating to the legislative implementation of agreements reached by the European social partners. It was no surprise that the Commission had not involved the social partners in the preparation of the Better Regulation provisions relating to these agreements. From then on, it aimed to apply strict limitations to the involvement of the social partners in the European legislative process, making it clear that it considered itself to have total freedom in its assessment of requests for implementing social partner agreements. In particular, the Commission felt entitled to 'reject' any agreement with which it was unhappy.<sup>40</sup> Its aim was to avoid the sort of disputes sparked under the second Barroso Commission by the agreements concluded in the context of the sectoral social dialogue (in particular the 2012 'hairdressing' agreement; see Dorssemont *et al.* 2018; Tricart 2019).

This aspect went virtually unnoticed at the time of adoption of the Quadripartite Statement. It reminds us, however, that the disputes over the legislative implementation of sectoral agreements did not disappear with the end of the second Barroso Commission and the relaunch of the social dialogue by the Juncker Commission. They reared their head once again a few months later, when a major disagreement broke out between the Commission and the signatories of an agreement concerning the central administration sector – a disagreement which would result in an action being brought before the Court of Justice of the EU (case T-310/18).

For the Juncker Commission, the relaunch of the European social dialogue was part of a broader initiative to reinforce the social dimension of European integration and of the EMU (Degryse 2018). This broader initiative included, in particular, the proclamation of a 'European Pillar of Social Rights'<sup>41</sup> (hereafter the 'Pillar'), greater consideration of social issues in European policies, and the objective of promoting 'upward convergence' in the Eurozone.

While all observers and participants agree on the symbolic and political importance of the proclamation of the Pillar, opinions are divided as to the added value of its content (a statement of principles rather than of rights). And opinions are above all divided on its potential impact, since the Pillar is largely to be implemented via initiatives to be taken by local and national authorities, the social partners and civil society, with possible support from the Union. In practice, the Commission only presented three (not

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40. The concept of 'rejection' has emotional connotations, unlike, for example, the term 'refusal'. It is not used in any of the five communications on the European social dialogue presented by the Commission between 1993 and 2004. Its repeated use from the time of the disputes on the sectoral agreements suggest that these generated strong feelings (Tricart 2019).

41. For an overview of discussions on the European Pillar of Social Rights, see Vanhercke *et al.* (2018).



very ambitious) legislative proposals together with the Pillar; this is very little compared to previous initiatives.<sup>42</sup>

The Commission's decision to de facto deny itself the use of legislation to promote social rights may seem surprising. However, supporters of the Pillar emphasise that the aim is to make use, for its implementation, of the European Semester and the future European funds, thus involving all Union economic and social policies. This of course assumes that these instruments and policies are the most efficient tools to promote social rights; such an assumption is far from certain and ignores the possibility that the logic behind these policies and tools may in fact hamper promotion of these rights and do nothing to reduce inequalities and disparities in the Union (ETUI 2017). It is, however, too soon to evaluate the impact of the various social initiatives taken under the Juncker Commission.

With regard, more specifically, to the European social dialogue, the Juncker Commission certainly created the conditions for closer consultation of the social partners, and especially the cross-sector organisations, in the setting of European policies. The Juncker Commission, by presenting itself as ready to listen to the social partners, also encouraged them to seek common positions on various issues related to the labour market. At cross-sector level, they carried out another joint analysis of the challenges facing the labour market, adopting joint statements on topics such as apprenticeships, industrial policy, digitalisation, the integration of refugees, vocational training and the multiannual financial framework for the European budget. The social partners also concluded an autonomous agreement on active ageing (2017).<sup>43</sup> Of course, they avoided the most sensitive issues, as well as, generally, anything which might result in social legislation. Nevertheless, these achievements show that restoring the conditions for tripartite social dialogue at European level can also stimulate bipartite social dialogue at the same level.

Despite these developments, however, the Juncker Commission and its relaunch of the social dialogue did not dispel the tensions concerning the legislative implementation of social partner agreements. Indeed, these tensions were stirred up by the Better Regulation programme, particularly for some sectoral social dialogue organisations, to such an extent that they threatened to permanently undermine collective negotiations at European level.

As I have said, the second Barroso Commission had expressed its opposition to implementing the 2012 'hairdressing' agreement by means of EU legislation. The Juncker Commission inherited this controversial dossier (on which all work had stopped) and, on revising their agreement in 2016, the social partners confirmed

42. While the action programme for implementing the 1989 Charter listed 47 initiatives, including 18 legislative ones, the presentation of the Pillar was accompanied by three initiatives. The mission letter of Commissioner Nicolas Schmit includes a call for an action plan to implement the Pillar (von der Leyen 2019): this may seem to be an acknowledgement of the fact that, two years since proclamation of the Pillar, no such plan has yet been drawn up.

43. As part of their autonomous work programme, the European interprofessional social partners have presented, in recent years, several joint reports and joint statements, as well as one autonomous agreement (see, for example, ETUC *et al.* 2015, 2016a, 2016b, 2016c, 2017a, 2017b, 2018a and 2018b).

their request for legislative implementation. The Commission also had to examine the request for the legislative implementation of an agreement on the information and consultation of workers in the central administration sector, concluded in late 2015.<sup>44</sup> Both these dossiers, however, received a hostile reaction from the Commission and its departments, which had no desire to propose social legislation on these issues. President Juncker said that the Commission should be dealing with ‘bigger’ things than the agreement on occupational health and safety in the hairdressing sector – a comment which shocked the signatories to this agreement. Work on these issues stagnated, while relations between the Commission and the signatory organisations deteriorated, with some strong language and accusations recalling the Barroso years.

In early 2018, to break the stalemate, the Commission made a proposal to the social partners in these two sectors. They were asked to withdraw their requests for legislative implementation, in return for financial and political support for the autonomous implementation of their agreements – a proposal going completely against the principle that the choice between legislative and autonomous implementation of an agreement falls entirely within the autonomy of social partners. While the social partners in the hairdressing sector agreed to begin discussions with the Commission on this autonomous implementation, the signatories to the central administration sectoral agreement turned down the Commission’s proposal. The Commission then decided to formally reject the request from the social partners in this sector. This was an unprecedented step: the agreement had been negotiated following formal consultation of the Commission which had explicitly invited the social partners to consider these negotiations.

The sensitive political nature of this dispute, and the varying expert opinions as to the rule of law on this point, led the European Public Service Union (EPSU), the main union signatory to the agreement, to bring an action against the Commission before the Court of Justice of the EU – another unprecedented move from a union organisation in relation to the social dialogue. A great deal was at stake for the whole European social dialogue, since the provisions relating to the agreements applied to both the sectoral and the cross-sector dialogue. As we have seen, the capacity of cross-sector social partners to conclude agreements to be implemented through legislation had already declined. But the Commission’s decision to make the implementation of social partner agreements subject to cumbersome, suspicious procedures, and the intense controversy surrounding Article 155.2 TFEU, more or less stamped out any last wish of the sectoral social dialogue organisations to enter into negotiations.<sup>45</sup>

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44. The agreement on information and consultation rights of civil servants and employees of the central administrations was concluded on 21 December 2015 between TUNED (Trade Union’s National and European Delegation) and EUPAE (European Public Administration Employers).

45. In the course of the ten years 2005–2014, seven directives were added to European labour law, as opposed to 23 and 24 new directives, respectively, during the two previous ten-year periods (not counting revisions and geographical extensions). Of these seven directives, four are transpositions of agreements by the European social partners (Silva 2015). This explains the Commission’s hostility to these agreements, as it wishes to reduce the amount of new social legislation. The Better Regulation provisions and the disputes related to agreements in the hairdressing and central administration sectors have deterred the sectoral organisations from entering into this type of collective negotiation at European level.

In October 2019, the Court of Justice rejected the action brought against the Commission,<sup>46</sup> but EPSU appealed against this first judgement. The very existence of this dispute blots the copybook of the Juncker Commission with regard to the relaunch of European social dialogue – and this dossier is still very sensitive within the Commission.<sup>47</sup> All in all, the Juncker Commission managed to restore the Commission's 'pro-social' image. But it considerably weakened collective negotiations at European level by making it more difficult to achieve the legislative extension of the agreements stemming from these negotiations. At cross-sector level, bipartite social dialogue was hampered by the refusal of the employer organisations to commit to binding agreements. This, for the Commission, reduced the European social dialogue to a form of social concertation. Though such concertation may well come in multiple forms, it can only have the impact allowed by the institutions: as recent history shows, this impact may be no more than the sending out of a political message. Such a situation may suit the employers, whose priority has always been to oppose any initiative which would establish new rights through legislation. But it certainly does not satisfy the trade unions with their greater expectations from this dialogue, who are having to resign themselves given the current balance of power. The risk is, however, that if European social dialogue is reduced to tripartite social concertation, even extended concertation, and to bipartite actions or declarations on only the least controversial issues, then it is unlikely to be able to rally the lasting and strong involvement of the national organisations, whether on the employer or union side.

## Conclusion

Common Market, single market, Economic and Monetary Union: the European integration process has essentially followed an economic rationale. European economic integration, however, has only ever been politically and socially acceptable, and therefore possible, when given a certain 'social dimension', the content and extent of which have thus been the subject of ongoing discussion and compromise: Europe had to be social in nature, at least to some extent. For some, a 'Social Europe' was the only meaningful outcome. For others, however, this social dimension should only exist and develop to the extent strictly necessary to render European economic integration generally acceptable (Pochet 2019).

It was because of this challenge, inherent to European integration, that the European social dialogue was invented, in the particular historical context of the Delors years. It then essentially took the form of a tripartite cross-sector social dialogue – between European employers' and workers' organisations structured specifically for that purpose, but also with the Commission, which had been granted a specific mandate by the Treaty to promote this dialogue. The European social dialogue, therefore, did not develop from the long history of industrial relations, which were basically confrontational and

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46. CJEU, Judgment of the General Court, 24 October 2019, Case T-310/18. See the EPSU comments (EPSU 2019).

47. The publication of his recent study on the legislative implementation of agreements between the European social partners (Tricart 2019) showed the author of this chapter how politically sensitive this issue was within the Commission services.

bipartite and which gradually moulded national social dialogue traditions. Rather, it emerged from the brief history of attempts to seek consensus on social concertation mechanisms and contractual relations at European level to support the development of a Social Europe, within the limits of the ambitions which could be given to this Social Europe in a particular historical context. This process of inventing the European social dialogue enabled the social partners to become key players in the ongoing debates and compromises required by the prospect of this social Europe, or by the social dimension of European integration. And ever since the Val Duchesse social dialogue in 1985, all Commission presidents have, in one way or another, affirmed that the European social dialogue is part of the Union's DNA. In this way, they have made their contributions to the 'story' told by the social partners themselves: that the social dialogue is inherent to European integration and necessary for its success.

The European social dialogue has proved to be very resilient over the course of its history. Initially strengthened by the support it received from the Delors Commissions and from most of the then-Member States, which recognised that it was vital to the construction of the single market, it was able to overcome the disagreements between employers and unions concerning the need for social regulations and its possible role in generating European social legislation. Strengthened by the resolve to modernise European social policy as enshrined in the European Employment Strategy and the Lisbon Strategy, it was able to enhance its social concertation role, even at a time when the evolution of social policy paradigms tended to reduce its potential contribution to the production of European social standards, as well as curtailing the role of social legislation. It was, however, seriously weakened when the European institutions, particularly the Commission, stopped providing political support to all its functions – consultation, as well as negotiation – and switched to providing very selective support, i.e. only to social partner initiatives in line with their policies.

Appealing to the crisis, the EU organised its governance around a neoliberal economic rationale which gradually reduced social concertation to a cosmetic exercise and which undermined the impact of collective bargaining at European level. The European social dialogue had been developed in a climate of trust between the social partners and the institutions, particularly the Commission; distrust and exasperation now characterised these relations. And, with no real prospect of developing the tripartite dialogue, bipartite dialogue lost its influence: the unions could no longer achieve any sufficiently meaningful outcomes from it, while the employers stood to gain more by direct interaction with the European institutions which usually held similar views to theirs. Given the deterioration of the social dialogue in the mid-2010s, the relaunch of the European social dialogue came at a good time, particularly as it was linked to the prospect of relaunching the social dimension of Union policies. In this way, the Juncker Commission was able to restore trust in concertation with the social partners. It did not, however, change its hostile attitude towards the legislation emerging from European collective negotiations – an attitude which had developed at the time of the Barroso Commissions – and thus seriously weakened the negotiating role core to the invention of the European social dialogue.

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## Chapter 5

# From the Lisbon strategy to the European Pillar of Social Rights: the many lives of the Social Open Method of Coordination

Bart Vanhercke

### Introduction<sup>1</sup>

This twentieth edition of *Social policy in the European Union* (or *Bilan social* in its shorter French version) provides a timely opportunity to revisit the EU's turn to 'soft governance' – notably in the area of social protection and social inclusion – which was formalized two decades ago. In July 1999, the Santer European Commission proposed a 'Concerted Strategy for Modernising Social Protection' (European Commission 1999). Following its adoption by the Council of the EU (1999), the new strategy was politically rubberstamped at the highest political level, at the March 2000 Lisbon European Council. The heads of state and government provided the EU with a political mandate to launch a 'new Open Method of Coordination' (OMC), not only in the area of poverty and social exclusion but 'at all levels' (European Council 2000:§7), with a view to implementing the EU's Lisbon Strategy (aimed at smart, sustainable and inclusive growth) through the use of non-binding tools such as reporting, monitoring, benchmarking against agreed indicators, targets and peer reviews.

It may come as a surprise to the many critics of the OMC – which is not legally constraining and therefore has a questionable reputation among academics in terms of actual delivery<sup>2</sup> – that the method is still alive and well (amongst others in the form of the European Semester) twenty years after its formal launch, even though open coordination is now far less visible in the European Commission's key documents. Since 2005, the Commission has indeed given precedence to the EU's consecutive overarching socio-economic coordination processes – the Lisbon Strategy, the Europe 2020 Strategy and the European Semester – rather than to 'competing' sectoral strategies such as the OMC.

At the same time, within the Employment Committee (EMCO) and the Social Protection Committee (SPC) – the two advisory bodies of the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council formation – references to the OMC remain frequent, including in their published opinions. The basic tools of the OMC, including different types of peer reviews and indicator-driven comparisons between Member States, indeed remain fully

1. The author would like to thank Francesco Corti, Denis Crowley, Sophie Dura, Boris Fronteddu, Dalila Ghailani, Peter Lelie, Richard Lomax, Christos Louvaris, Slavina Spasova, Luc Tholoniati and Jonathan Zeitlin for their constructively critical feedback on earlier versions of this chapter, which was essential for sharpening the arguments and getting the empirical analysis right. I take full responsibility for any remaining errors and for the views presented in the chapter.
2. As explained by Schäfer (2006), the initial praise for the OMC, both by politicians and scientists, quickly turned into scepticism. For a literature overview of the four categories of the early OMC literature – theoretical, normative, empirical, and critical – see Citi and Rhodes (2007).

operational: they have been firmly institutionalized and considerably reinforced over the years and, as will be demonstrated below, still serve as mutual learning and benchmarking tools in the European Semester and, since 2018, in the implementation of the European Pillar of Social Rights. The role of the OMC tools in the monitoring of the Sustainable Development Goals (SDGs) is currently under discussion in the aforementioned Committees.

In other words, while the debate about the EU's next 'grand strategy' is ongoing (as the Europe 2020 Strategy is drawing to an end), the OMC continues to provide a template for policy coordination in areas where the EU has limited or no competencies, allowing players to 'agree to disagree', i.e. agree on a working method at EU level while holding divergent views on policy priorities. This is confirmed in the recent joint EMCO/SPC assessment of the Europe 2020 Strategy: while both committees acknowledge that 'the overall impact of the OMC, which depends on voluntary take-up by Member States and national stakeholders, has not been strong enough, given the difficult context of the great recession' (EMCO and SPC 2019: 107), they also agree that 'the method has contributed to putting important social policy issues on the agenda at EU and national level' (*ibid.*: 87). As a result, 'there is strong support for continuation of the OMC as it provides a means for achieving upward social convergence' (*ibid.*).

This chapter seeks to revisit the emergence<sup>3</sup> of the OMC in the area of social protection and social inclusion, as well as its development over the past two decades, embedding the discussion in a wider reflection about (not so) soft governance in the EU. It describes the institutionalization of the OMC in the areas of social protection and social inclusion over the past two decades, starting with its formal launch in 2000. The OMC is a flexible and constantly metamorphosing tool: I will distinguish six stages (or 'lives') of the Social OMC since the term was first coined by the Lisbon European Council. Section 1 describes the initial stage of *experimenting*: the proliferation of OMCs after Lisbon. Section 2 on *streamlining* outlines how the Social OMC was rolled back *and* grew teeth in 2005–2006. Section 3 on *capacity building* illustrates how the OMC's learning tools were further developed 'in splendid isolation' in the years 2007–2009. Section 4 deals with the *marginalisation* of the Social OMC at the start of the Europe 2020 Strategy and the European Semester. Section 5 on *reinvigoration* provides an account of how the Social Protection Committee saved its process in 2013 and thereby paved the way for the initial 'socialisation' of the European Semester. How the OMC fared under the Juncker Commission is explained in Section 6 on *maturity*, which looks at the further socialisation of the European Semester through the OMC toolbox.<sup>4</sup>

The chapter's conclusions discuss the implications of the presented empirical findings for the ongoing (academic) debates about social Europe and the debate over new governance in the EU. It argues that whether the OMC will continue to play a significant role in the EU's post-2020 socio-economic governance will ultimately not depend on its hardness or

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3. The fact that the heads of state and government placed modernising social protection and promoting social inclusion high on the political agenda at their Lisbon gathering did not come 'out of the blue'. Elsewhere I have argued that ten 'milestones' – or important turning points – can be identified which led, over a very long timespan, to the formal launch of the Social OMC in 2000 (Vanhercke 2006).

4. Some of these terms are based on Tholoniati (2010), who usefully identified three stages in the development of the Social OMC between 2000 and 2009: an experimental phase, streamlining and a period of maturity.

softness, but on whether key domestic and EU players continue to use it strategically to further their ambitions. Whether this happens will in turn be determined by the OMC's visibility within the EU's ever-expanding policymaking toolbox: a clear political affirmation of the Social OMC's political objectives under the EU's next grand strategy, also clarifying how it ties in with the European Pillar of Social Rights and the Sustainable Development Goals (SDGs), seems warranted. The recently launched economic governance review (European Commission 2020a) provides a window of opportunity to further socialise' the EU's overarching strategy by making full use of the OMC toolbox: only as part and parcel of this strategy can the OMC maintain its influence and thus its relevance.

## 1. Experimenting: a proliferation of OMCs after Lisbon (2000-2004)

The story of the OMC started well before its baptism in Lisbon in 2000: it was strongly influenced by the experience of the European Employment Strategy (EES), the origins of which can be traced to the early 1990s. The working methods of the OMC proposed by the Lisbon European Council indeed built on the existing EES as well as the Broad Economic Policy Guidelines (BEPG): both of these can be considered as OMCs *avant la lettre* which served as an institutional template for soft policy coordination and were themselves largely inspired by the work of the Organisation for Economic Cooperation and Development (OECD).<sup>5</sup>

And yet, the Lisbon European Council in March 2000 seems an appropriate starting point for our narrative, as it provided a broad mandate to launch a new European-wide approach in a variety of policy areas: in addition to social exclusion, the Conclusions of the European Council (2000) explicitly referred to the use of the OMC in the areas of the information society and e-Europe (*ibid.*: §8), innovation and research and development (*ibid.*: §13). Furthermore, even though the term 'OMC' was not explicitly used with regard to social protection (pensions more particularly), enterprise promotion, economic reform and education and training, the wording of the Lisbon Council Conclusions was such that it gave *de facto* support to launching or continuing policy coordination in these and other policy areas. According to Rodrigues (2001), the OMC was indeed up and running in around a dozen policy areas at the beginning of the 2000s.

Even though these OMCs clearly involve to some extent the specific ensemble of elements defined by the Lisbon European Council (objectives, indicators, etc.), 'actual OMC processes as they have evolved since Lisbon vary considerably in their modalities and procedures, depending on the specific characteristics of the policy field in question, the Treaty basis of EU competence, and the willingness of the Member States to take joint action' (Zeitlin 2005). This should not come as a surprise, since initiatives 'emerged through contacts between individual Directorates General, national ministries, business actors and/or NGOs in the sectors concerned. *Ad hoc* arrangements were agreed upon to reflect sectoral specificities and most processes started informally' (Tholoniati 2010: 97). As Vandenbroucke (2002: 9)

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5. Apart from the BEPG and the EES, one could also mention the Cardiff Process for structural economic reforms, the Bologna Process for cooperation in European higher education, and the code of conduct against harmful tax competition (Zeitlin 2005: 20).

put it, OMCs have been created that ‘together constitute a cookbook that contains various recipes, lighter and heavier ones.’

## 1.1. Social inclusion: a sense of urgency, leading to a full-blown OMC

Thanks to a strong mandate from the Lisbon European Council,<sup>6</sup> a firm institutional setup<sup>7</sup> and concerted action by a small group of policy entrepreneurs,<sup>8</sup> the Social Inclusion<sup>9</sup> OMC evolved from a blueprint to a detailed architecture within a very short time (2001–2002). Its architecture encompassed all ideal-typical OMC tools: four common objectives, endorsed by the Nice European Council, 18 commonly agreed and defined indicators (prepared by the SPC Indicators Sub-Group and endorsed by the Laeken European Council), National Action Plans on Social Inclusion, Joint Reports (adopted jointly by the Commission and the (EPSCO) Council formation) and the requirement to set national targets – and not EU-wide targets, as the Commission had proposed – in the fight against poverty.<sup>10</sup>

In addition, agreement was reached on a Community Action Programme to combat social exclusion that would explicitly support the OMC on social inclusion (European Parliament and Council of the European Union 2002).<sup>11</sup> Importantly, on 17–18 October 2002, the first European Roundtable on Poverty and Social Exclusion was held in Aarhus, Denmark; from this moment onwards, this Roundtable would be held annually, with the support of the European Commission, by the country holding the Presidency of the EU. In other words, by the end of 2002, the complete analytical infrastructure of the Social Inclusion OMC was in place. In 2003, European Commissioner Anna Diamantopoulou and the Social Affairs ministers of the acceding countries formally signed ten Joint Memorandums on Social Inclusion (JIMs), preparing the future Member States for full participation in the Social Inclusion OMC upon accession in 2004, the year in which the second Joint Report on Social Inclusion was adopted and in which the new Member States submitted their first full-blown National Action Plans on Social Inclusion. In 2005, all Member States submitted updated action plans, reporting on new initiatives and thereby providing essential input

6. The Lisbon European Council stated that ‘The number of people living below the poverty line and in social exclusion in the Union is unacceptable. Steps must be taken to make a decisive impact on the eradication of poverty’ (European Council 2000: §31).
7. The OMC has been implemented by the SPC and its predecessor, the Interim High-Level Working Party on Social Protection. The SPC was created through a Council Decision in 2000 and provided the Committee with a strong political mandate (Council of the European Union 2000). The SPC inherited the working methods of the Employment Committee, including the fact that civil servants report directly to the competent ministers (i.e. deliberations from the SPC go straight to Council, without going through COREPER). At a later stage, the SPC became a Treaty-based Committee in Article 160 of the Treaty on the Functioning of the EU.
8. For a detailed discussion, see Vanhercke 2016.
9. The European Commission was instrumental in expanding, at the end of 1990s, the terminology from ‘poverty’ and ‘social exclusion’ to the broader notion of ‘social inclusion’, which contributed to mobilizing political support around a positive (social inclusion) rather than a negative (poverty) EU policy agenda. Thanks to Eric Marlier and Luc Tholoniati for pointing this out.
10. The Barcelona European Council stipulates that ‘Member States are invited to set targets, in their National Action Plans, for significantly reducing the number of people at risk of poverty and social exclusion by 2010’ (European Council 2002: 9).
11. The Programme covered the period January 2002 – December 2006 and was ‘part of an open method of coordination between Member States to give a decisive impetus to the elimination of social exclusion and poverty’ (European Parliament and Council of the European Union 2002: 3).

for the first 'Joint Social Protection and Social Inclusion Report' under the 'streamlined' OMC in this field (see Section 2).

## 1.2. Pensions: a more prudent approach, leading to a 'partial' OMC

In this same period (2000–2004), and following a much lighter mandate from the Lisbon European Council,<sup>12</sup> the Pensions OMC followed a more prudent development path, leading to a provisional architecture which was only endorsed after the publication of several studies, a progress report and a Commission Communication on Safe and Sustainable Pensions (European Commission 2000). The initial agreement on the objectives and working methods of EU cooperation on pensions – politically rubberstamped by both the EPSCO and Economic and Financial Affairs (ECOFIN) Council formations under the Belgian Presidency in December 2001 – left many doubts about whether this particular OMC was meant as a cyclical process, or rather as a one-off exercise to be integrated later in existing coordination processes like the BEPG.

The preliminary architecture of the Pensions OMC encompassed 11 (rather general) common objectives, decided between the SPC and the Economic Policy Committee (EPC); 'National Strategy Reports' (rather than 'Action Plans') based on a common SPC-EPC outline; and Joint Reports on Pensions which were intensely negotiated (in 2001 and 2003) between the European Commission and the Member States. The 2003 Brussels European Council endorsed the second Joint Report and confirmed that the OMC was there to stay and not a one-shot exercise (European Council 2003: §49). Social Affairs Ministers thereby finally confirmed the EPSCO as the legitimate Council formation for dealing with the issue of pensions, while the 'economic' players (i.e. ECOFIN, the EPC and the Economic and Financial Committee, EFC), continued to assess pensions – and more broadly the challenges posed by ageing populations, including health care (see Section 1.3) – from a financial sustainability perspective.

After 2.5 years of work in the SPC and especially its subgroup on indicators, agreement was reached in 2002 on a very limited number of indicators which were, in the words of the SPC, 'second-best measures of the success of current and future pension systems' (SPC 2002: 3). A meagre outcome compared to the 18 commonly agreed Laeken indicators on social exclusion agreed within a period of six months under the 2001 Belgian Presidency of the Council of the EU (for a discussion, see Marlier *et al.* 2007). Unsurprisingly, there was no reference to (or in fact even a discussion about) setting 'national targets' in the Pensions OMC. After completion of the first cycle of the OMC on pensions, the SPC maintained momentum by producing several studies, *inter alia* on 'promoting longer working lives' (SPC, 2004) and on 'Privately managed Pension Provision' (SPC 2005). The new Member States submitted their first National Strategic Reports on Pensions, and the old Member States their second ones, in July 2005. The analysis of these reports by the European

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12. The Lisbon European Council did not explicitly refer to the OMC when considering pensions. Rather than immediately requiring the development of common objectives or targets (as was the case with social inclusion), it gave a mandate to the High-Level Working Party on Social Protection (the SPC's predecessor) to compile a study and a progress report on the future evolution of social protection, giving particular attention to the sustainability of pension systems.

Commission primarily served as input for the 2005 'Social Protection and Social Inclusion Report' under the streamlined OMC (see Section 2).<sup>13</sup>

### 1.3. Healthcare: European Commission activism and Member States' foot-dragging

Last but not least, the debate over the launch of EU cooperation on healthcare was launched neither by the Lisbon European Council<sup>14</sup> nor the Ministers for Health in the EPSCO Council: it was pushed onto the agenda by the European Commission, which creatively used the reference<sup>15</sup> to 'healthcare and care for the elderly' in the Conclusions of the Göteborg European Council (2001a) to seize ownership of this subject,<sup>16</sup> notably by issuing a Communication on the future of healthcare and care for the elderly (European Commission 2001). By doing so, the Commission successfully set the terms of the future EU healthcare debate at an early stage, defining its three components: balancing access, quality and financial sustainability. The Commission also managed to secure a mandate<sup>17</sup> from the Laeken European Council (2001b) to continue working on the topic, despite Member State reservations on discussing healthcare at EU level. Following a (very brief) initial report on healthcare and care for the elderly (drafted by the SPC and the EPC) at the beginning of 2002, work during 2002–2003 concentrated on gathering information and prudently exploring possibilities for mutual learning and cooperation, culminating in another SPC/EPC report.

Crucially, the Commission labelled its draft analyses of Member States' replies to a questionnaire issued in 2002 as a 'Proposal for a *Joint Report* on Healthcare and Care for the Elderly' (European Commission 2003a), thereby for the first time linking the report, in discursive terms, to the existing OMCs on social inclusion and pensions. Indeed, the term 'OMC' had not until then been mentioned once in any official document dealing with healthcare. The Joint Report was adopted by the ECOFIN and Social Affairs Council formations (Council of the European Union 2003), but not until the majority of references to individual Member States had been deleted from the text. While Member States accepted that a process of mutual learning and cooperation on healthcare should be continued, they set clear limits (including on developing indicators). This hesitation of the Member States was confirmed at the March 2004 Spring European Council, when they continued to block the Commission's proposal (European Commission 2004a: 26) to formally extend the OMC to healthcare, despite European Parliament insistence on doing just that (European Parliament 2004: §7).

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13. For a further discussion of the pensions OMC, see Natali (2008) and Vanhercke (2009).

14. The Lisbon European Council Conclusions merely stated that social protection needs to be adapted to be able, amongst other things, to provide quality health services.

15. The European Council (2001a: §43) asked the Social Protection Committee and the Economic Policy Committee to 'prepare an initial report for the Spring 2002 European Council on orientations in the field of health care and care for the elderly'.

16. This in the absence of a request from the heads of state to do so or, for that matter, any reference to the OMC in this area

17. The precise wording of the mandate was carefully fine-tuned (over dinner) between the Belgian Presidency and officials from DG EMPL of the European Commission.



The formal decision to launch an ‘OMC on Health and Long-term Care’ was not taken until October 2004 (Council of the European Union 2004),<sup>18</sup> following another Commission proposal in April 2004 (European Commission 2004b). And even then, health ministers dragged their feet, making the new process subject to certain conditions<sup>19</sup> and failing to explicitly endorse the common objectives proposed by the Commission. The OMC on healthcare was thus launched without an agreed set of common objectives or an agreed reporting framework. Member States also insisted on taking stock of data already available from a range of sources, rather than on indicators to be developed. Member States submitted Preliminary National Reports (and not ‘Action Plans’ or ‘Strategic Reports’) in 2005. These reports would be used, first, to establish the common healthcare objectives in the future streamlined OMC and, second, for drafting the first Joint Report on Social Protection and Social Inclusion (see Section 2).

The wording accompanying the formal launch of the healthcare OMC was not, to put it mildly, the prose of newly enamoured partners. It rather reflected the fact that new governance methods for healthcare had indeed become attractive to Member States at approximately the same time as health ministers realized that the penalty for not taking action would be healthcare policy dictated by EU economic policymakers (notably the ECOFIN Council formation, DG ECFIN and the EPC) and progressively submitted to internal market law and extended in an unpredictable, case-by-case manner by the CJEU and DG Internal Market and Services. DG EMPL convinced health ministers that the planned streamlining of the social OMCs presented a window of opportunity to start ‘occupying the healthcare territory’, in the words of a former SPC Chair. It was helped in this endeavour by the publication of the draft Services in the Internal Market Directive (January 2004), which alerted health ministers throughout the EU to the fact that healthcare systems were not sheltered from the application of internal market rules (Baeten 2007).

## **2. Streamlining: rolling back *and* growing teeth for the Social OMC (2005–2006)**

The post-Lisbon enthusiasm for policy cooperation through the OMC came to a rather abrupt end in 2004, when the High Level Group headed by Wim Kok assessed the overall Lisbon Strategy, coming to the conclusion that ‘Lisbon is about everything and thus about nothing’ (Kok 2004: 17), while the OMC ‘has fallen far short of expectations’ and therefore calls for ‘a radical improvement of the process’ (*ibid.*: 42). While the operational conclusions of the Kok report – including the supposed need for ‘naming, shaming and faming’ and the appointment nomination of a ‘Mr or Mrs Lisbon’ in every Member State – were largely dismissed by the European Council, the re-launched Lisbon II Strategy from 2005 onwards focused on ‘jobs’ and ‘growth’. This implied largely discarding the social and environmental pillars of the initial strategy,<sup>20</sup> which Dehousse (2004) described as a ‘galaxy’ of initiatives,

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18. This despite the EPC’s resistance, as it had strong doubts about launching the process.

19. Stressing the need for flexibility, added value, subsidiarity and coherence, avoiding overlaps, etc.

20. In response to furious reactions from trade unions and socialist MEPs, who warned against dropping the social and environmental pillars during the Lisbon relaunch, Commission President Barroso explained that ‘it is as if I have three children – the economy, our social agenda and the environment’. Like ‘any modern father, if one of my children is sick, I am ready to drop everything and focus on him until he is back to health ... but it does not mean I love the others any less’ (EUobserver 2005).

‘a label’ or a ‘meta-instrument’, rather than a ‘strategy’. The Broad Economic Policy Guidelines (BEPG) and Employment Guidelines were merged (or ‘streamlined’ in the EU jargon) into a single set of Integrated Guidelines. The important overhaul of the Lisbon Strategy effectively turned it into a meta-OMC, leading to the creation of new tools and techniques, including reporting on the Integrated Guidelines through new National Reform Programmes (NRPs), a simplification of the set of indicators and a more central role for the Commission’s Secretariat General (SECGEN) in steering the strategy (Tholoniati 2010).

At the same time, while a wide range of OMC processes were being simplified and suppressed,<sup>21</sup> the European Commission decided to roll back the Social Inclusion, Pensions, and Health and Long-Term Care OMCs by moving them to the periphery of the Lisbon II Strategy. This rolling back went hand in hand with a second streamlining under Lisbon II: the decision was taken to merge these three separate OMCs into a single Social Protection and Social Inclusion OMC (henceforth ‘Social OMC’), with three interconnected strands for each policy area. As explained in Section 1.3, the European Commission (2003b) streamlining proposal also provided for a strand on healthcare. The streamlining of the Social OMC was formally adopted in 2006: despite initial reticence, social affairs ministers finally toed the line, as this provided the prospect of increasing the critical weight of their pet process, notably *vis-à-vis* the EES and the BEPG. Member States were now tasked with translating the streamlined common objectives – containing both strand-specific and overarching objectives applying to all three strands<sup>22</sup> – into integrated National Reports on Strategies for Social Protection and Social Inclusion (rather than issue-specific action plans or strategic reports). Annual Joint Social Protection and Social Inclusion Reports replaced the earlier Joint Reports of the previously separate OMCs.

Unsurprisingly, below the surface of a streamlined Social OMC, many differences existed between the three strands (very visible in the first streamlined Joint Social Protection and Social Inclusion Report), reflecting their rather different characteristics and stages of development (see Section 1). The streamlining of the three strands created strong leverage on the pensions and healthcare strands over the years, bridging the gap to the social inclusion strand in terms of the precision of the common objectives, the quality of the indicators and, more generally, acceptance of European Commission involvement in sensitive policy areas (Vanhercke 2016). Perhaps ironically, the pensions and healthcare strands indeed started growing teeth in a similar way to the social inclusion strand due to this very streamlining.

At the same time, however, it should be recognised that the streamlined Social OMC had in practice been reduced to a process parallel to the revised Lisbon II Strategy, rather than being an integral part of it, as was formerly the case under Lisbon I, at least in the perception of social affairs players. On paper, a reciprocal relationship was created between the Integrated Guidelines for Growth and Jobs and the streamlined Social OMC, both at national and European levels. The Social OMC was indeed supposed to ‘feed in’ to

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21. Formally abandoning the Social OMC would arguably have come at too high a cost, since it enjoyed wide support among social-democratic governments as well as EU social stakeholders.

22. For example, with the third overarching objective, Member States undertake to promote ‘good governance, transparency and the involvement of stakeholders in the design, implementation and monitoring’ of their social inclusion, pensions, and healthcare and long-term care policies.

growth and employment objectives, while the latter supposedly ‘fed out’ to advance social cohesion goals. But in the absence of specific institutional mechanisms to ensure a mutually reinforcing interaction between the social, economic, and employment dimensions of the relaunched Lisbon Strategy, the practical effectiveness of such reciprocal feedback remained limited, with wide variations across Member States. Only a minority of Member States, for example, included social cohesion objectives in their NRPs, most of which made little cross-reference to the Social OMC. Nor was there much evidence under Lisbon II of explicit feeding out from the Integrated Guidelines and NRPs to the Social OMC (Zeitlin and Vanhercke 2018).

### **3. Capacity building: enhancing the OMC's learning tools in splendid isolation (2007–2009)<sup>23</sup>**

In a context of splendid isolation, work within the three strands of the Social OMC in the years 2007–2009 (under the revised Lisbon Strategy) focused mainly on enhancing its toolbox through indicator development, mutual learning activities and funding stakeholder networks.

#### **3.1. Indicator development and benchmarking**

The OMC's original set of social inclusion indicators was developed in the context of the EU15 in 2001 (see Section 1). In 2004, ten new Member States joined the EU, with two further countries following in 2007, leading to a marked (downward) shift in the EU averages of several indicators. This meant that some indicators and basic concepts had to be reconsidered. One key example was the concept of poverty itself. In the original set of Laeken indicators, the headline indicator for measuring poverty was the relative at-risk-of-poverty rate. Since some of the new Member States were characterised by low income inequality, they were among the best performers measured using this indicator, despite the fact that their general standard of living (and the absolute level of the relative poverty threshold) was actually quite low. This resulted in considerable political pressure to develop a more balanced picture of poverty to reflect both its relative and absolute dimension. Agreement was reached in 2009 on a material deprivation indicator, reflecting the share of persons with living conditions severely constrained by a lack of resources. This refining of measuring poverty was a vital step, notably in view of finding an agreement on an EU poverty and social exclusion target at the start under the Europe 2020 strategy in 2010 (Section 4).

After the midterm review of the Lisbon strategy in 2005 and the discussion over the implementation gap, the SPC's Indicators Sub-Group started working on input and output indicators (originally, the set of social inclusion indicators was exclusively outcome oriented) so as to facilitate analysis of the links between policies and policy instruments and outcomes (*which policies produce which outcomes?*), notably in the area of pensions. A ‘national indicators’ label was also developed in cases where a common definition had

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**23.** This section largely draws on Lelie and Vanhercke (2013). I am grateful to my co-author for our inspiring exchanges over the years, which started roughly at the time of the emergence of the Social OMC.

been developed, but where harmonised data sources were missing or difficult to compare across countries due to major institutional differences. Important progress in the use of indicators was made during the thematic reporting years (i.e. years where there was no Joint Report). A key development was the child poverty report produced by a task force of the Indicators Sub-Group of the SPC on child poverty (SPC 2008). It provided an example of how far the analysis (benchmarking exercise) could be pushed using the common indicators. The child poverty report contained an explanatory analysis in that it not only showed a ranking<sup>24</sup> of Member States regarding child poverty outcomes, but also examined main causal factors: joblessness, in-work poverty and ineffective social transfers. The work on child poverty prepared the way for the forthcoming Commission initiative on a child guarantee (Section 6).

### 3.2. Improving the peer reviews

During this stage of Social OMC capacity building, Member States and the Commission started organising 8-10 peer reviews every year on specific issues relevant to social protection and social inclusion in the Member States (host countries) in the context of the PROGRamme for Employment and Social Solidarity (PROGRESS).<sup>25</sup> For these PROGRESS peer reviews,<sup>26</sup> a specific methodology has been developed over the years. This includes the writing of a discussion paper by the thematic expert (describing the policy under review and putting it in an international comparative perspective),<sup>27</sup> key questions for discussion, and comment papers written by peer countries and stakeholder networks. The meeting itself combines an *ex cathedra* introduction to the policy under review, followed by questions and answers and, often, a site visit or a more practical and interactive exchange between participants as well as lesson-drawing (discussion of pros and cons, room for improvement, transferability etc.). The Commission insists that the host country should provide monitoring and evaluation data and that local stakeholders (e.g. users of the services under review or people that are the subject of the policy) are present and can be questioned by participants.

In the same period, the European Commission and the SPC also dramatically changed the working methods of a second type of peer reviews organised by the SPC, for which it is important to distinguish between two waves. The early SPC peer reviews (organised before EU enlargement in 2004) on National Social Inclusion Plans took place during plenary sessions.<sup>28</sup> They did not generate much enthusiasm on the part of participants, to put it mildly. In fact, a lot of the criticism in the literature about OMC peer reviews seems to refer to these early reviews, which tended to lead to endless and frankly tedious meetings

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24. A six-level scale is used, ranging from '+++' (the best performers) to '---' (the worst performers). The foreword to the child poverty report, signed by the SPC Chairperson and the Director-General of DG EMPL, indicates that 'Indicators have not been used to name and shame but to group countries according to the common challenges they face'. Ranking countries, although part and parcel of the Social OMC, remains a sensitive issue until the present day.

25. Two modalities of PROGRESS peer reviews can be distinguished: *good practice peer reviews* and *policy problem or policy reform peer reviews*.

26. A typical PROGRESS peer review is attended by 30-40 people. On average, seven or eight peer countries and two EU stakeholder networks participate.

27. In many cases, the host country also produces a host country paper.

28. With all SPC delegations present, i.e. with some 50 to 60 participants.

in which the full National Social Inclusion Plans of all Member States were presented one after the other, with nearly no time for discussion. Starting in 2005–2006, the streamlined Social OMC increasingly focused on key issues, allowing for more in-depth discussions during these SPC peer reviews. In the full reporting years (2006 and 2008), Member States were asked to present their policies on a limited number of strategic policy priorities in National Strategy Reports on Social Protection and Social Inclusion.<sup>29</sup> In between full reporting years, reporting was limited to one focus theme per strand ('thematic' years, or light reporting years)<sup>30</sup>. As a result, the SPC peer reviews have become more focused, with separate working groups on different themes (key topics), and are now known as 'in-depth reviews', which continue until the present day in the context of the Semester (Section 5).

### 3.3. Funding EU stakeholder networks

In order to give stakeholders a voice, but also with a view of creating a constituency for the EU's social dimension, the Commission has been providing funding, since the late 1990s, to European networks such as the European Anti-poverty Network (EAPN). As of 2007, EU stakeholder networks received core funding through PROGRESS.<sup>31</sup> These networks are intended to bring stakeholders together at national level and to support and organise their engagement with the Social OMC process at national and EU levels. They are expected to assess input provided by governments and to participate in consultations and benchmarking activities. In 2010 the Commission was funding twelve such networks<sup>32</sup> specifically under the social inclusion theme. These networks covered themes such as the social economy, homelessness, children-in-poverty, social services, financial inclusion, and social inclusion policy in local government. Many of these civil society networks have organised their own benchmarking exercises and developed scorecards of their own, consulting their members on what governments are actually doing with regard to specific issues covered by the three strands of the Social OMC.

Through the development of indicators, the turn to in-depth SPC reviews and the launch of PROGRESS peer reviews, the SPC significantly increased its monitoring and mutual learning capacities in the years 2007–2009.<sup>33</sup> In parallel, the Commission had been actively promoting the development of a 'Social OMC community', regularly bringing together all these stakeholders in the context of conferences and seminars, but also in the context of peer reviews. Nevertheless, the Social OMC remained largely isolated from the EU's overarching economic strategy (Lisbon II).

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**29.** In the case of social inclusion, it is suggested that the NSR should cover at most four strategic priority policies. Member States are invited to include full strategies in an annex to their NSR.

**30.** For example, in the area of social inclusion there have been thematic focuses on child poverty (2007); homelessness and housing exclusion (2009); and the social impact of the financial and economic crisis (2010). There has also been a multi-annual focus on active inclusion.

**31.** The PROGRESS Programme (2007–2013) was a financial instrument supporting the development and coordination of EU policy in the areas of employment, social inclusion and social protection, working conditions, anti-discrimination and gender equality.

**32.** The networks are funded by the PROGRESS programme to varying degrees (principle of co-financing), ranging between a very modest proportion of total funding for large organisations such as CARITAS, and very significant means for networks such as EAPN or FEANTSA.

**33.** In parallel, EMCO became increasingly influential in monitoring and evaluating the implementation of the Integrated Guidelines in cooperation with EU economic policy players.

## 4. Marginalisation in the face of Europe 2020 and the Semester (2010–2011)

The initial design of the Europe 2020 Strategy – which replaced the Lisbon Strategy in 2010 and was designed as a European exit strategy from the global economic and financial crisis that started in 2008 – kept the promise to correct this situation of isolation of the Social OMC. At the time of its launch, it had a rather all-encompassing political agenda (to some extent, a return to the original Lisbon Strategy), attaching considerable visibility and importance to employment and social inclusion. More concretely, Europe 2020 was organised around three integrated pillars: a) macroeconomic surveillance (through the Macro-economic Imbalance Procedure, MIP); b) fiscal surveillance under the Stability and Growth Pact; and c) thematic coordination and structural reform (in areas such as innovation, research and development, employment, education and social inclusion).

‘Thematic coordination’ under the initial Europe 2020 Strategy combined EU priorities with EU headline targets as well as seven EU flagship initiatives. Thus, ‘inclusive growth’ was one of Europe 2020’s key objectives. Thematic coordination was guided through four Integrated Guidelines on employment, including Guideline 10 on promoting social inclusion and combating poverty.<sup>34</sup> Following difficult discussions with the Member States, Commission President Barroso himself managed to convince the heads of states and government to accept the first-ever numerical EU poverty and social exclusion target,<sup>35</sup> i.e. to lift at least 20 million people out of the risk of poverty and exclusion by 2020, compared to 2008. The Europe 2020 flagships included ‘An agenda for new skills and jobs’ and the European Platform Against Poverty (EPAP).

While at the time of its launch in 2010 it seemed that employment and social issues in the Europe 2020 Strategy had some visibility, initial experiences under the European Semester, which effectively started in 2011 (in the midst of the global financial crisis), seemed to confirm critics’ worst fears that the new integrated EU policy coordination framework would result in the subordination of social cohesion objectives to fiscal consolidation, budgetary austerity and welfare retrenchment imposed by economic policy players (Pochet 2010). This subordination was indeed striking in the first policy documents produced during the first cycle of the European Semester in 2011. In the Commission’s first Annual Growth Survey (European Commission 2011:6), for instance, healthcare was regarded merely as a burden on government budgets, with reforms intended to balance the books.<sup>36</sup> Just as importantly, social policy was narrowed down to policy against poverty and social exclusion in the setup of the new strategy. Only three Country-specific Recommendations (CSRs), all directed at new Member States in Central and Eastern Europe, addressed issues of poverty and social inclusion, despite weak national targets, which the Commission acknowledged would not together meet the EU-wide target of lifting 20 million people out of poverty or social exclusion by 2020. As a result, these targets rapidly lost political significance. The National Reform Programmes, too, were largely focused on economic issues (Zeitlin and Vanhercke 2018).

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34. The first six guidelines related to the economic policies of the Member States and the EU.

35. The EU poverty and social exclusion target is based on a combination of three indicators: the at-risk-of-poverty rate, the severe material deprivation rate, and the share of people living in (quasi-)jobless (i.e. very low work intensity) households.

36. Similarly, the early Semester texts treated education only as a public expenditure area to be controlled or cut.



At the same time, moreover, the Barroso II Commission effectively withdrew its support for the Social OMC as an autonomous process. Beginning in 2010, motivated by the ongoing financial crisis management and the need to ‘stay focused’, Member States were no longer formally requested to produce National Social Reports, while the Commission also withdrew from the production of the annual Joint Report on Social Protection and Social Inclusion. A key motivation in both cases was the insistence by the Commission, and particularly the SECGEN, that there should be no parallel policy coordination processes outside Europe 2020 – which one high-ranking Commission official called ‘the only game in town’ for Social Europe; and that social reporting at both national and EU level should be channelled exclusively through the procedures of the European Semester (Zeitlin and Vanhercke 2014).

Experience with the European Platform Against Poverty (EPAP), the Commission’s social policy flagship under the new European Semester, was similarly unencouraging. High-level interviews confirm that the EPAP was ‘landed’ on social policy players – including DG EMPL and the SPC – without prior consultation in the final stage of designing Europe 2020 (DG EMPL interviews, June 2012). It was unclear at the outset whether the EPAP was intended to replace or supplement the Social OMC, and the long-delayed founding communication largely repackaged pre-existing activities and initiatives, rebranding for example the Roundtable on Poverty and Social Inclusion which had taken place every year since 2002 (see Section 1) as the EPAP ‘Annual Convention’.<sup>37</sup> As a consequence, social players never really considered the EPAP as a strategic tool (others would say they failed to seize the EPAP window of opportunity). The EMCO-SPC (2019: 137) assessment of the Europe 2020 Strategy confirms that ‘after an ambitious start, this initiative has lost its momentum and political relevance’.

In other words, the start of Europe 2020 and the European Semester coincided with the economic downturn and the dominance of Brussels-led austerity, obliterating the patiently developed view of social policy as a productive factor. This, in turn, sapped ‘all the political energy away from social policy, with the Social OMC effectively going into abeyance’ (Armstrong 2016: 34).<sup>38</sup>

## **5. Reinvigoration: the Social Protection Committee ‘saves’ its process – initial socialisation (2011–2014)**

Against such a background, it is perhaps no surprise that the social affairs ministers of the Member States – endorsing an Opinion of the SPC, which showed a great deal of agency at the time – felt the need to boldly declare, in June 2011, that the Social OMC had proved a flexible, successful and effective instrument and that it would be ‘reinvigorated’ (read: relaunched) in the context of the new Europe 2020 Strategy (Council of the European Union 2011). The political objectives of the Social OMC were updated and reconfirmed,

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37. After the mid-term review of the Europe 2020 Strategy, the Annual Convention of the EPAP became the ‘Annual Convention on Inclusive Growth’. See Sabato and Vanhercke (2014) for an early assessment of the EPAP.

38. Dawson (2018: 195) goes even further and argues that ‘the separate Open Method of Coordination for social inclusion ... was abolished altogether’.



with social affairs ministers deciding that the method would continue aiming to have a decisive impact on the eradication of poverty and social exclusion; on the promotion of adequate and sustainable pensions; and on the organisation of accessible, high-quality and sustainable healthcare and long-term care in the Member States. At the same time, the EPSCO Council decided to continue regular strategic reporting (including through National Social Reports produced by most, but not all, Member States in 2012 and 2014), enhance mutual learning, strengthen analytical capacity (including the development of the common indicators) and improve stakeholders' involvement (SPC 2011a and 2011b). The SPC also took over responsibility for producing Annual 'Social Reports', a more political and reader friendlier replacement for the previous Joint Social Report (SPC 2013 and 2014) as well as thematic reports. This illustrates a key point made by Armstrong (2016: 39): 'it has been through the activities of the SPC that the Social OMC has been kept analytically operational'.

Social Affairs Ministers and the SPC, discretely but effectively supported by the Secretariat of the SPC, which is provided by DG EMPL, thus took primary responsibility for reviving the Social OMC. In doing so, they strategically confirmed its wide scope: the process would continue to cover not only social inclusion (as planned in the initial Semester cycle), but equally pensions and health- and long-term care. Elsewhere I have argued that, while Member States recognised the evident flaws of the OMC process, the majority decided they could not afford to lose it under the European Semester (Lelie and Vanhercke 2013). To be more precise: a broad coalition of Member States felt that, in the absence of the Social OMC's contribution in terms of analysis and consensus framing capacity, social affairs ministers would be deprived of the necessary tools to a) counterbalance the excessive focus on fiscal and economic considerations in the first cycle of the European Semester; b) tackle the whittling down of social policy to poverty and social exclusion policy; and c) evert the one-sided focus on social protection as a cost factor in the EU's discourse, in the initial cycles of the European Semester.

While the SPC's role in tracking the European Semester's social dimension has evolved by increasing its collaboration with the EMCO, it also builds substantially on the expertise of its own Indicators Sub-Group (ISG), which has developed an extensive portfolio of statistical indicators and data sources for monitoring the EU's common objectives across all three strands of the Social OMC (Barcevičius *et al.* 2014: chapters 2-3; Lelie and Vanhercke 2013). At the EPSCO Council's request, the EMCO and SPC have developed, beginning in 2011, a Europe 2020 Joint Assessment Framework (JAF) for monitoring the Employment Guidelines. The results produced by the JAF in turn feed into the Employment Performance Monitor (EPM) and Social Protection Performance Monitor (SPPM), developed by the two committees at the request of EPSCO and the European Council, in 2011 and 2012 respectively. Both monitors include visual representations of Member States' comparative performance against a portfolio of overarching and context indicators, along with detailed country profiles summarizing key challenges and good outcomes. The SPPM also highlights common longer-term social trends to watch, where indicators in a significant number of countries are seen to be moving in the wrong direction relative to the Europe 2020 targets and guidelines.

With the essential support of Commissioner Andor and his team, 'the Social Protection Committee was brought back into the governance mainstream of the European Semester in 2013 and was also given the opportunity to participate in the review of both the National Reform Programmes and the CSRs' (Copeland and Daly 2018: 11). From 2013 onwards, the country teams in DG Employment, Social Affairs and Inclusion were even made responsible for the first drafts of the social CSRs (*ibid.*: 12). In that same year, the SPC Indicators Sub-Group developed, in cooperation with the Council Working Party on Public Health at Senior Level (WPPHSL), a Joint Assessment Framework in the field of health (the discussion of which continues to this day in the SPC-ISG). In response to the debate on the 'Social Dimension of the EMU' initiated by the President of the European Council (2013), the SPC and EMCO furthermore developed – at the request of the Commission and the EPSCO Council – a Scoreboard of Key Social and Employment Indicators (intended to complement the JAF, EPM and SPPM) which was used in the Joint Employment Report.

This extended social and employment policy monitoring has gone hand-in-hand with a significant intensification of multilateral surveillance and peer review within both the EMCO and SPC, in response to successive requests from the EPSCO Council: thus, in-depth thematic reviews and, interestingly, *ex ante* reviews of prospective social reforms were conducted by the SPC in 2013 and 2014. At the same time, the EMCO and SPC have also continued to organize an extensive programme of voluntary peer reviews of good national practices through the EES Mutual Learning Programme, PROGRESS and (since 2014) the new EU Programme for Employment and Social Innovation (EaSI).

The reinvigoration of the Social OMC thus proved a success. It is indeed remarkable that, in an environment so strongly defined by the economic crisis, the EMCO, the SPC and the DG EMPL were ultimately able to use the Europe 2020 mandate (including the poverty and social exclusion target) and the European Semester context to further intensify, as of 2011, mutual surveillance throughout the year, with a view to strengthening their own analytical toolbox and thereby their overall influence on the contents of the Country-specific Recommendations (CSRs) in the areas of employment, poverty, pensions and (to a lesser extent) healthcare and long-term care (Zeitlin and Vanhercke 2014). After having played a strictly limited role in the trial-and-error implementation of the first cycles of the European Semester, the SPC indeed established itself as a key player in monitoring, reviewing and assessing national reforms within the European Semester, alongside the EMCO, EPC, and EFC.

As a result, as the sovereign debt crisis within the Eurozone morphed into a broader economic and employment crisis, a significant rebalancing between social, economic, and employment objectives became visible in the policy orientation of successive European Semesters, a trend which Jonathan Zeitlin and myself coined as the 'socialisation' of the European Semester (Zeitlin and Vanhercke 2014 and 2018). Note that Copeland and Daly (2018: 2) argue that the socialisation of the Semester has been 'conditional and contingent', *inter alia* because 'EU social policy as enunciated through the CSRs is much more oriented to supporting market development than it is to correcting for market failures'.

## 6. Maturity: further socialising the Semester through the OMC toolbox (2015–2019)

In a speech to the European Parliament in October 2015, where Commission President-Elect Juncker enunciated his ambition for the EU to achieve a ‘Social Triple A’ rating, he stated that the Semester is not just an economic and financial process, but should necessarily take into account the social dimension, including in the CSRs (Juncker 2015). The new Commission promptly introduced a series of significant innovations to the organization of the Semester, including another round of streamlining.<sup>39</sup> The fact that, since the beginning of 2015, DG EMPL has been tasked with drafting the chapter on social and employment policy in the newly introduced Country Reports certainly contributed to the further socialisation of both the Semester’s substantive policy content and its governance procedures, a fact which became increasingly visible in the 2016 cycle. For this exercise, DG EMPL could draw on substantial in-house policy and country expertise built up over the preceding years, as well as on key units dealing with labour market policy and training and skills which had been transferred, following a decision of the Juncker Commission, from DGs ECFIN and Education and Culture (EAC) respectively (Zeitlin and Vanhercke 2018).

In the course of 2015–2017, the Commission services, in close cooperation with the SPC-ISG working group, finalised the list of JAF health indicators and produced 28 country-specific analyses. In 2017 it was also agreed to include reporting on national developments in the field of social protection and social inclusion in the NRPs and to give social reporting an annual thematic focus (EMCO and SPC 2019: 76). It should be noted however that, in spite of this, the effectiveness of social reporting via the NRPs was recently questioned by the EMCO and SPC (2019: 87), *inter alia* because the scope for social reporting in the NRPs is much more limited than the common objectives of the Social OMC (*ibid.*: 147).

The official proclamation by the European Parliament, the EU leaders and the Commission<sup>40</sup> of Juncker’s flagship initiative, the European Pillar of Social Rights,<sup>41</sup> can be seen as a true game-changer in that it effectively revamped the EU social policy agenda and further institutionalised the OMC as a policy instrument (Vanhercke *et al.* 2018). The strong pressure of the Juncker cabinet to immediately integrate the European Pillar of Social Rights in the ongoing cycle of the Semester (including the Employment Guidelines), gave further leverage to social affairs players, particularly in DG EMPL, to call for greater consideration of social and employment challenges in the Country Reports (CRs) and to continue developing the monitoring toolbox. Thus, the 2018 Joint Employment Report (JER) presented for the first time a new Social Scoreboard (replacing the 2013 social scoreboard referred to in Section 5) that monitors Member States’ performance in relation to key principles of the European Pillar of Social Rights via 12 headline indicators. Based on their performance, the Member States are (visually) classified in seven groups: ‘best performers’, ‘better than average’, ‘good but to monitor’, ‘on average/neutral’, ‘weak but improving’, ‘to watch’ and ‘critical situations’.

39. The Semester streamlining involved a) integrating the MIP In-Depth Reviews with the Staff Working Documents supporting the CSRs into a single Country Report; b) revising the timetable; and c) producing fewer, more strategic and less prescriptive CSRs (for a further discussion, see Zeitlin and Vanhercke 2018).

40. During the European Council’s first-ever Social Summit, which took place in Gothenburg in November 2017.

41. President Juncker first announced the establishment of the Pillar in his September 2015 State of the Union Address.

The main new feature of the 2019 European Semester was the strengthening of the links between the Semester and EU funding.<sup>42</sup> In particular, the 2019 Country Reports contained a new Annex D on ‘Investment Guidance on Cohesion Policy Funding 2021–2027’. This is a listing of issues and policy areas in which Member States are invited to step up their investment. The unwritten but clearly understood point is that Member States are expected to build their future structural fund-related<sup>43</sup> Operational Programmes around addressing these priority investment areas. Also of note is that, when the Commission signed a Memorandum of Understanding with Greece for a new stability support programme, it published, for the first time, an *ex-ante* social impact assessment of the new programme in August 2015 (European Commission 2015).

As a result of the prominence given to social challenges under the Juncker Commission, Corti (2020) found a further increase of ‘social protection’ and ‘social investment’ CSR’s as well as a substantial drop in ‘social retrenchment’ recommendations during the 2018 and 2019 cycles of the Semester.

It should be noted that the OMC was put forward as one of the tools to be used in implementing the Council Recommendation<sup>44</sup> on access to social protection (Council of the European Union 2019), one of the first concrete results of the European Pillar of Social Rights: implementation ‘should be discussed in the context of the multilateral surveillance tools in line with the European Semester and the Open Method of Coordination for Social Protection and Social Inclusion’ (*ibid.*: §19).<sup>45</sup> The question of how the OMC’s monitoring and learning tools should be adapted in view of the planned integration of the Sustainable Development Goals (SDGs) in the European Semester will be at the heart of the work in the EMCO and SPC in 2020.

Crucially, the Pillar of Social Rights has been fully embraced by the new President of the European Commission, Ursula von der Leyen: she asked the new Social Affairs Commissioner, Nicolas Schmit, to prepare an Action Plan by early 2021 to implement the Pillar (von der Leyen 2019; European Commission 2020c). The new European Commission’s work programme for 2020 refers to a legal initiative on fair minimum wages for workers (European Commission 2020b). It also announces, by 2021, the set-up of a European Child Guarantee that would ensure access to basic rights for every child at risk of social exclusion, as well as a proposal for a European Unemployment Reinsurance Scheme. The European Commission (2020c) also announced, by the first quarter of 2020, a new European gender equality strategy. In addition, it cannot be ruled out that the von der Leyen Commission’s prioritising of the impact of demographic change<sup>46</sup> (*ibid.*) may create new momentum for DG EMPL to step up OMC-type exchanges on long-term care (virtually non-existent to this day), a topic that has so far been largely dominated by DG ECFIN. A recent Synthesis Report

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42. For a discussion of the interplay between the OMC and EU funding, see Verschraegen *et al.* (2011).

43. The European Regional and Development Fund, the European Social Fund Plus and the Cohesion Fund.

44. In a similar vein, the implementation of the European Commission (2008) Recommendation on the active inclusion of people excluded from the labour market, as well as the European Commission (2013) Recommendation on Investing in children, have been monitored in the context of the Social OMC.

45. More generally, the European Commission (2018a) considers that the European Semester of policy coordination provides an appropriate tool for monitoring progress in key areas covered by the European Pillar of Social Rights.

46. The European Commission (2020c) announced a Green Paper on ageing in the fourth quarter of 2020.

of the European Social Policy Network (ESPN) indeed concludes that Member States will continue to face significant long-term care system challenges, including a growing gap between the need for long-term care and the supply of care (Spasova *et al.* 2018).

## Discussion and conclusions

This chapter has first of all shown that talking about ‘the OMC’ is, inevitably, an intellectual shortcut. Even among the three strands of the Social OMC, important differences come to the surface: the Social Inclusion, Pensions and Healthcare and Long-term Care OMCs followed different development timelines (a fast pace for social inclusion, a slower pace for pensions and even slower for healthcare), resulting in varying institutional architectures and degrees of ‘bite’ of the respective processes. They were also driven by different stakeholder configurations: social affairs ministers were calling the tune in the area of social inclusion, while health ministers dragged their feet in the field of healthcare, effectively leaving the political initiative to the Commission. Note an important absentee in the OMC story: the European Parliament. The strands were also created for very different reasons (for pensions and healthcare, ‘occupying the territory’ *vis-à-vis* economic players was a key motivation).

This chapter has also illustrated that the OMC is constantly being reinvented,<sup>47</sup> despite being constrained by past choices. Yet, as Armstrong (2016: 3) argues, ‘it would be wrong to view the history of the OMC as a unidirectional phenomenon in which its deployment and salience simply increased over time’. Indeed, after an initial phase of experimenting, the strands of the Social OMC were streamlined into one overarching Social OMC in 2006 (allowing the healthcare OMC to be launched, despite Member States’ resistance). This was to a large extent side-lined under the revised Lisbon Strategy (a period used to enhance the OMC monitoring and learning toolbox), further marginalised at the start of the Europe 2020 Strategy only to be reinvigorated in 2011 (thanks to the agency of the SPC), and finally reached maturity under the European Semester, which it helped to ‘socialise’. Dawson (2018: 207), however, points to an important paradox in the socialisation thesis: it ‘hopes to rescue the European Semester by capturing its processes for social voices. What, though, of the danger that social voices are themselves captured, or “socialised into” the Semester’s wider logic of competitiveness and market fitness?’

The OMC seems to be coping with what Tholoniati (2010) calls the ‘soft law dilemma’: on the one hand, the OMC has to sustain policy activism at the highest EU political level in order to supply the EU agenda. On the other, it needs to ensure a sufficient degree of institutional predictability to permit effective implementation. The drivers of the process, which have varied over time, have indeed creatively adapted (at times reinvented) the procedural routines to changing political circumstances (for example, the revision of the Lisbon Strategy under the Barroso Commission). Member State representatives in the EMCO and SPC have exploited the institutional *acquis* and flexibility of the Social OMC as a

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47. Mark Dawson (2018: 194) argues that the Social OMC is ‘a candidate for the most altered and tinkered-with EU policy process in history’, while Tholoniati (2010: 112) refers to ‘inventing and reinventing’ the ‘OMC wheel’ and Armstrong (2016) refers to ‘a form of governance that has been in constant flux since its inception’.

voluntary process to introduce – at a time when the process had been side-lined for several years and even risked being abandoned – new social reporting initiatives at both national and EU level, including the in-depth reviews and the launch of an innovative programme of *ex-ante* peer reviews of major social reforms (on the peer pressure mechanism in European Semester, see Louvaris 2018). In doing so, the social players have acquired an increasingly influential position within the European Semester, fully incorporating the OMC toolbox. The most recent step is the use of the OMC in the implementation of the Pillar (notably the Council Recommendation on access to social protection) and the ongoing debate about the adaptation of the monitoring tools in view of the planned integration of the SDGs in the European Semester (European Commission 2020b). Contrary to most predictions, it would thus seem that social policy coordination has shown to be obstinate, rather than obsolete (Armstrong 2016).

This chapter has shown that the OMC is not simply ‘here to stay’, i.e. existing on paper merely because it is difficult to abolish.<sup>48</sup> Indeed, the Social OMC has been institutionalized at national and EU levels in ways that may not even have been expected. The OMC has become a template for EU, domestic and even regional policy coordination in sensitive policy areas, and for achieving better practices in the absence of centralized policy regimes (see Greer and Vanhercke 2010 and Vanhercke 2014 for a more detailed discussion); the OMC has become linked to various EU policy instruments such as legislation and EU funds, while becoming a trusted resource – amongst others – for a variety of domestic and EU players. As a result, the OMC is doing considerably more than staying around: new governance instruments sooner or later refer to the OMC as a goal to attain. Academic scholars recently argued that the OMC would be the appropriate vehicle for promoting business and human rights<sup>49</sup> (Augenstein *et al.* 2018) and could usefully be applied to the EU’s common security and defence policy (Sweeny and Winn 2017). It should be noted that the OMC continues to operate as a stand-alone governance process in a variety of other policy areas, including education and training (Council of the European Union 2009), culture (European Commission 2018b), youth (European Commission 2018c), aquaculture (European Commission 2019) and even (be it in disguise) in tax policy (Radaelli 2003).

Rather than abandoning legislative responses, EU institutions pursue these more traditional modes of implementation and enforcement alongside the array of governance mechanisms available to them. In spite of a Cambrian explosion of new forms of governance (Sabel and Zeitlin 2008), there is ‘no apparent loss of appetite for the adoption of substantive and detailed legislative acts including the use of directly applicable regulations’ (Armstrong 2016: 253; for a different view, see Tricart, this volume). The recent legislative initiatives in the wake of the EPSR (for a discussion, see Clauwaert 2018) and the announced legislative initiatives in the new Commission’s work programme (on a fair minimum wage, the Child Guarantee and a European Unemployment Reinsurance Scheme) seem to confirm this claim.

The discussion over soft versus hard modes of governance is in need of nuance: scholars like Trubek and Trubek (2007) were among the first to point to the increased dependence

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48. Commission civil servants informally confirm that scenarios abandoning the various OMC processes circulated at the time of the preparation of the 2005 Spring European Council.

49. In view of implementing the United Nations (UN) guiding principles in this area.



or even hybridization of existing policy instruments, which can no longer be neatly separated. Graziano and Halpern (2016: 13) argue that the pressures of the crisis blurred the boundaries even more between soft- and hard-law EU governance mechanisms. The enhanced linkages between the Semester priorities and EU funding (through the new Annex D of the Country Reports; see Section 6) further illustrate this point. Armstrong (2016:13) provides several illustrations of how 'OMC processes may be harnessed towards the ends of elaborating and monitoring the application of binding legal instruments'. Taken together, these examples call for a nuanced discussion about hard law and new governance in the EU: future assessments of the impact of the OMC need to acknowledge instrument hybridity.

Elsewhere I discussed how a soft process, whose architecture has been found wanting by much of the academic literature, can plausibly impact hard social policies. This is because the OMC's tools have been more hybrid (links with other policy instruments), diversified (variety of existing tools) and dynamic (constant innovation of instruments) than generally acknowledged; in some cases, OMC tools have been creatively appropriated by stakeholders and have created cumulative effects (through combining different OMC instruments), while at the same time gaining more bite (exerting considerable pressure) and becoming more open to different players (leading to capillary effects outside the OMC inner circle) than is generally assumed. This explains why – in spite of overwhelmingly sceptical academic accounts and repeated attempts to weaken the process – 20 years after its formal launch, the OMC continues to appeal to EU and domestic players: it is seen as an instrument with an added value in at least two respects: a) the OMC's so-called 'soft' tools are being used by policymakers and stakeholders alike to assess key phases of the hard policy development process; and b) under certain conditions and in certain countries, the OMC operates as a catalyst or selective amplifier for reform strategies, as a consequence having both substantive and procedural effects on domestic and EU policymaking.

At the end of the day, it is not the hardness or softness of the OMC (with its recommendations, national reports, indicators) that matters, but its capacity to stimulate policy learning and especially creative appropriation and leverage by European, national and sub-national stakeholders.

For the OMC to stay relevant under the EU's next overarching strategy (post-Europe 2020), a clear political affirmation of its overall objectives, also in relation to the European Pillar of Social Rights, may be warranted. At the same time, this should not lead to nostalgic reflections about the 'return to autonomy', as was the case under Lisbon I: while it 'carries the hope of rescuing Social Europe from the unfriendly discourse into which it must now fit', such a return also presents the 'risk of marginalisation and political irrelevance' (Dawson 2018). Put differently: becoming again a closed conversation of social policy players increasingly ignored by the EU's main centre of political gravity, oriented around the Eurozone (*ibid.*: 208). Only as an integral part of the post-Europe 2020 Strategy can the Social OMC maintain its influence: promoting upward social convergence and ultimately supplementing and counterbalancing budgetary and macro-economic coordination. The recently launched 'economic governance review' (European Commission 2020a) perhaps provides a window of opportunity in this respect. With the solid backing of the European Pillar of Social Rights, social players may have a real opportunity to further socialise the next EU grand strategy.



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All links were checked on 20 February 2020.



## **Chapter 6**

# **From Amsterdam to Lisbon and beyond: reflections on twenty years of gender mainstreaming in the EU**

**Roberta Guerrina**

### **Introduction**

Twenty-two years since the incorporation of the principle of gender mainstreaming (GM) into the Treaty of Amsterdam (1997), the time has come to pause and reflect on the opportunities offered by this policy approach or strategy for advancing gender equality in the EU. Much has already been said about the role of the EU as a gender actor, so much so that the idea of the EU as a promoter of women's rights has become one of its foundational myths (Guerrina and Wright 2016; MacRae 2010). Despite the promise of the institutions that gender equality is part of the very fabric of the EU, unfortunately – as many gender scholars have pointed out – there is a significant gap between the rhetoric and reality (MacRae 2010; Kantola 2010; Guerrina *et al.* 2018; Ahrens 2018; Abels and Mushaben 2012; Woodward 2012).

These critiques and analyses highlight policymakers' widespread neglect of gender as a cross-cutting policy issue, to the extent that Jacquot (2015) claims that we are witnessing the progressive dismantling of this policy area post-Lisbon Treaty. Cavaghan's detailed assessment of EU macroeconomic policy in the context of crisis (Cavaghan 2017a) highlights the widespread institutional resistance to GM (Cavaghan 2017b). Gender silences, however, are not only noticeable within the institutions and the policy programmes they produce. Academic analysis of social and economic affairs has similarly paid scant attention to the issue, even in areas such as social policy where we could expect it to take centre stage (see Ghailani 2014). This gap in the literature further entrenches the position of gender at the bottom of the policy agenda (Guerrina *et al.* 2018; Abels 2012; Cavaghan 2017b).

Gender mainstreaming was introduced as a strategy for increasing equality between men and women after the 1995 Beijing World Conference on Women convened by the United Nations, in the form of the Beijing Platform for Action. What this platform provides is an agenda for women's empowerment and women's human rights. Additionally, it introduces the principle of GM as an approach to policy that focuses on gender inequalities. It defines mainstreaming as follows:

To ensure effective implementation of the Platform for Action and to enhance the work for the advancement of women at the national, sub-regional/regional and



international levels, Governments, the United Nations system and all other relevant organizations should promote an active and visible policy of mainstreaming a gender perspective, *inter alia*, in the monitoring and evaluation of all policies and programmes (Article 292, Beijing Platform for Action).

This development was welcomed by many women's rights advocates and policy analysts as an opportunity to include gender in a range of policies, and more broadly as a way of bringing gender in from the margins, i.e. 'mainstreaming' it. It is an approach that seeks to apply 'gender lenses' to all policymaking. What this means is that policymakers are supposed to assess the impact of their decisions and policy actions on both men and women, checking whether they have a detrimental impact on women and other under-represented groups (Woodward 2012).

The introduction of GM both as a principle and in practice raised the hopes of civil society, practitioners, and academics for a more inclusive policymaking process where gender issues were more visible and thus more likely to be acted upon. From this perspective, GM was to become a transformative strategy challenging implicit or unconscious (gender) bias across all policies (Minto and Mergaert 2018; Rees 2005; Woodward 2012). Yet, more than twenty years since its introduction as a policy principle, evidence of its impact is at best mixed; at worst it has contributed to the dilution of gender equality throughout European institutions and has legitimised the further marginalisation of gender across the EU (Hubert and Stratigaki 2016). Whereas GM calls for the adoption of gender-sensitive lenses throughout the policy cycle in order to address imbalances of power, policymakers' failure to fully engage with gender analysis ultimately reified the marginal position of gender issues in 'mainstream' policy domains (Allwood 2013; Allwood *et al.* 2013).

This chapter explores the impact of GM as a principle within the process of European integration, providing an entry point for a more detailed evaluation of progress in the area of gender equality. Given that GM challenges the siloing of gender to equality and diversity policies, the chapter provides a useful test for the inclusiveness of different policy domains and thus the health of equality programmes in the EU. The chapter starts with a brief guide on 'how to do' GM, with Section 1 detailing the European Institute for Gender Equality's approach and its toolkit for GM in practice. Section 2 gives an overview of how gender equality policies have developed in EU. This provides the backdrop against which the principle of GM was included in the Treaty of Amsterdam and explores the impact, opportunities and constraints of this principle. Section 3 explores the literature mapping the development and implementation of this policy principle and strategy, examining the impact it has had on the way the EU promotes gender equality. Section 4 looks at three case studies illustrating the opportunities and constraints offered by GM as a principle. The final section concludes and looks forward.

## **1. Gender mainstreaming: a 'how to' guide**

As a principle, GM highlights the fact that gender is a cross-cutting issue and that institutional players need to act across a range of policy and issue areas to address

structural inequalities hindering men and women from benefitting fully from the equality framework. As a policy strategy GM thus requires policymakers to understand the actual and potential impact of key policy objectives on men and women. To be effective, GM requires a detailed assessment of the impact of gender, not as a variable but as a structure of power, on equality outcomes. This requires a shift in the way we think about gender. It means accepting that social, economic, and political institutions are not neutral but have been historically created in the image of those in power. Men and masculinity have thus been internalised as the norm permeating every aspect of an institution, including its processes and working practices. As a result, women are inherently disadvantaged, having to fit into structures not originally constructed for them. *Why does this matter?* Like the institutions that create them, policies reflect dominant gender norms and values. If no assessment is therefore made of the impact of a policy on different groups, this impact can be asymmetrical, reproducing inequalities that prop up political institutions and economic structures. *But what exactly does this mean?*

In the view of the European Institute for Gender Equality (EIGE), a GM strategy requires both political commitment and a legal framework, and it has two dimensions: a) equal representation in decision-making and b) policies informed by a gender perspective. EIGE then maps out the conditions and methods required for the delivery of more inclusive policy processes and institutions (EIGE 2016). In terms of the actual tools and processes, EIGE breaks down mainstreaming into a four-stage process: a) define, b) plan, c) act, and d) check. This approach is not dissimilar to Bacchi's (2009) 'what's the problem represented to be?' methodology for policy analysis, which calls for diagnosis, prognosis and intervention. In so doing, policy analysts and policymakers are able to identify, and act upon, implicit biases.

For GM to take place, the first step is to *define* the nature of the problem and identify key equality objectives. This phase requires data and indicators disaggregated by gender and for use in completing gender impact assessments with a view to establishing the impact of specific policies on men and women. The aim here is to generate evidence-based policies reflecting the needs of both groups. EIGE's advice at this initial stage is to draw on existing resources and consult key stakeholders to avoid unintended consequences of policy options and decisions. In the *planning* phase, policymakers are asked to consider the resources required to deliver the equality objectives identified in phase one. Gender budgeting is one of the main tools to be deployed here. Policymakers should also involve end-users in order to ensure full buy-in to the objectives. The *action* phase focuses on implementing the policy or programme. The main tools available to practitioners in this phase are training and capacity building, so that responsibility for implementation does not reside solely in the hands of experts. The final phase involves *checking* the effectiveness of the policy action implemented in phase three. Practitioners are required to monitor progress against the objectives set out in phase one. Regular reports against key indicators are the most used tools here.

It is important to note that this is just one approach to operationalising GM. As Squires (2005) points out, in the first ten years of this strategy it was possible to identify a range of different approaches to GM, from those seeking to mainstream gender lenses to those

focusing on equality opportunity policies. Squires (2005) argues that GM is a strategy of displacement. One of the main critiques of the dominant approach to GM is that it tends to treat women as a homogeneous group, ignoring the impact of diverse experiences on members of this category.

## 2. The EU's approach to gender mainstreaming

The European journey to the inclusion of GM in the Treaty of Amsterdam is an interesting one, as it highlights implicit biases at the heart of European institutions and the process of integration. There are a number of ways to map the development of EU gender equality policies. For instance, Rees (2005) identifies three approaches adopted by the EU to promote gender equality. First came *equal treatment*, an approach seeking to include women into existing models. Rees describes this approach, widely used in the 1970s, as *tinkering*. In the 1980s the EU's approach focused on *positive action* through a range of programmes focused on challenging historical forms of inequality. Rees describes this as *tailoring*. Finally, from the 1990s onwards, Rees sees the EU as adopting a more *transformative* approach embedded in the EU's adoption of mainstreaming as a strategy or tool for drawing attention to gender issues. Similarly, Jacquot (2015) identified three distinct periods based on different models for promoting gender equality. The first period was the *exception model* which ran from the inclusion of the principle of equal pay in the Treaty of Rome to the late 1980s. The focus here was on enhancing women's access to the labour market and challenging historical inequalities. The second phase marked a shift towards an *anti-discrimination model* in the period between the signing of the Treaty of Maastricht and the Treaty of Lisbon (2007). As the policy focus in this phase was largely influenced by the principle of mainstreaming, this resulted in a push to treat gender as a cross-cutting issue. The final phase, the *rights-based model*, is ongoing and is the defining feature of the EU's post-Lisbon Treaty approach to gender equality. These two descriptions of the historical development of this policy domain are important, insofar as they highlight the multiple ways in which the principles of GM and equality have been transformed through the policy process. All too often, the narrative of the EU as a gender actor is one of progress, agency, creativity, ingenuity and inclusion (see for instance Guerrina 2005; Kantola 2010; Guerrina 2016). However, the picture is complex and does not necessarily tie in with the mythologization of the EU as a gender actor (MacRae 2010). It is therefore a good idea at this juncture to review in some detail the way gender equality came to be included in the process of European integration.

The EU's equality journey started with Article 119 of the Treaty of Rome (1957), which established the principle of equal pay for equal work. This article had a complex history. Rather than representing a strong commitment to equal rights and women's empowerment by the 'founding fathers', it was a compromise to assuage French fears over social dumping. The principle of equality in European law is therefore grounded in market rationalities to ensure fair competition and can thus be seen as a form of functional spill-over. As Jacquot (2015: 20) explains, 'a genuine mythology has been constructed around this article as a foundational act. It was the basis that "made everything possible", but it was also introduced into the Treaty of Rome for the "wrong

reasons”’. This approach to integrating gender into this policy framework inevitably limits the scope of the principle, tying it to market forces. Unsurprisingly, one of the main criticisms of this approach to gender equality is that it is highly commodified, with the value of equality attached to economic growth and the functioning of the common market. Given how Article 119 came into being, the development of the *gender acquis* in the 1970s and 1980s was not a foregone conclusion. The expansion of the principle, from ‘equal pay for equal work’ to ‘equal treatment’, came about as a result of the *Defrenne* cases (Case 80/70; Case 43/75; Case 149/77)<sup>1</sup> and of the work of key civil servants within the gender equality unit of the European Commission’s Directorate General (DG) for Employment, Social Affairs and Inclusion (EMPL).

During the 1980s, we witnessed the establishment of a ‘velvet triangle’, with Woodward (2015) viewing key developments as the result of feminist constellations or coalitions working to advance the agenda within the Commission. Specifically, Woodward identified three types of key actors: femocrats working within the Commission act as policy entrepreneurs; epistemic communities of feminist academics, e.g. the European Expert Group on Gender and Employment (EGGE), provide evidence and data to support policy initiatives; and organised feminist civil society organisations, e.g. the European Women’s Lobby (EWL), lobby for bottom-up change. Their close cooperation led to the rapid development and expansion of the equality agenda.

This analysis ties in with Squires’ (2005: 371) overview of key approaches to GM, in which she finds that ‘mainstreaming is most likely to be truly transformative when technocratic expertise, social movement participation and transnational networks are all in place’. Key to this success was the institutionalisation of the policy framework and the creation of a public policy community, as previously also described by Woodward (2015). While providing a space for the development of the *acquis*, the market rationale also limited the scope of the main focus to the cost of non-equality and to improving women’s access to formal employment.

The establishment of the principle of GM as a working principle in the wider international community provided additional momentum for the reformists operating within the institutions, with the focus shifting from introducing legislation in support of women’s employment rights to tackling persisting inequalities between men and women. The 1990s were a decade marked by significant progress in the area of gender equality. Spurred by the Nordic enlargement and widespread concerns about demographic decline, the Commission was able to widen the scope of gender policy to include matters around work-life balance.

The 1996 European Commission communication on *Incorporating equal opportunities for women and men into all Community policies and activities* sets out the EU’s approach to GM (European Commission 1996). It specifically defines GM as follows:

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1. The *Defrenne* cases represented landmark decisions for the future development of the equality principle. In them, Gabrielle Defrenne, a flight attendant working for the Belgian Sabena airline, challenged her employer’s policy which allowed male stewards to receive higher pay and retire 15 years later than women, despite the job specification being the same for both. The cases were significant in that they established the principle of direct effect and reaffirmed that equal pay for equal work was a founding principle of EU law (Cichowski 2004).

This involves not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (gender perspective). This means systematically examining measures and policies and taking into account such possible effects when defining and implementing them (European Commission 1996).

This communication thus set out a comprehensive approach to integrating and promoting gender equality at European level. Badged as one of the most significant milestones for gender equality in the EU, it reaffirmed the centrality of equal rights in the European project, while recognising that siloing equality policies to the employment sphere would not allow the EU and its member states to shift from formal to substantive equality (Guerrina 2005). Unfortunately, the communication itself made a number of strategic errors, e.g. using GM and gender equality interchangeably, thus hollowing out the concept from its inception (Stratigaki 2005).

The Treaty of Amsterdam (1997) was intended to consolidate further the principle of equality in the process of European integration. As Masselot explains, the Treaty widens the scope of this principle: ‘the introduction of Article 13 EC in the Treaty of Amsterdam changed this situation when, for the first time, competence was given to the Community to take appropriate actions to combat discrimination based on gender (racial or ethnic origin, religion or belief, disability, age or sexual orientation) outside the field of employment’ (2007: 153). More significantly, the Treaty ‘formalises the Community’s positive obligation to achieve and promote gender equality’ (Masselot 2007: 154). For instance, Article 141 (formerly Article 119) is reframed in recognition of the way the principle of equality had been widened through secondary legislation.

For many commentators (see for instance Pollack and Hafner-Burton 2000; Rees 2005; Guerrina 2003), the Treaty of Amsterdam thus marked a step change in the way gender equality was accepted as a foundational norm of European integration. Twenty years on, it is now clear that its operationalisation remains torn between two frameworks or logics: the fundamental rights framework, and the market-based framework (Jacquot 2015: 97). The two clearly take different approaches to equality, thereby allowing for different forms of action.

Alongside the changes introduced by the Treaty of Amsterdam, it is also important to note the way gender equality was included as the fourth pillar of the European Employment Strategy (EES) (Rubery 2002). Although this inclusion had major symbolic importance, the EES ‘focused on improving the supply side of the economy and not on changing the behaviour of employers, where many of the obstacles to gender equality may be encountered’ (Rubery 2002: 502). It also entailed a shift away from legally binding provisions in favour of soft policy governance. The EES and other examples of the Open Method of Coordination were supposed to facilitate policy learning and the sharing of best practice among Member States, allowing for a more organic development of key

policy areas such as equality. However, the EES also relied on Member State compliance and engagement (Beveridge and Velluti 2008; Rubery 2002).<sup>2</sup>

Undoubtedly, there is a degree of cross-over and interaction between soft and hard policy measures. However, the shift towards the former is highlighted as one of the reasons for the lack of progress in the 2000s, and possibly one of the negative repercussions of GM as a policy strategy. Whereas Europeanisation was seen as a way to ensure policy transfer and progress in the area of gender equality, the way that different polities interact with the EU, as a form of multilevel governance, raises important questions about whether GM can maintain its transformative potential at different sites of governance (Alonso 2017; Forest and Lombardo 2012).

Important developments on the road to the Lisbon Treaty (2007) were the 2004 Equality in Access to Services Directive (2004/113/EC) and the 2006 Recast Equal Treatment Directive (2006/54/EU). The first expands the principle of equality and equal treatment to include access to goods and services, making it the first directive to extend the principle beyond employment rights. It is therefore seen by many as a critical juncture in the development of the *gender acquis*, closing ‘an important gap and strengthening the principle of equality under European law’ (Caracciolo di Torella 2005: 337). A prime example of compromise, this directive made a number of concessions and omissions that fundamentally limited its impact (*ibid*).

Conversely, Directive 2006/54/EC of the European Parliament and the European Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) aggregates and streamlines historical provisions. It defines the parameters for both direct and indirect discrimination and brings together provisions relating to sexual harassment and employment rights. Its main aim is to improve the quality of European legislation through a process of ‘recasting’ intended to produce ‘more easily accessible and readable gender equality law, including legislative updates in the light of European Court of Justice judgments’ (Massetot 2007: 161). The text was supposed to follow key guidelines for best-practice in policymaking, including a detailed impact assessment. However, the process was fraught with difficulties that cast doubt on the methodology adopted and the accuracy of the findings (Massetot 2007: 161).

Growing awareness of the impact of inequality on the future economic growth of the single market provided the necessary stimulus to support policies aimed at activating women as a ‘reserve army of labour’, to be mobilised to fill labour shortages. Rather than focusing on equality as a social justice issue, this approach downgraded equality to a second order issue to be mobilised in order to fulfil higher (economic) priorities (Guerrina 2008). In this context, Jacquot (2015: 135) refers to the ‘shift from “equality within the market” to “equality for the market”’. This refers back to the enduring tension between equality as an economic issue and equality as a social justice issue, underpinning

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2. See also Vanhercke in this volume for a more general discussion about the ‘soft governance’ turn in EU policymaking.



the economic rationalities that led to the inclusion of the equality principle in the Treaty of Rome in the first place (Bain and Masselot 2013).

The Lisbon Treaty was finally ratified in the context of an emerging financial crisis. Article 8 of the Treaty on the Functioning of the EU (TFEU) specifies: 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women', thereby reiterating the commitment to mainstreaming gender in all policy areas (Bain and Masselot 2013; Timmer and Senden 2019: 7). Additionally, Article 19 TFEU prohibits all forms of discrimination. Article 157 also addresses the issue of equal pay for work of equal value, placing responsibility on the Member States to make sure the principle is applied. Additionally, it seeks to tackle historical sources of inequality through positive measures. The coupling of positive action and GM is designed to provide renewed momentum for the European gender equality agenda. For Bain and Masselot (2013: 108), 'the Amsterdam and Lisbon Treaties have clearly changed the game in that gender equality is no longer considered a question of reaction, but more importantly of pro-action'. From this perspective, these two Treaties 'have entrenched' the position of gender equality as a foundational principle (Bain and Masselot 2013).

As noted previously, Jacquot (2015) expresses a much less positive outlook for gender equality in the post-Lisbon era. Competence for gender equality was relocated from the European Commission's DG EMPL to the then DG Justice (now DG for Justice and Consumers). This move was intended to break the implicit link between economics and equality, widely criticized as commodifying equal rights. In many complex ways, this change of institutional home within the European Commission was not just symbolic but shifted the focus of the agenda at a time marred by economic and fiscal crisis. However, this change also destabilized the balance that had helped drive equality between men and women in the EU. Key actors within the European Commission had become very adept at promoting the economic arguments for equality. Drawing attention to aspects such as the impact of inequality on demographic trends or the cost of non-equality, these critical actors were able to establish a framework for the institutionalization of equal employment rights (Woodward 2015). The social justice argument for equality, however, proved to be much harder to mainstream, particularly in view of significant opposition to this widening of the agenda from Central and Eastern European member states.

Four policy initiatives are worth noting as they gave renewed momentum to the European equality agenda in the post-Lisbon period: the 2010 revised directive on equality for self-employed workers (2010/41/EU); the 2010 revised parental leave directive (2010/18/EU), like its predecessor concluded with the social partners; the 2011 Directive on Combating Trafficking (2011/36/EU); and the 2012 Council guidelines (2012/C 11/01) for the application of the 2004 directive on access to goods and services, which stipulate the importance of equality in access to insurance services. All these legal texts replaced previous legal instruments and were intended to expand the scope of the policy. It is questionable, however, whether they have lived up to the expectation that they would significantly expand and consolidate the *gender acquis*. Negotiated against the backdrop of the economic crisis, the Member States' position was to protect the interests of employers, rather than expand the rights-based framework (Jacquot 2017).



Similar considerations also underpinned negotiations on the revisions to the Pregnant Workers Directive, which was ultimately shelved due to fundamental disagreements between the Council and the European Parliament (Guerrina and Masselot 2018; Jacquot 2017).

### **3. Research on gender mainstreaming in the EU: twenty years of engagement and critique**

When first introduced into the Treaty of Amsterdam, GM was seen as a significant step towards the full implementation of the principles established in the Treaty of Rome. It was seen by many as recognition of the fact that gender is best understood as a structure of power which permeates all policy domains, as opposed to something that is best dealt with in the 'equality between men and women' silo. For Maria Stratigaki, the inclusion of the principle of GM in the Treaty of Amsterdam marked the resolution of the conflict between two distinct policy approaches to promoting equality between men and women: positive action on the one hand and gender mainstreaming on the other. In her view, whereas the first approach (positive action) focused on transformative change, the latter (gender mainstreaming) is best understood as a policy tool (Stratigaki 2005). From this perspective, in the tension between mainstreaming and positive action, the former won out.

According to Stratigaki (2005), GM has not bridged the gap between equal opportunity policies and other policy domains. In those areas traditionally seen as gender-neutral, there continues to be a lack of awareness about how gender applies to those particular issues. Jacquot (2017) is also critical of GM, which she sees as having contributed to the dismantling of the institutional platforms and instruments supporting this policy portfolio. The approach to gender taken in a range of programmes in the 2000s is partly responsible for this lack of awareness. Whereas activation policies were directly aimed at increasing women's participation in the labour market, the gender-neutral language adopted by the documents helped further marginalise concerns about social justice (Jacquot 2017; Guerrina 2008; Bain and Masselot 2013).

In many ways, the adoption of GM as a policy strategy in the Treaty of Amsterdam contributed to the 'hollowing out of the gender equality agenda, despite a sympathetic environment' (Stratigaki 2005). As discussed previously, GM is supposed to bring gender to all policy areas and to assess the impact of key decisions on different demographic groups. Unfortunately, 'this process of routinisation has occurred more in a context of (polite) disinterest than in one of the deconstruction of gender norms and the transformation of dominant power structures' (Jacquot 2017). In a similar vein, Alonso (2017: 175) finds that the level of complexity and knowledge required for the full implementation of this strategy means that it is often 'lost in translation'. This became particularly clear in the context of the financial and economic crisis when policymakers continued to ignore warnings about the gendered impact of austerity, despite the mounting evidence (EWL 2012). As pointed out by Philip Alston (UN Special Rapporteur on Extreme Poverty and Human Rights) at the end of 2018, women disproportionately have borne the brunt of cuts in social and welfare provisions. As a

result of these policy decisions, women are faced with an increased caregiving burden in the private/domestic sphere (Alston 2018).

Gender budgeting (GB) is perhaps the most widely used methodology in the GM toolkit. Yet even this approach was not mainstreamed in the context of the Euro crisis. GB is a tool for identifying strategic gaps in fiscal policy that ultimately lead to unequitable or asymmetrical outcomes. GB is intended to be based on impact assessments and to be included as a required part of planning. However, it requires a detailed understanding of how gender shapes and is shaped by socio-economic structures. As noted previously by Jacquot (2015), a polite disregard for the complexity of this process or strategy thus works against the development of a holistic and intersectional approach.

## **4. Gender mainstreaming in practice: where is it in times of crisis?**

Three widely researched and interrelated areas where GM could or should have been included at the heart of policy are 1) the economic crisis and austerity, 2) economic governance, and 3) Brexit. Each of these areas demonstrates the challenges facing the mainstreaming of gender and diversity in the face of 'higher' economic and political priorities (Guerrina 2017).

### **4.1. Gendering the financial crisis**

There is substantial evidence of the impact of cuts to the public sector and public services on women in the wake of the 2008 economic and financial crisis and its associated austerity policies (see Karamessini and Rubery 2014; Walby 2015). GM hardly featured at all in the analysis of the economic crisis, apart from noting that core principles of equality and gender were not really mainstreamed in the development and implementation of economic policy (Gonzales Gago and Segales Kirzner 2014). This omission raises important questions about where, and how, gender plays a role in economic governance. Specifically, it provides important insights into the implicit biases of decision-making processes that prioritise men's interests over women's. For instance, O'Dwyer (2018) explains how decisions to cut public services instead of raising taxes were deeply gendered, insofar as women are the primary users of public services. Indeed, whereas cutting public services primarily affects women reliant on them by making it harder for them to participate in the labour market, not increasing the tax burden on higher earners generally benefits men. In this context, not only were policy decisions not subject to an impact assessment, but they also crystallised dominant gender structures and unequal access to resources. In other words, such decisions bolstered economic and social structures disadvantaging women or non-primary economic players.

Exposing these 'strategic silences' (O'Dwyer 2018) is the only way to show how the current crises are shaping the very social, political and economic fabric of Europe. Drawing attention to the way in which structures and practices of governance have been realigned as a result of the crisis, Walby (2018:1) goes as far as to claim that 'Europe is

being remade during the “crisis”. In this context, she notes how current proposals for the future of post-Brexit economic governance are almost completely gender-blind. Her analysis draws attention to ongoing discussions about the future of economic governance in the EU. The policy architecture that will emerge out of the crisis, she argues, will redefine the balance of power between European actors. More significantly, she finds that there is a tension underpinning the EU’s aim for economic growth. This goal can be achieved either through de-regulation (the neoliberal model) or through the social model (the social democratic model). These approaches have a radically different impact on gender equality outcomes. In her view, the level and quality of institutionalisation of gender equality projects at both the EU and the Member State levels will determine the long-term prospects for this agenda post-crisis. Her analysis of the 2017 proposals on the future of the EU 27 makes sober reading: ‘The EC’s White Paper for the future of the EU 27 – with their five possible scenarios – are largely presented as if gender were not relevant to them’ (Walby 2018: 316). And yet the areas covered – the economy, security and democratic governance – are all deeply gendered. Cavaghan and O’Dwyer (2018) find that the Commission’s current narrative on recovery largely ignores some of the groups worst affected by austerity. For these two authors, the Commission’s analysis of the EU’s recovery from the crisis highlights the marginal position of women’s interests in European economic governance. Drawing on feminist political economy, their analysis shows how the entrenchment of ‘rule-based economic policies’ came at the expense of GM (Cavaghan and O’Dwyer 2018: 101). What this means is that the urgency of the crisis, with its focus on debt reduction and public spending cuts, led to key decisions that adversely affect women. For instance, cuts in social and welfare provisions had a greater impact on women, who as the primary carers are the main beneficiaries of such services. What is taken for granted in these decisions is that the family will fulfil the social function of care, without regard for gender divisions of labour in the private sphere (Cavaghan and O’Dwyer 2018).

#### 4.2. Economic governance: blind spots or careless disregard?

It is now very clear that austerity did not happen in a vacuum. As O’Dwyer (2018: 749) points out, ‘gender inequalities have persisted and worsened under the EU’s new economic governance regime’. This finding supports Cavaghan’s (2017a) detailed analysis of decision-making processes which exposes that the primacy of macroeconomic policy at European level facilitated the dilution of the *gender acquis*. Where approaches to economic governance remain gender-blind, they are ‘able to call on such gendered assumptions of the economy without ever explicitly addressing them’ (O’Dwyer 2018: 751). This means that social institutions like the family are taken out of the policymaking realm, with their role in supporting the dominant economic model remaining unchallenged. This blindness can be seen either as a result of implicit bias in the decision-making process, or as deeply engrained in the very fabric of economic governance. Going back to the previous discussion on the roots of gender equality in Europe and the economic rationale that supported the inclusion and expansion of this principle, it is now clear that this kind of approach fails to anchor the principle in the very fabric of the organisation, beyond rhetoric. Not even a focus on values and

fundamental rights can withstand the pressures embedded within the politics of crisis to concentrate on those area of politics traditionally seen as gender-free.

Emejulu and Bassel's (2018) critique of European macroeconomic policy highlights how the priority given to the dominant economic agenda has left women, particularly women of colour, to manage the consequences of a policy agenda that reifies an economic model based on a racialised gender regime. Their analysis highlights the way European economies rely on the undervalued and underpaid labour of women, and specifically women of colour. Only an intersectional approach allows us to expose such silences in the dominant policy narrative and approach (O'Dwyer 2018). The transition of gender regimes with its focus on activating (white) European women has come to rely on women of colour to fulfil some of the domestic and caring work in the private sphere (Emejulu and Bassel 2018). This must lead us to question the depth of the transition towards the Adult Worker Model Family<sup>3</sup> embedded in European social policy and its focus on activation (Giullari and Lewis 2005), as well as the transformational potential of GM as a strategy for achieving social justice.

### 4.3. The Brexit test

Brexit similarly raises important questions about the mainstreaming of GM. The UK's 2016 decision to leave the European Union and the ensuing negotiations tested national governments and the EU's commitment to gender and social justice issues. The high-pressure environment of the Brexit negotiations coupled with widespread concerns at European level about disintegration relegated social policy, gender equality and social rights to second-order issues (Guerrina and Masselot 2018; Kantola and Lombardo 2019; Haastrup *et al.* 2019). In many ways Brexit has highlighted the superficial way in which GM has up to now been included in policymaking.

Brexit is expected to have a detrimental impact on gender equality in the UK. Guerrina and Masselot (2018) have mapped the footprint of EU law in the UK in the cases of maternity rights and women on boards. During the negotiations on the amendment to the pregnant workers' directive, UK ministers repeatedly claimed the costs associated with the provisions would place an undue burden on Member States at a time when they were still trying to tackle the financial crisis and implement austerity measures (BIS 2011). Guerrina and Masselot's (2018: 325) analysis highlights the level of government resistance against widening the scope of equality provisions.

The conservative governments behind the referendum and the withdrawal negotiations have made no significant commitments to consolidating social rights in a post-Brexit environment. Conversely, their focus on competitiveness and deregulation is expected to adversely impact the position of women on the labour market (Caracciolo di Torella 2019; Dustin *et al.* 2019). This early research on Brexit looks at the way the UK

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3. The idea of the Adult Worker Model Family, as outlined by Giullari and Lewis (2005), refers to the transition in gender regimes from the male breadwinner model to a dual breadwinner model. This is linked to the wide-ranging activation policies ratified by the EU and various Member States to encourage women's economic activation.

government has negotiated key policies with a direct impact on women's participation in the labour market. Fagan and Rubery (2018: 306) similarly warn that Brexit would leave equality policies exposed to deregulatory forces, particularly in view of the fact that 'UK equality legislation and policy have been shaped by the EU equality framework'.

It is this blind spot that is concerning feminist scholars and women's rights activists both in the UK and at European level. Although it is widely accepted that in terms of social rights the UK has been a force for deregulation at European level and has actively put employer interests over women's rights, there is growing concern that Brexit will adversely impact the transnational coalitions driving the European equality agenda. Moreover, Brexit as a process has also highlighted how far down the EU agenda gender has slipped. The urgency of the negotiations between the UK and the EU 27, with their focus on trade, migration and the Irish border, has further sidelined social issues, including gender (Chilcott 2018; Guerrina and Masselot 2018; Haastруп *et al.* 2019).

These three case studies illustrate the patterns of exclusion that have become normalised by downgrading gender expertise and diffusing responsibility for gender issues to policymakers ill-equipped to carry out gender analysis and impact assessments. As noted by Squires (2007), GM without a detailed understanding of diversity leaves much to be desired. Recognition of the intersectional nature of inequality thus becomes a pre-requisite of GM, perhaps even able to induce a shift towards diversity mainstreaming. This call is echoed by Emejulu and Bassel (2018) who put forward a compelling argument to move beyond the binaries that have dominated macroeconomic policy and the political agenda. In many ways, this is a critique of a policy strategy that treats structures of power as variables, or analytical categories, and has thus failed to achieve its transformative potential. It is notable that GM has failed to ensure that equality and social justice remain on the agenda in a crisis context. This recognition thus raises important questions about the suitability of a 'fair-weather' strategy to deal with complex, multi-layered and intersectional issues at times when policymakers are forced to prioritise and revert to type.

## Conclusions

The last twenty years have been marked by huge opportunities as well as disappointments for those promoting gender equality. Whereas the introduction of GM in the Treaty of Amsterdam offered a space for ensuring that gender, equality and diversity were integrated into all policy fields, the failure of policymakers to deploy the most basic tools associated with this approach (e.g. gender impact assessments) at times of crisis highlights some of the limitations of GM. Most significantly, GM requires political will and commitment to be effective. In a way, in the post-Amsterdam era we have seen the limitations of an approach to equality rooted in economic rationalities. This functionalist logic separates the principle of equality from that of social justice. It stresses the neutrality and apolitical nature of the principle of mainstreaming. This has proved to be a very effective strategy in times of growth, particularly as a way of supporting mainstream policies. However, it ignores the fact that it feeds into a specific gender

regime, with associated structures and practices. As such, it is not transformative but reproduces socio-economic hierarchies.

This analysis also highlights the limitations of a policy approach that has yet to adopt an intersectional lens, and thus has a tendency to treat gender as a homogeneous category. This trend is all the more evident when GM principles are stress-tested in a crisis context. As such, the fact that the latest White Paper on the future of the EU27 (European Commission 2017) does not prioritise equality and GM (Walby 2018) is further evidence of the challenge ahead. The formal proclamation of the European Pillar of Social Rights in 2017 is recognition that ten years of austerity have had a significant impact on social cohesion in Europe. Divided into three chapters, it is supposed to place equality at the front and centre of the discussion. Indeed, Chapter I on 'Equal Opportunities and Access to the Labour Market' reiterates the commitment to equality, equal opportunities and equal access to the labour market. Additionally, Chapter II on 'Fair Working Conditions' includes the principle of work-life balance for individuals with caring responsibilities, whereas Chapter III on 'Social Protection and Inclusion' touches on access to childcare. Like previous provisions and policies, the European Pillar of Social Rights represents a highly commodified approach to equality. Where mainstreaming is referred to in Chapters II and III, it is along very gendered lines. In this regard, this document or proclamation represents continuity with the EU's approach to equal opportunities, centred around the value added by equality for the market, rather than social justice. This ultimately limits the scope of both the principle of equality and the opportunities for GM to drive transformative change.

These latest developments highlight the limitations of the EU's approach to gender equality and gender mainstreaming. The cooptation of gender equality by European institutions for economic gains is both a manifestation of the widespread implicit bias embedded within the organisations, as well a reflection of the fact that the EU was not created to promote the interests of under-represented groups. These processes ultimately lead to the normalisation of blind spots with regard to the impact of mainstream policies on under-represented groups, as highlighted by extensive feminist analysis of the financial crisis and the associated austerity policies (Cavaghan and O'Dwyer 2018). Without the transformative change of social and economic structures, equality and inclusion will only ever have a limited impact on outcomes. GM calls for the application of gender-sensitive lenses, requiring practitioners to engage with the root causes of inequality, e.g. access to decision-making, rather than treating the symptoms, e.g. gender pay gaps. Failing to address these fundamental questions means that equality will remain an elusive goal for the EU.



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## Chapter 7

# Sixty years of European social security coordination: achievements, controversies and challenges

Rob Cornelissen and Frederic De Wispelaere

### Introduction

Under the Juncker European Commission, renewed attention has been directed to Europe's social dimension.<sup>1</sup> Nevertheless, 'social Europe', we argue, has always been a reality, not least for people who are mobile<sup>2</sup> in Europe. From 1958 onwards, the Treaty included a strong legal basis for legislation in the field of coordinating social security. Now enshrined in Article 48 TFEU, this legal basis obliges<sup>3</sup> the legislature – the Council and the European Parliament – to take measures to provide, in the field of social security, protection to people who make use of their right to free movement. In this contribution, we will show that Europe has been trying to fulfil this duty to the best of its ability for the past 60 years. The Regulations currently in place are 'Basic' Regulation 883/2004 (European Parliament and Council 2004a) and 'Implementing' Regulation 987/2009 (European Parliament and Council 2009), hereinafter jointly referred to as the 'Coordination Regulations'. Little, however, is said in public and political debate – or, for that matter, in the 19 previous issues of this edited volume – of the importance of these rules in European social policy, mainly due, it seems, to the perception that they promote 'welfare tourism'<sup>4</sup> and 'social dumping'<sup>5</sup>, but perhaps also due to the highly complex nature of the Coordination Regulations. There is a risk, therefore, of the importance of guaranteeing social rights in the case of (labour) mobility, today and in the future, being relegated to the background.

In 2019 we celebrated the 60th anniversary of the European coordination of social security systems. In the form of Regulations 3 (Council of the European Communities 1958a) and 4 (Council of the European Communities 1958b), this was one of the first

1. For a comprehensive overview of initiatives, we refer to a recently published brochure 'Putting social matters at the heart of Europe: How the European Commission supported employment, social affairs, skills and labour mobility (2014-2019)' (European Commission 2019).
2. EU citizens moving between Member States, be it for reasons linked to work or for other reasons.
3. Article 48 TFEU: 'The European Parliament and the Council *shall* ... adopt such measures...' (emphasis added). If the legislature does not take the required measures it does not discharge its obligation under Article 48 TFEU: C-443/93, Vougioukas, EU:C:1995:394, para 34.
4. Or the so-called 'welfare magnet' hypothesis, whereby migrants are attracted to countries that provide more generous welfare (Borjas 1999).
5. Vaughan-Whitehead (2003: 325) defines social dumping as 'any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also plays a determinant role in this process'.

domains in which the Community was active.<sup>6</sup> Entered into force on 1 January 1959, the main objective of these regulations was to protect the social security rights of migrant workers and their families. This 20<sup>th</sup> edition of *Social policy in the European Union: state of play* is an appropriate moment to reflect on the achievements, but also on the controversies and the challenges that this legislation brings with it. As to the achievements, we will focus on the ‘pillars’ of the Coordination Regulations as well as on their personal and material scope (Section 1). The challenges and controversies discussed in Section 2 are those at the forefront of the debate around the 2016 Commission proposal to modify the Coordination Regulations (European Commission 2016a). Embodied by the common denominator of fairness, the fight against ‘social dumping’ and ‘welfare tourism’ (perhaps even rather the fight against the perception of its existence)<sup>7</sup> was concretised by the Commission proposal to revise certain provisions in the Coordination Regulations. For example, provisions on the export of unemployment benefits and family benefits, on the aggregation of insurance periods for unemployment benefits as well as on access to minimum subsistence benefits for inactive people can be linked to the debate on ‘welfare tourism’, while certain provisions on intra-EU posting can of course be linked to the debate on ‘social dumping’. The last section concludes and looks forward.

## Coordination of social security systems at the heart of the ‘social acquis’

The group of people protected by the European coordination system is certainly not small<sup>8</sup> and cannot be narrowed down to intra-EU migrants of working age. In fact, the Coordination Regulations nowadays protect, in the field of social security, all EU citizens moving between Member States, be it for reasons linked to work<sup>9</sup> or for other reasons (holiday, planned healthcare, moving abroad as a retired person, etc.). The rules of the Coordination Regulations not only apply to EU nationals but also to nationals of Norway, Iceland and Liechtenstein, thanks to the Agreement on the European Economic Area (EEA),<sup>10</sup> as well as to Swiss nationals by virtue of a bilateral agreement on the free movement of persons.<sup>11</sup> Some figures serve to illustrate the scope of the European coordination system (see Table 1). In 2017, there were 19 million EU/EFTA<sup>12</sup> movers<sup>13</sup> in

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6. The first regulation adopted by the Council of the EEC (Regulation 1 of 15 April 1958) determined the languages to be used by the EEC. Regulation 2 of 1st July 1958 established the form of laissez-passer issued to members of the Parliamentary Assembly.

7. For example, the European Commission (2016b: 47) states in its preparatory Impact Assessment that ‘Not undertaking action in the field of aggregation could lead to increased public disenchantment and exacerbate criticism of, and anxiety about the consequences of free movement. It could lead to the situation that (more) Member States apply their own interpretation of the current rules in a restrictive way, thus reducing legal certainty and risking that mobile EU workers will lose out on rights.’

8. Moreover, the group of people who have been able to benefit from the EU coordination system has increased considerably over the last 60 years, not least because of the considerable enlargements of the European Union in 2004, 2007 and 2013.

9. Different types of labour mobility can be defined: labour migration, seasonal work, commuting, posting, people normally working in two or more Member States, etc.

10. The agreement was signed in Oporto on 2 May 1992 and entered into force on 1 January 1994. However, for Liechtenstein the EEA agreement only became applicable on 1 May 1995.

11. The agreement entered into force on 1 June 2002.

12. The European Free Trade Association: Iceland, Liechtenstein, Norway and Switzerland.

13. EU/EFTA movers: EU-28 or EFTA citizens who reside in an EU-28 or EFTA country other than their country of citizenship.

the EU/EFTA, according to Eurostat population statistics, including 14 million persons of working age (20-64 years). They made up 3.6% of the total EU/EFTA population and 4.5% of the total working-age population. While these figures give us an idea of the stock of EU/EFTA movers, they do not say anything about annual flows. For instance, some 2.1 million persons migrated within the EU/EFTA in 2017 (Eurostat data). In addition, there were some 1.9 million cross-border workers in the EU/EFTA in 2017, around 1.8 million postings and finally some 1 million persons who normally worked in two or more Member States (Fries-Tersch *et al.* 2018; De Wispelaere and Pacolet 2018a). Furthermore, roughly 1.8 million EU/EFTA citizens aged 65 or over were living in an EU/EFTA country other than their country of citizenship, making up 1.8% of the population aged 65 or over in the EU/EFTA. Finally, EU/EFTA residents also made around 229 million trips with overnight stays in another EU/EFTA country – some 204 million tourist trips and around 25 million trips for business purposes (Eurostat data).

**Table 1** Composition of intra-EU mobility by different types, 2017

Type of mobility	Extent
Stock of EU/EFTA movers in the EU/EFTA	19 million
As share of total population in the EU/EFTA	3.6%
Stock of EU/EFTA movers in the EU/EFTA of working age (20-64 years)	14 million
As share of the total working age population in the EU/EFTA	4.5%
Flow of EU/EFTA movers in the EU/EFTA	2.1 million
Cross-border workers in the EU/EFTA	1.9 million
As share of the total employed in the EU/EFTA	0.8%
Postings in the EU/EFTA*	1.8 million
As share of the total employed in the EU/EFTA	0.8%
Persons who normally worked in two or more Member States*	1 million
As share of the total employed in the EU/EFTA	0.4%
Stock of EU/EFTA movers in the EU/EFTA aged 65 or over	1.8 million
As share of the total population aged 65 or over in the EU/EFTA	1.8%
Trips with overnight stay in another EU/EFTA country	229 million

Note: \* Based on the number of Portable Documents A1 issued.

Source: Eurostat data; Fries-Tersch *et al.* 2018; De Wispelaere and Pacolet 2018a.

## Characteristics and objectives of the Coordination Regulations

The EU coordination system is unique in the world. Under the rules of the Treaty, the power of the legislature<sup>14</sup> to determine the content of the coordination system is subject to the respect of the objectives of Article 48 TFEU on social security and free movement. Indeed, by virtue of Article 267 TFEU the CJEU has jurisdiction to rule not only on the interpretation but also on the validity of the provisions laid down in secondary legislation. Already in its first judgments pertaining to Regulation 3<sup>15</sup> the CJEU clarified that all provisions laid down in the regulations should be interpreted in the light of the objective pursued by Article 51 EEC (now Article 48 TFEU), namely to promote and secure the free movement of workers by offering them protection against the harmful consequences which might result from the exclusive application of national law. This means that a provision laid down in the regulation sometimes has to be interpreted in a way not foreseen by the legislature.<sup>16</sup> It also means that the regulations based on (the predecessor of) Article 48 TFEU cannot be applied in such a way as to deprive a mobile worker of benefits granted solely by virtue of the legislation of a single Member State.<sup>17</sup> The ultimate consequence is that a provision laid down in the regulation has to be considered invalid if it is contrary to the aim of (the predecessors of) Articles 45-48 TFEU. The abundant case law of the CJEU played an essential role in the evolution from the early coordination system set up under Regulation 3 to the system under Regulation 1408/71 (Council of the European Communities 1971) and to today's Regulation 883/2004.

The outcome is a high standard of protection<sup>18</sup> for European citizens who move between Member States, be it for occupational or private reasons. As pointed out by Eichenhofer (2009: 90), the provisions are 'an important part of European legislation, because it makes Europe into a unique 'social space'. Moreover, he concludes that 'The coordination of social security between Member States has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable' (Eichenhofer 2000: 231). The European Commission<sup>19</sup> and scholars<sup>20</sup> are certainly doing their bit to change this.

Because of the legal basis of the Coordination Regulations, their objective is both modest and ambitious. The Regulations have a modest objective in that they only 'coordinate' the various national social security systems. Instead of opting for harmonisation, the authors of the Treaty of Rome adopted the more cautious and politically more acceptable method of coordination. Member States are still free to decide who is to be insured,

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14. The Council of the EU and the European Parliament.

15. 100/63, Van der Veen, EU:C:1964:65 and 1/67, Ciecelski, EU:C:1967:27.

16. C-205/05, Nemec, EU:C:2006:705; C-352/06, Bosmann, EU:C:2008:290 and C-208/07, Von Chamier, EU:C:2009:455.

17. 24/75, Petroni, EU:C:1975:129.

18. Based on a high-quality level of coordination techniques.

19. For example, a campaign on 50 years of free movement of workers and 60 years of coordination of social security systems was recently launched by the European Commission. The Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL) also finances a legal network (MoveS) and a statistical network (Network Statistics FMSSFE).

20. On 16 and 17 May 2019, HIVA - Research Institute for Work and Society held a conference on 60 years of social security coordination from a workers' perspective.



what benefits should be granted, how they should be calculated and for how long they should be granted. The Coordination Regulations cannot affect the disparities between the various social security systems. As the CJEU has underlined in its case law,<sup>21</sup> the Treaties offer no guarantee to workers that extending their activities to more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may or may not be to the worker's advantage in terms of social security, according to the circumstances. And yet, in the current debate on 'welfare tourism', it is often assumed that such an extension or transfer of work will turn out to be mainly positive for the mobile person.

The Coordination Regulations are, at the same time, ambitious in that they aim at making the right to free movement a reality by ensuring that a person is not penalised in the field of social security for having moved from one Member State to another. The protection offered by social security coordination is indeed an indispensable element of free movement. In line with their different social and political histories, Member States set limits to their solidarity systems, sometimes on the basis of nationality, but mostly on the basis of territoriality (Cornelissen 1996). In general, this means that each state confines the scope of its national scheme by setting territorial conditions, such as the requirement to work or reside in that state. The ambition of the EU system is to overrule, at least partially, the application of these nationality- and territoriality-based criteria. Without such an ambition, the goal of the EU rules – to remove all social security barriers impeding genuine free movement – could not be achieved. However, this ambition seems to be under political pressure due to several Member States putting a stronger focus on their sovereignty.

## 1. Achievements: a hidden 'European welfare state'

The fact that EU legislation has been coordinating national social security legislation for 60 years is an achievement in itself. Over this period, a number of important adjustments have been made to ensure its sustainability. In 2016 the Commission proposed further significant changes, in particular in the areas of applicable legislation, unemployment and long-term care. The proposal also contains a series of provisions aimed at fighting fraud and abuse (European Commission 2016a). The negotiations on this proposal in March 2019 led to a provisional agreement between Council and Parliament.<sup>22</sup> However, at the time of writing (July 2019) the Council of the EU has not approved it. In addition, Parliament has postponed the vote on it until the next legislature period. Therefore, it is completely unclear at the moment what the outcome will be. We will come back to this when we discuss the related controversies and challenges. But first, we will look at the achievements of this regime, showing that EU legislation has created a kind of 'European welfare state', well-hidden from academic, public and political scrutiny.

21. C-393/99 and C-394/99, *Hervein and Hervillier*, EU:C:2002:182, para 50-51; C-493/04, *Piatowski*, EU:C:2006:167, para 34; C-208/07, *Von Chamier*, EU:C:2009:455, para 85.

22. See the provisional agreement: <https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>

## 1.1. The pillars of European social security coordination

Certain key principles protect the social security rights of persons moving within Europe: a) the prohibition of discrimination, reinforced by the equal treatment of cross-border facts and events (i.e. principle of assimilation); b) the aggregation of insurance periods; c) the exportability of benefits; and d) the determination of a single applicable legislation.

The principle of equality of treatment is one of the cornerstones of the Union. The EU rules on the coordination of social security systems guarantee equality between EU nationals. This is done not by striving towards unity, but by managing diversity. The CJEU has given a broad interpretation of this principle, prohibiting not only direct discrimination based on nationality but also covert forms of discrimination which, by applying other distinguishing criteria, *de facto* achieve the same result.<sup>23</sup> It also follows from the CJEU's case law that the principle of equal treatment may require the social security institution of a Member State, when examining whether all qualifying conditions for a benefit are fulfilled, to treat facts and events which occur in another Member State as if they were facts or events occurring in its own state.<sup>24</sup>

In addition, the aggregation of all insurance periods, irrespective of the Member State in which they were accrued,<sup>25</sup> is a technique enabling the career of a migrant worker to be tracked. In this way, the Regulation guarantees the retention of social security rights in the process of being acquired.

The Coordination Regulations guarantee the portability of social security rights in the EEA/Switzerland. The concept of 'portability' has been very well developed by Holzmann *et al.* (2005) in the economic literature. 'Portability' in this context is understood as the mobile person's ability to preserve, maintain and transfer acquired social security rights, independent of nationality and country of residence. According to Holzmann, the social protection status of migrants can be classified in four regimes: Regime I: portability; Regime II: exportability; Regime III: no access, Regime IV: informal.<sup>26</sup> Regime I is the most favourable in terms of formal social protection for migrants. Research by Avato *et al.* (2009) reveals that only a quarter of all migrants worldwide are covered by such a regime. It applies, however, to all EU/EFTA citizens moving within the EU/EFTA. This is a good example of the well-developed social protection that the EU offers to mobile persons, which is far from guaranteed in the rest of the world.

In order to prevent different national criteria leading to conflicts of law in cross-border situations,<sup>27</sup> Regulation (EC) No 883/2004 contains uniform criteria for determining the applicable social security legislation. This is an important issue both for the mobile

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23. 41/84, Pinna, EU:C:1986:1 and C-349/87, Paraschi, EU:C:1991:372.

24. C-228/88, Bronzino, EU:C:1990:85, C-12/89, Gatto, EU:C:1990:89 and C-349/87, Paraschi, EU:C:1991:372. This case-law is now in general terms reflected in Article 5 Regulation 883/2004.

25. Article 6 Regulation 883/2004.

26. For a detailed explanation of these regimes, see Holzmann *et al.* 2005.

27. A negative conflict: a person is insured in no Member State. A positive conflict: the person is insured simultaneously in two or more Member States.

person, since it has an impact on what social protection can be enjoyed,<sup>28</sup> and for the employers and Member States concerned, since it determines where social security contributions have to be paid. People who are not economically active are subject to the legislation of the Member State of residence. For economically active people the main rule is that a person is subject to the legislation of the Member State in which they work, even if their place of residence is in another Member State (the so-called *lex loci laboris* principle).<sup>29</sup> However, for specific categories of workers, namely posted workers<sup>30</sup> and workers normally employed in two or more Member States,<sup>31</sup> special rules have been created.

Regulation 883/2004 also contains special conflict of law rules for certain categories of workers for certain benefits. Under the main rule (*lex loci laboris*), mobile workers have to claim benefits in the Member State where they work. However, for unemployment benefits special rules have been created for wholly unemployed persons who reside in a Member State other than the state of last employment.<sup>32</sup> This means that frontier workers have to claim unemployment benefits – and to register as job-seekers – in their Member States of residence. This special conflict of law rule is based on the assumption that frontier workers enjoy the most favourable conditions for seeking new employment in their state of residence.<sup>33</sup> Other unemployed workers who reside in a Member State other than that in which they work, such as seasonal workers, have the right to choose where to claim unemployment benefits: they may either remain in the Member State of last activity and are entitled to draw unemployment benefit there,<sup>34</sup> or they may return to the Member State of residence and draw unemployment benefit there. Special conflict of law rules have also been created for pensioners with regard to access to healthcare<sup>35</sup>. These special rules not only have an impact on which healthcare can be enjoyed by the pensioner but also determine which Member State has to bear the costs for the pensioner's healthcare. The application of these special rules has sometimes surprising results. A pensioner who for instance worked one year in Portugal and then 35 years in Germany and who returns to Portugal after retirement will receive two pensions, one from Portugal<sup>36</sup> and one from Germany.<sup>37</sup> He or she is entitled to healthcare provided in accordance with Portuguese legislation, the costs of which will be borne entirely by Portugal.<sup>38</sup> This is a good example of the financial implications the provisions may have on Member States.<sup>39</sup>

28. For instance, Rennuy argues that 'it is hardly tenable that a person, who lived and worked his entire life in one Member State, would be most closely connected to another State, in which he started to work part-time the day before' (2017: 251).

29. Article 11(3)(a) Regulation 883/2004.

30. Article 12 Regulation 883/2004.

31. Article 13 Regulation 883/2004.

32. Article 65 Regulation 883/2004.

33. 1/85, Miethe, EU:C:1986:243 and C-444/98, De Laat, EU:C:2001:165.

34. Provided they register as a person looking for a job there.

35. Articles 23-30 Regulation 883/2004.

36. Thanks to the aggregation provision referred to above, the person fulfils the conditions for entitlement; his or her Portuguese pension will be calculated in accordance with the pro-rata method laid down in Article 52(1)(b) Regulation 883/2004.

37. Since the person has worked 35 years in Germany, the conditions for entitlement to a German pension are fulfilled without any need to aggregate periods completed in other Member States. His or her German pension will be calculated in accordance with the provisions laid down in Articles 52-56 Regulation 883/2004.

38. Article 23 Regulation 883/2004.

39. One can therefore question the financial sustainability of this provision (see also Roberts *et al.* 2009).

## 1.2. Gradual expansion of the personal scope: virtually all European citizens protected

Regulation (EC) No 883/2004 applies to all EU nationals insured under national law, whether employed, self-employed, students, civil servants, pensioners or non-active persons, as well as to the members of their families and survivors, regardless of their nationality. This constitutes major progress *vis-à-vis* the previous regulations which only covered economically active people and members of their families. The group of mobile persons enjoying social protection has therefore expanded considerably over the past 60 years.

For a long time, third-country national workers were excluded from the protection offered by the EU social security regulations, since they do not have the right to free movement within the meaning of Article 45 TFEU.<sup>40</sup> However, developments in primary law in the last two decades have paved the way for extending the Coordination Regulations to third-country nationals (Cornelissen 2018). Regulation (EC) No 1231/2010 (European Parliament and Council 2010) now offers third-country nationals the same protection, in terms of social security, as EU citizens moving within the EU.<sup>41</sup> However, this extension is subject to two conditions: the third-country national must legally reside in a Member State<sup>42</sup> and there must be a cross-border element between at least two Member States.<sup>43</sup> Therefore, the Coordination Regulations do not apply to workers from a third country who remain in one and the same Member State.

## 1.3. Further extension of the social risks covered, though not to social assistance

The Coordination Regulations can be applied only in respect of legislation concerning benefits covered by the material scope of Regulation 883/2004 as defined in its Article 3. It covers the following branches of social security: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, and family benefits.<sup>44</sup> This is an exhaustive list. Benefits not mentioned here are not covered. Article 3(5) explicitly excludes benefit schemes for victims of war or its consequences.

The EU Regulations based on Article 48 TFEU apply only to legislation concerning social security (whether contributory or non-contributory). Social assistance has always been explicitly excluded from the material scope of the EU Regulations,<sup>45</sup> though no

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40. C-230/97, Awoyemi, EU:C:1998:521, para 29.

41. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

42. C-477/17, Balandin, EU:C:2019:60.

43. C-247/09, Xhymshiti, EU:C:2010:698.

44. The branches of social security listed in Regulation (EC) No 883/2004 are clearly modelled on ILO Convention No. 102 of 1952, concerning minimum social security standards.

45. Article 3(5) Regulation 883/2004.

specific definition of the term ‘social assistance’ (differentiating it from social security) is to be found in these Regulations. There are a number of non-contributory benefits – financed not by contributions but by taxes – which have the characteristics of social security and social assistance.<sup>46</sup> The abundant case law of the CJEU under Regulation 1408/71 ruled that many benefits considered as ‘social assistance’ by the Member State concerned actually fell within the material scope of the EU Social Security Regulations, with all their consequences, such as the waiving of residence clauses for entitlement to benefits. The reaction of the legislature to this case law was to create<sup>47</sup> a separate coordination system for ‘special non-contributory benefits’ in order to avoid their exportability. Under Article 70(4) Regulation 883/2004, the ‘special non-contributory benefits’ listed in Annex X are provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that state.

Regulation (EC) No 883/2004 extended the material scope to pre-retirement benefits and paternity benefits. The importance of this extension should not be overestimated, as it only applies to statutory schemes and thus not to the numerous pre-retirement schemes laid down in collective agreements. Apart from the extension to paternity and pre-retirement benefits, the branches of social security covered by the material scope of Regulation 883/2004 are identical to those laid down in Regulation 3 adopted 60 years ago. Nevertheless, the experience of the last decades shows that the European coordination system has, to a large extent, been able to deal with the introduction of many new branches of social security. However, this is the result of the work not of the legislature but of the CJEU.

A few examples serve to illustrate this. As a response to demographic developments and declining fertility rates, several Member States introduced new kinds of benefits, such as child-raising allowances or parental benefits. These allow a parent to devote himself or herself to raising a young child, mitigating the financial disadvantage of giving up income from full-time employment. However, the list of branches covered by the Coordination Regulations was not adapted accordingly. This led to the CJEU ruling<sup>48</sup> that such benefits should be treated as ‘family benefits’ for the purposes of the coordination system, since parental benefits were also intended to meet family expenses. As a result, when a person works in one Member State while his or her family lives in another Member State, that person’s spouse is entitled, under Article 67 of Regulation 883/2004, to receive a family benefit such as parental benefit from the first state. However, treating parental benefits in exactly the same way as traditional family benefits could, for the application of other provisions of the EU regulations, in some situations lead to negative consequences for those involved. The CJEU ruled<sup>49</sup> that, in such situations, parental benefits must be regarded as different from traditional family benefits. These developments finally led to the intervention of the legislature. In its 2016 proposal to modify the Coordination Regulations, the Commission inserted provisions in Regulation 883/2004 aimed at

46. Some examples are the guaranteed income for elderly persons in Belgium, the disability and mobility allowances in Ireland, the state unemployment allowance in Estonia, the social pensions in Poland, Cyprus and Italy and the old-age solidarity allowance in France.

47. Regulation 1247/92, O.J. L 136 of 19 May 1992.

48. C-245/94 and C-312/94, Hoeber-Zachow, EU:C:1996:379 and C-275/96, Kuusijärvi, EU:C:1998:279.

49. C-347/12, Wiering, EU:C:2014:300.

taking account of the special nature of parental benefits. As stated above, this proposal is still pending before Council and Parliament.

Another example is the ‘long-term care insurance’ introduced by several Member States. This provides for benefits designed to cover the costs of care provided at home by another person. Though the material scope of the Coordination Regulations has not been adapted accordingly, the CJEU ruled<sup>50</sup> that such benefits must be regarded as ‘sickness cash benefits’ for the purposes of the Coordination Regulations. The result is that the care allowance must be paid by the Member State where the person is covered by care insurance,<sup>51</sup> even if the beneficiary resides in another Member State.<sup>52</sup> However, treating ‘care allowances’ in exactly the same way as traditional ‘sickness benefits’ could, for the application of other provisions of the EU regulations, in some situations lead to negative consequences for those involved. The CJEU ruled<sup>53</sup> that, in such situations, the other provisions must be interpreted in such a way that the person concerned is not disadvantaged for having moved to another Member State. These developments again led to an intervention of the legislature. In its 2016 proposal to modify the Coordination Regulations, the Commission included long-term care benefits as a distinct branch of social security and inserted a separate chapter ‘long-term care benefits’ in Title III Regulation 883/2004.

#### 1.4. Some protection goes beyond mere coordination

In some aspects, the Coordination Regulations provide social protection going beyond mere coordination, creating rights which citizens would not otherwise have. We give two examples in the area of cross-border healthcare.

A person who is insured for healthcare in one Member State and who stays temporarily in another Member State (e.g. during a city trip, family visit, holiday) is entitled to any healthcare which becomes necessary in that other Member State as if he or she is insured in that other Member State. In order to benefit from this arrangement, the person only has to show his or her European Health Insurance Card (EHIC) to the care provider. It is estimated that there are currently more than 236 million EHICs in circulation (De Wispelaere and Pacolet 2018b). One of the basic principles is that the cost of healthcare provided by the Member State of stay is fully reimbursed by the competent Member State, in accordance with the tariffs of the Member State of treatment and not of the competent Member State. This financing mechanism avoids a high financial burden being put on a patient receiving healthcare abroad and shifts the higher cost to the competent Member State. This is particularly important for patients who come from Member States with relatively low tariffs and obtain healthcare in a Member State with higher medical charges. Consequently, the provision facilitates the free movement of

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**50.** C-160/96, Molenaar, EU:C:1998:84, C-215/99, Jauch, EU:C:2001:139 and C-286/03, Hosse, EU:C:2006:125.

**51.** Provided, of course, that the person fulfils the conditions for entitlement in accordance with the legislation of that Member State.

**52.** Article 7 Regulation 883/2004.

**53.** C-388/09, Da Silva Martins, EU:C:2011:439.



persons, strengthens the social rights of EU citizens and is a visual reminder of the social character of the Coordination Regulations.

The Regulation also enables a person insured for healthcare in one Member State to go to another Member State to obtain medical treatment there, at the expense of the competent institution, provided he or she receives authorisation from that institution. If that authorisation is granted, he or she will benefit from reimbursement conditions far more favourable than those contained in the so-called Patient Mobility Directive (Directive 2011/24/EU)<sup>54</sup>. As the CJEU has underlined in its case law,<sup>55</sup> the Regulation thus helps facilitate the free movement of persons covered by social insurance and, to the same extent, encourages the provision of cross-border medical services between Member States.

## 2. Controversies and challenges

Over the years, the EU Regulations on the coordination of social security systems have been well received by both those covered and the Member States. While it is true that the Coordination Regulations are highly complicated, hardly anybody would contest that they provide a high standard of social protection for people moving across borders within the EU.

Yet there have always been voices claiming that the protection offered by these Coordination Regulations, as interpreted by the CJEU, goes too far and that Member States with the highest level of social protection have to pay disproportionately favourable benefits to people covered by these EU rules. The impression sometimes arises that this interpretation by the CJEU has the potential to jeopardise the high level of protection provided by the social security schemes of the ‘old’ Member States.

Some of the issues which have been the subject of controversy over the last few years are the export of family benefits and unemployment benefits, the aggregation of periods for unemployment benefits, access to subsistence benefits for inactive people and, last but not least, the posting of workers. These controversies are briefly described in the sections below. Their legal and socio-economic impact, with the exception of posting, was also extensively discussed in the Commission’s Impact Assessment (European Commission 2016b),<sup>56</sup> resulting in the above-mentioned Commission proposal to amend certain provisions.

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54. Directive 2011/24/EE of The European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare.

55. C-56/01, *Inizan*, EU:C:2003:578, para 21 and C-145/03, EU:C:2005:211, para 46.

56. However, the phenomenon was analysed by the European Commission in preparation of the revision of the Posting of Workers Directive (European Commission 2016c).



## 2.1. Export of family benefits

According to Regulation (EC) 883/2004, a person who works in one Member State and whose children reside in another Member State is entitled to family benefits from the state of employment (as the primarily or secondarily competent Member State), as if the children were residing in that state. Recently a number of ‘old’ Member States have requested a modification of the Coordination Regulations, allowing the Member State of employment to index such benefits to the standard of living of the Member State where the children reside. The Member States concerned refer to the controversial deal offered by EU leaders to the UK before the 2016 British referendum as proof that such indexation is legally viable (European Council 2016). Despite this political pressure, the 2016 Commission proposal does not contain any amendment to the existing EU rules on the export of family benefits (European Commission 2016a).<sup>57</sup> However, the discussions on this issue continue. Indeed, since 1 January 2019 Austria has implemented such indexation in its national law.<sup>58</sup> It therefore seems that the controversial EU proposal to the UK has opened Pandora’s box. It is also remarkable that the settlement with the UK on this point was even agreed by the EU, as the UK exports just 0.2% of its family allowance budget to other Member States (De Wispelaere and Pacolet 2018b).

## 2.2. Export of unemployment benefits

Subject to strict conditions and for a limited period of time, an unemployed person receiving unemployment benefit in the competent Member State can go to another Member State to seek work there and retain entitlement to unemployment benefit. Figures show a negative relationship between the share of unemployed persons exporting their benefit and the unemployment rate of the Member State paying the benefit (De Wispelaere and Pacolet 2018b). In other words: workers probably have reasons weighing more heavily than the unemployment rate for exporting their unemployment benefit. For instance, these may be mobile workers who return to their country of origin after they became unemployed. The concern is that this group is not always really looking for work. This may also explain the low percentage of unemployed who found work abroad (i.e. ‘success rate’) during the export period. For example, success rates seem to be low in the Netherlands, one of the main ‘benefit-exporting’ Member States, and in Poland as the main ‘benefit-importing’ Member State.<sup>59</sup> Given such low success rates, a number of Member States, including the Netherlands, are reluctant to extend the export period. This reluctance existed right from the start, making it very difficult to adjust EU rules (Cornelissen 2007).

The discussions above also divert attention from the risk of non-take-up of social rights. For instance, despite the large outflow of people from Poland and Romania, we observe

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57. EU commissioner Marianne Thyssen defended this with the slogan ‘equal benefits for equal contributions at the same place’.

58. We estimate that this could lead to public savings of around €100 million. This is mainly due to the fact that Austria exports a large amount of family allowances to Hungary and Slovakia (as secondarily competent Member State).

59. The Netherlands granted some 4,800 authorisations in 2017 (De Wispelaere and Pacolet 2018b). Poland received some 8,800 persons who exported their unemployment benefit from another Member State.

that these Member States only granted a limited number of authorisations to export the unemployment benefit (De Wispelaere and Pacolet 2018b). Based on the EU Labour Force Survey, we estimate that in 2013 more than 90,000 people were unemployed when they moved to another Member State. However, the number of authorisations granted to export the unemployment benefit has remained around 30,000 (De Wispelaere and Pacolet 2018b), meaning that there is a formal non-take-up of this social right by two out of three unemployed people who have moved to another Member State. However, in reality, a (large) group of unemployed people may in fact have exported their unemployment benefit abroad without reporting it (i.e. informal take-up).

### 2.3. Aggregation of periods for unemployment benefits

According to Regulation 883/2004,<sup>60</sup> aggregation is subject to the condition that the person becoming unemployed has most recently completed periods of insurance or employment in the Member State where the claim for unemployment benefit is made. The philosophy behind this provision is clear: the state in which the unemployed person last worked or paid contributions should bear the burden of providing the unemployment benefit. However, Article 61 of the 'Basic' Regulation does not specify how long the person must have 'most recently' completed such periods in the Member State where he or she became unemployed before being able to invoke aggregation. The result is a divergent implementation of this provision in the EU. Some Member States permit aggregation after just one day of insurance in the Member State concerned. Other Member States require a minimum period of four weeks (Finland) or even three months (Denmark and Belgium).

The 2016 Commission proposal inserted a minimum qualifying period of three months in the Member State of most recent activity before a right to aggregate arises. Under the March 2019 provisional agreement between Council and Parliament, this has been reduced to one month. Some Member States, in particular Belgium, expressed the view that this period is not long enough to ensure that the financial burden for paying unemployment benefits is not incurred in situations where mobile EU workers have not yet made a significant contribution to the scheme of the host state. For this reason, Belgium was one of the Member States opposing the March 2019 provisional agreement. However, on the basis of the available data, it appears that in roughly seven out of ten cases of aggregation a period of insurance, employment or self-employment of more than three months had already been completed by the unemployed mobile worker in the Member State of last activity (De Wispelaere and Pacolet 2018b). This is an indication that intra-EU movers of working age who become unemployed in their new host state after only working there for a very short period represent just a minority of cases.

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60. Article 61(2) Regulation 883/2004.

## 2.4. Access to subsistence benefits for inactive people

One of the provisions in the Coordination Regulations that sparked the most controversy in the last decade was access to subsistence benefits in the host state by economically non-active people coming from other Member States. In this context it is worthwhile recalling that the current Regulation 883/2004 applies to all EU citizens insured under national law, whether they are economically active or not. For many people, fears of welfare tourism are inextricably linked to the free movement of economically non-active persons. Directive 2004/38/EC specifies the residence rights of EU citizens (and members of their families) moving within the EU and defines certain conditions and limitations (European Parliament and Council 2004b). By virtue of Article 7(1) of this Directive, economically inactive persons are entitled to residence for more than three months, subject to the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and that they have comprehensive sickness insurance.<sup>61</sup>

As we have seen above under Section 1.3., the legislature has created a separate coordination system for ‘special non-contributory benefits’ to avoid their exportability. The special non-contributory benefits listed in Annex X of Regulation (EC) No 883/2004 are provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that Member State.

A number of Member States, such as Austria and the UK, have imposed a condition on the entitlement to special non-contributory benefits listed in Annex X of Regulation (EC) 883/2004 for non-active people coming from another Member State: these must have right of residence there in accordance with Directive 2004/38/EC. Since Directive 2004/38/EC and Regulation (EC) No 883/2004, adopted on the same day, do not refer to each other, the CJEU has had to rule on the relationship between the two legal instruments. In its famous *Brey* judgment<sup>62</sup> and subsequent case law,<sup>63</sup> the CJEU clarified that the notion ‘social assistance’ within the meaning of the Directive could comprise special non-contributory social security benefits within the meaning of Regulation 883/2004. There is nothing to prevent the entitlement to such benefits for Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions of the host Member State for obtaining a right of residence under Directive 2004/38.

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**61.** These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers or self-employed people.

**62.** C-140/12, EU:C:2013:565.

**63.** C-333/12, *Dano*, EU:C:2014:2358, C-67/14, *Alimanovic*, EU:C:2015:597, C-299/14, *Garcia-Neto*, EU:C:2016:114 and C-308/14, *Commission versus UK*, EU:C:2016:436.

## 2.5. Rules determining the applicable social security legislation

### 2.5.1. Are these rules still fit for purpose?

Changes in the nature of the labour market have an impact on the rules determining the applicable social security legislation. And yet these rules have not been substantially modified over the last 60 years. The Coordination Regulations were adopted at a time when it was the norm for workers to have full-time and permanent jobs. While this form of employment still accounts for a large proportion of jobs, over the last decades we have seen a significant rise in new types of work, such as fixed-term, part-time, on-call or framework contracts. Telework has become a common phenomenon. We have also seen an increase in forms of mobility which are not new but which have become more common, such as intra-corporate transfers and people who regularly work in two or more Member States.

A case currently pending before the CJEU<sup>64</sup> illustrates very well that the current rules determining the applicable social security legislation do not take sufficient account of these developments. As said before (Section 2.1.), for economically active people the main rule is that a person is subject to the legislation of the Member State in which they work. This rule does not differentiate between full-time and part-time employment.<sup>65</sup>

The pending case concerns persons who worked in a mini-job in Germany while residing in the Netherlands. It refers to facts and events that occurred under Regulation 1408/71. Like Regulation 883/2004, Regulation 1408/71 contained an explicit provision<sup>66</sup> that ‘persons to whom this Regulation applies shall be subject to the legislation of a single Member State only’. The wording of that provision could not be clearer. However, it follows from the case-law of the CJEU<sup>67</sup> that a Member State not designated as the competent one by the Regulation nevertheless has the ‘right’ to grant benefits to a worker who resides on its territory. The persons concerned by the pending case were, as mini-jobbers, not covered for sickness, unemployment and old-age in Germany. In addition, they could not invoke Regulation 1408/71 to claim German family benefits, because they were explicitly excluded<sup>68</sup> from the notion of ‘employed person’ within the meaning of Regulation 1408/71. According to the legislation of the Netherlands, everybody residing in the Netherlands is covered for family benefits and old-age, except people who are subject to the legislation of another Member State. The persons concerned claimed family benefits and old-age pension in the Netherlands for the years that they were engaged in minor employment in Germany. The Dutch institutions based their refusal on the fact that during these periods they were, in accordance with Regulation 1408/71, subject to German and thus not to Dutch legislation. The final result of taking up a mini-job in Germany was that the persons concerned were not protected in the family benefits and old-age branches in any Member State. It seems obvious that this result was incompatible with the objectives pursued by Articles 45-48 TFEU, but the question

64. C-95/18 and C-96/18, Giesen and Franzen.

65. C-2/89, Kits van Heijningen, EU:C:1990:183.

66. Article 13(1) Regulation 1408/71. The wording of Article 11(1) Regulation 883/2004 is identical.

67. C-352/06, Bosmann, EU:C:2008:290, C-611/10 and C-612/10, Hudzinski and Wawrzyniak, EU:C:2012:339.

68. Annex I, E (‘Germany’) Regulation 1408/71.

was – and is – how to avoid such an outcome. In 2013 the Dutch court requested a preliminary decision<sup>69</sup> from the CJEU on the compatibility of the application of the Dutch legislation with Union law. The Advocate-General in that case<sup>70</sup> doubted whether it would be possible to solve the problem on the basis of the rules of Regulation 1408/71. He proposed that the application of the legislation of the State of employment, provided for by Regulation 1408/71, should be suspended if the application of that legislation does not lead to any social security protection concerning family benefits or old-age. During this period of suspension, the persons concerned should be subject to the legislation of the State of residence. In practical terms the Advocate General suggested that during the aforementioned period of suspension the persons concerned would be subject to the legislation of two Member States at the same time: the State of residence for those branches for which the State of employment does not offer any protection and the State of employment for those branches for which it does offer sufficient protection (such as accidents at work). Obviously, this suggestion raises questions about legal certainty and predictability of the coordination rules.

In its judgment<sup>71</sup> the CJEU did not follow the opinion of the Advocate General. Instead, the CJEU referred to the Bosmann judgment and repeated that a Member State which is not the competent one by virtue of the Regulation nevertheless has the power to grant benefits to its residents. However, this judgment was based on a misunderstanding of Dutch legislation. In fact, Dutch law did not empower the Dutch institutions to grant benefits to the persons concerned.<sup>72</sup> This has resulted in a further – currently pending – referral of the Dutch court to the CJEU.

In her conclusions on this new case,<sup>73</sup> Advocate-General Sharpston raises an interesting point,<sup>74</sup> namely that the rules of Regulation 883/2004 determining the applicable social security legislation are not only intended to protect mobile workers, but also to share the financial burden between the Member States fairly. A person working in Germany, even on the basis of a mini-job, is subject to German legislation (*lex loci laboris*). During this period the Netherlands, as the non-competent Member State, cannot levy contributions. Thus, the persons concerned do not contribute to the Dutch social security system. However, according to the Advocate-General the Dutch legislature has gone beyond what is necessary to attain the legitimate goal of protecting the financial equilibrium of its social security scheme by excluding everybody who is subject to the legislation of another Member State. They could have made an exception for people working in another Member State on the basis of marginal employment, opening up the possibility for a voluntary insurance – and voluntary payment of contributions – for such persons.

The Court's judgment of 19 September 2019 is surprising, to say the least. The Court repeats its well-known case-law that primary law can provide no guarantee to a worker

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69. C-382/13, Franzen.

70. Conclusions of Advocate General Szpunar, EU:C:2014:2190 para 88-93.

71. C-382/13, Franzen, EU:C:2015:261.

72. At least not for periods completed after 1 January 1989.

73. Which concerns the same people as in the previous case.

74. Conclusions of Advocate General Sharpston of 26 March 2019, EU:C:2019:252, para 41-45.

that moving to a Member State other than his Member State of origin will be neutral in terms of social security. Given the disparities between Member States' social security schemes and legislation, such a move might be advantageous or perhaps disadvantageous for the person concerned. Article 48 TFEU only foresees the coordination and not the harmonisation of Member States' social security systems. It cannot be interpreted as obliging a non-competent Member State to grant social security benefits to its residents working in an employed capacity in another Member State. Otherwise, both the coordination system and the equilibrium established by the TFEU could be questioned. In fact, such an obligation could ultimately lead to situations where only the legislation of the Member State with the most favourable social security system would be applied. In practical terms, this judgment means that persons residing in the Netherlands who had taken up a mini-job in Germany after 1 January 1989 were not entitled to family benefits and did not accrue pension rights in any Member State. According to the Court, this outcome is not incompatible with the objectives pursued by Articles 45-48 TFEU.

This judgment should be an incentive for the legislature to re-examine the rules determining the applicable legislation. *Is it really logical that a person who works only to a marginal extent in another Member State is subject to the social security legislation of that Member State?*

### 2.5.2. Intra-EU posting

As said before, for economically active people, the main rule is the *lex loci laboris*: a person is subject to the legislation of the Member State where he or she works. This rule is based on the idea that a migrant worker should have the same rights as a host state national. This rule seeks to prevent unfair competition between employers using migrant workers in a Member State and those only using non-migrant workers. The difference in social protection levels between Member States following the 2004, 2007 and 2013 enlargements has further strengthened this objective.

Nonetheless, from 1959 onwards, the year Regulation 3 entered into force, the law of the country of work did not apply in the event of a worker being sent by his employer for a short period to another Member State to work there on the latter's behalf. It would indeed be a severe burden on workers, employers and social security institutions if the worker were required to be insured under the social security system of every Member State to which he was posted in the course of his employment, even if such postings were of very short duration. Such workers continue therefore to be subject to the legislation of the sending State. However, postings are subject to a number of strict conditions<sup>75</sup> to prevent their use in cases for which they are not intended.

From the very beginning, the CJEU has taken not only the interests of the worker into account but also those of the employer and the social security institutions. Initially, the CJEU underlined simplification as an objective of the posting provision. However,

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75. Articles 12 Regulation 883/2004 and 14 Regulation 987/2009, further elaborated in Decision A2 of the Administrative Commission, OJ C 106 of 24 April 2010.



in its 2000 *Fitzwilliam* judgment,<sup>76</sup> the CJEU ruled that the purpose of the posting provisions is ‘in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established’. The objective of simplification is mentioned only in second place.

Posting is a very sensitive issue. For some Member States, in particular the ‘new’ Member States from Eastern Europe, a further tightening of the existing conditions could lead to protection of the labour market of the host state. However, in several of the ‘old’ Member States, such as Belgium, the Netherlands, Germany and France, intra-EU posting is increasingly seen as a Trojan horse since it could lead to unfair competition and to downward pressure on the level of social protection in the host state. In view of the political sensitivity, figures on the characteristics, size and impact of posting are therefore very useful. While evidence reveals that the number of posted workers and their share in total EU employment remains marginal (De Wispelaere and Pacolet 2018a),<sup>77</sup> it is striking how often this phenomenon occurs in the construction sector. For instance, roughly one out of every three persons employed in the Belgian construction sector is a posted worker.<sup>78</sup> In relative terms, some 5% of the total Slovenian labour force, but even six out of ten employed persons in the Slovenian construction sector, are posted to another Member State. The level of posting from Poland is substantial in absolute terms, but much less so in relative terms.<sup>79</sup> Figures also counter the common perception that intra-EU posting is really only used for low-skilled posted workers moving from low-wage to high-wage Member States, as most posted workers come from an EU-15 country and four out of every ten postings take place between high-wage Member States (De Wispelaere and Pacolet 2018a). Despite these figures, which give a more nuanced picture of posting, the phenomenon will probably continue to be a divisive issue in the EU.

Proof that the legislation of the sending state is applicable is provided by a certificate (Portable Document A1) issued by the competent institution of the Member State whose legislation is applicable. CJEU case law<sup>80</sup> has ruled that such a document is binding for all other institutions of the Member States concerned. This means that whenever the decision of the issuing institution is contested by the institution of the place where the work is actually carried out, a (retroactive) change of the applicable legislation is not possible without the consent of the issuing institution to withdraw or to invalidate the A1 Document in question.

The CJEU based its case law on the principle of cooperation in good faith laid down in Article 4(3) TEU. On the one hand, this principle requires the issuing institution to carry out a proper assessment of the facts and to (re)examine whether all conditions for

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76. C-202/97, EU:C:2000:75, repeated in C-404/98, Plum, EU:C:2000:607.

77. In 2017, an equivalent of 0.4% of EU employment could be related to intra-EU posting.

78. However, this figure is an overestimation because the unit of measurement of the numerator (the number of posted workers over a year) is not the same as the unit of measurement of the denominator (the number of persons employed at a certain moment in the year).

79. ‘Only’ some 0.7% of the Polish employed population was sent abroad in 2017.

80. C-148/97, *Banks*, EU:C:2000:169 en C-2/05, *Herbosch Kiere*, EU:C:2006:69.



posting are fulfilled. On the other hand, the A1 Document establishes a presumption that the worker is properly affiliated to the social security system of the sending Member State. It is, therefore, binding on both the competent institution and the judiciary<sup>81</sup> of the Member State in which that person actually works, even in the case of a manifest error of assessment of the posting conditions.<sup>82</sup> In the case of a dispute arising between the competent institutions of the Member States involved they must contact each other.<sup>83</sup> However, the institution of the host State cannot unilaterally make the workers concerned subject to its own social security legislation.<sup>84</sup>

The dialogue procedure must be followed, even if the institution of the Member State where the work is carried out produces evidence collected in the course of a judicial investigation and supporting the conclusion that the A1 Document was fraudulently obtained or relied on. It is only when the issuing institution fails to take such evidence into consideration for the purpose of reviewing the grounds for the issue of that document that a court of the Member State where the work is carried out may disregard that document. This was decided by the CJEU in its famous *Altun* judgment,<sup>85</sup> which stresses that the principle of prohibition of fraud and abuse of rights is a general principle of EU law which individuals must comply with. However, the CJEU clarified that only a national court, not a social security institution, may disregard the document concerned. In such cases, obviously the right to a fair trial must be guaranteed. A national court is only allowed to disregard such a document in cases of fraud or abuse of rights. Findings of fraud are to be based on evidence that satisfies both an objective and a subjective factor. The objective factor is the fact that the posting conditions are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the posting conditions with a view to obtaining the advantage attached to it (e.g. paying lower social security contributions). In practice it will not always be easy to produce evidence supporting the subjective factor, indispensable to conclude the finding of fraud.

The European Commission (2016a) proposal to modify the Coordination Regulations contains a series of provisions aimed at fighting fraud and abuse as well as at strengthening the verification of the social security status of posted workers. As said before, it is unclear at the moment what the final outcome of the negotiations on this proposal will be.

## Conclusions

The European coordination system as it currently stands was built upon the pillars created 60 years ago by Regulation 3. Improved and reinforced over the years, these pillars remain to this day. Rennuy even argues that the Regulation ‘weaves a seamless

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81. C-2/05, *Herbosch Kiere*, EU:C:2006:69.

82. C-620/15, *Rosa Flussschiff*, EU:C:2017:309.

83. In the framework of the dialogue and conciliation procedure within the meaning of Article 5 Regulation 987/2009.

84. C-356/15, *Commission versus Belgium*, EU:C:2018:555.

85. C-359/16, EU:C:2018:63.

web of social protection: wherever they find themselves, migrants have uninterrupted access to many social benefits' (2017: 248). The initial concept was to avoid workers being penalized for exercising their right to freedom of movement. The system as it now stands reflects the transformation of the European Economic Community, with its economic focus, to the political European Union, serving the interests and well-being of all its citizens, regardless of whether they are engaged in economic activities. The 236 million European Health Insurance Cards (EHICs) circulating today illustrate that the current Coordination Regulations are of importance for all EU citizens when they move between Member States, be it for work or for private reasons. One could even argue that there are two well-known European symbols: the EURO and the EHIC. The first of these is a visual symbol of the European Monetary Union, the latter of a 'European Social Union' (see also Ferrera 2018).

However, we cannot turn a blind eye to some deficiencies in social protection coordination. For example, Article 64 Regulation 883/2004 limits the export period of the unemployment benefit for people looking for a job in another Member State in principle to three months, though allowing Member States to extend this period by another three months. As a result, mobile unemployed persons are treated differently by different Member States. Another example is the imprecise wording of Article 61(2) Regulation 883/2004, leading to a divergent implementation of the aggregation provision for entitlement to unemployment benefits in the EU. Furthermore, despite the good social protection guaranteed by the Coordination Regulations, many mobile persons in practice do not take up their social rights (Fingarova 2019). In this context, there is still room for improvement in the provision of information on the social rights of mobile persons, as such lack of knowledge can act as a major barrier.

The legislator also needs to become more aware of the financial implications of certain provisions, primarily on Member States but also on individuals and companies. We should not forget that Article 48 TFEU itself, as worded after the Lisbon Treaty, attaches importance to the issue of potential financial implications of the Coordination Regulations. In this context, it is important to ensure that concerns about 'welfare tourism' and 'social dumping' are based on facts and figures and not on myths.<sup>86</sup> This is the only way possible to respond to the controversies and challenges defined above. Both the Commission's impact assessment and its proposal to revise the Regulation clearly show that it is aware of this, with both focusing more on the budgetary impact of the Coordination Regulations and proposing amendments supported by the available data.

The coordination system has also to adapt to all kinds of developments in order to keep up with the times. Two points are of particular importance here.

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**86.** Article 91 Regulation 987/2009 is one of the 'hidden' improvements of the current Implementing Regulation in comparison with the past. It requires the competent authorities to compile statistics on the application of the Coordination Regulations and to forward them to the Administrative Commission. The reports on the various statistical data certainly help to assess the functioning of the current Regulations and to underpin proposals for possible improvements (see De Wispelaere and Pacolet 2018b).

First, changes in the nature of the labour market have an impact on the rules determining the applicable social security legislation. It is time for the legislature to reflect on an adaptation of the conflict of law rules laid down in the Coordination Regulations. Moreover, with new work forms becoming increasingly virtual (such as telework), an adaptation of the meaning of ‘workplace’ is needed. In addition, the borderline between the *lex loci laboris* and Article 13 (people who normally work in two or more Member States) is not very clear. The March 2019 provisional agreement between Council and Parliament on the 2016 Commission proposal to modify the Coordination Regulations contains several elements which are an improvement compared to the current text of the Regulations. While it clarifies and strengthens the conditions which must be fulfilled in order to invoke Article 12 (posted workers<sup>87</sup>), it does not clarify the borderline between the *lex loci laboris* and Article 13.

Second, the Coordination Regulations have not kept pace with the introduction of new forms of social security in Member States. While several new kinds of benefits, such as parental benefits and long-term care allowances have been brought into the material scope of the Coordination Regulations, this is not due to a dynamic legislature but to a dynamic CJEU. Parental benefits are to be treated as ‘family benefits’ and long-term care allowances as ‘sickness benefits’ for the purposes of the Coordination Regulations. This is, however, not an ideal situation. It follows from later case law that treating parental benefits in the same way as traditional family benefits and treating long-term care allowances in the same way as traditional sickness benefits could, for the application of other provisions of the Regulations, lead to negative consequences for the persons involved.

Fortunately, the legislature is now intervening. In its 2016 proposal to modify the Coordination Regulations, the Commission proposed to adapt the list of Article 3 determining the material scope of Regulation 883/2004 to include long-term care benefits, providing a definition of ‘long-term care benefits’ and creating a specific chapter for such in Title III, with the intention of providing greater legal certainty to the growing number of citizens in our ageing societies reliant on long-term care. In the March 2019 provisional agreement on this proposal, the Council and Parliament did away with the creation of a specific chapter on ‘long-term care benefits’ in Title III of Regulation 883/2004, as proposed by the Commission, instead providing for the insertion and modification of several provisions in chapter 1 of Title III which is renamed ‘sickness, long-term care, maternity and equivalent paternity benefits’ in order to clarify where mobile persons can claim long-term care benefits.

As to parental benefits, the March 2019 provisional agreement, generally following the 2016 Commission proposal, provides for the insertion of several provisions in the chapter ‘family benefits’ of Regulation 883/2004 aimed at taking into account the special nature of parental benefits. It distinguishes between family benefits in cash intended to replace income not earned due to child-raising (parental benefits) and all other family benefits. Parental benefits cannot be treated in the same way as traditional

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87. The provisional agreement aims at replacing the words ‘posted’ and ‘posted workers’ with ‘sent’ and ‘sent workers’.

family benefits for the calculation of the differential supplement to the family of a mobile person.<sup>88</sup> Parental benefits are granted solely to persons subject to the legislation of the competent Member State, without any derived rights. As a result, it will no longer be possible for the spouse of a person working in one Member State and living with his family in another one to be entitled to receive a parental benefit from the first State.

The 2016 Commission proposal to revise the coordination rules illustrates that the impact of the Coordination Regulations is regularly monitored in order to ensure that they meet current requirements. The March 2019 provisional agreement is a step in the right direction. However, it is unclear at the moment what the final outcome of the negotiations on the Commission proposal will be. Whatever the outcome, it will only be an episode in the 60-year-long history of adaptations of the Coordination Regulations to keep up with the times.

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**88.** Where, during the same period and for the same family members, family benefits are provided for under the legislation of more than one Member State (e.g. mother resides with the children in Member State A and father works in Member State B), very detailed priority rules apply laid down in Article 68 Regulation 883/2004. Family benefits are provided by the Member State designated as having priority. However, the other Member State has to provide a differential supplement if the amount provided for by the legislation of the latter Member State exceeds the amount due by the Member State designated as having priority.

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## Chapter 8

# The social impact of EU cohesion policy

Paolo Graziano and Laura Polverari

### Introduction

EU cohesion policy has been on the European policy menu for over forty years, if we consider the 1975 creation of the European Regional Development Fund (ERDF) as the starting point. While the Treaty of Rome set for its signatory countries the goal ‘to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions’ (European Economic Community 1957), the three instruments that it foresaw to this end – the European Social Fund (ESF), the European Investment Bank (EIB) and the Guidance section of the European Agricultural Guidance and Guarantee Fund – were small-scale. The ESF, in particular, was at that time mainly a tool to support labour mobility through education and training measures for workers in areas facing industrial decline (Brunazzo 2016: 18).

Over the four decades since 1975, several modifications have been made to the policy. The most important was the 1988 reform which increased the funds available, introduced specific policy principles and made cohesion policy the second most funded item in the EU budget, after agriculture. Over the years, EU cohesion policy has increased in importance, in parallel with the expansion of the European Union. It has become a flagship policy in terms of the attractiveness of the European Union political project, with acceding countries (especially the Central and Eastern European states which joined the European Union between 2004 and 2007) identifying these funds as one of the key reasons to join (Grabbe 2002). In the wake of recent Eurosceptic discourses, cohesion policy is increasingly viewed as a key political tool for creating and strengthening a European identity (Borz *et al.* 2018; Capello and Perucca 2019, 2017) and as a lever to counteract rising levels of Euroscepticism (Bachtler *et al.* 2019).

*What are the results of EU cohesion policy after forty years?* Over the past decades, several attempts have been made to assess the impact of this policy (for an overview, see Davies 2017 and Fiaschi *et al.* 2018). However, most of the studies have analysed its impact in terms of regional economic growth, rather than its direct social impact (for example in terms of unemployment reduction, employment promotion, poverty alleviation and social inclusion). We will be looking at these aspects in the following sections.



Since the early 1990s, funds have been allocated on the basis of specifically identified employment structure weaknesses. This was for example the case with the 1994–1999 and the 2000–2006 Objective 2 regions, designated as regions of ‘industrial decline’ or with ‘structural difficulties’, *inter alia* on the basis of their unemployment rates. In other words, the growing social embeddedness (i.e. the growing social relevance) of cohesion policy has become undisputable.

Over time, European Commission officials, practitioners and experts have highlighted the need for greater policy convergence and coordination between the EU’s emerging employment and social goals (which have become increasingly important since the launch of the European Employment Strategy in 1997) and cohesion policy. For example, the European Social Fund (ESF) has become the most visible interface between regional development policy and multi-level vocational training policy. To date, however, only a limited number of scholarly contributions have tried to assess the direct impact of cohesion policy on employment and poverty alleviation. While we have estimates of the aggregate impact of the policy in terms of gross jobs created, not much is known about indirect and net job creation; furthermore, there is virtually no aggregated data on the impact on poverty alleviation – especially from a diachronic perspective – partly due to the fact that indicators on poverty have only been used systematically at EU level since 2010. Past evaluations have also provided evidence of the impact of cohesion policy on social infrastructure (e.g. Applica *et al.* 2016). However, data collection and analysis, even in *ex post* evaluation exercises, tend to be primarily focused on the economic impact of cohesion policy and less on (direct and indirect) social impacts. In light of these gaps, the objective of this chapter is to shed light (also from a historical perspective) on the social impact of cohesion policy, on the existing data shortcomings hampering its appraisal, and on the lessons that can be learnt for the forthcoming programming period, with a view of ensuring that cohesion policy can indeed become a key tool for a more ‘Social Europe’.

The remainder of the chapter is structured as follows. Section 1 briefly introduces cohesion policy and its importance within the overall European Union public policy framework. Section 2 focuses on its economic impact, while Section 3 looks at its (direct) employment and social impact. The last section concludes with some policy recommendations and reflections on the future of the policy.

## **1. Cohesion policy: what is it?**

Cohesion policy is one of the most significant EU policies in terms of scope, funding and ambition. While historically its aims have primarily been linked to economic growth, it can also be considered as the closest thing that the Union has to an active employment and social policy, since ‘the most important financial instrument [for this] was and continues to be the ESF’ (Graziano 2013: 109).

## 1.1. Goals

The key goal of cohesion policy is to support the growth and catching up of lagging regions and, through this, to achieve ‘harmonious development’ in the Union. At the time of the Treaty of Rome (European Economic Community 1957)<sup>1</sup>, the Community’s efforts towards economic and social cohesion were still limited. National governments were reluctant to give up competences in a policy area that touched upon the delicate relationship between the State and the economy, and by and large conformed to a liberalist view trusting that interregional trade would eventually iron out the imbalances between regional economies (Manzella and Mendez 2009; Brunazzo 2016). Over time, however, the policy gradually expanded on the back of successive enlargements<sup>2</sup> and the progressive deepening of European integration. Coming in the wake of the accession of Spain and Portugal in January 1986, the Single European Act (SEA)<sup>3</sup> introduced the goal of social and economic cohesion as a counterbalance to the forthcoming single market, paving the way for the first landmark reform of the policy in 1988. This reform significantly boosted the resources assigned to cohesion policy, raising them, for the period 1989–1993, to about one-third of the Community budget, de facto setting a benchmark that continues to apply till this day. Figure 1, below, shows the financial allocations of the three cohesion policy funds – namely the ESF, the European Regional Development Fund (ERDF), and the Cohesion Fund (CF) – from 1989 to date.<sup>4</sup>

**Table 1** The resources allocated to cohesion policy 1989–2020 (2011 prices, EUR billion)

Programming period	ESF	ERDF	Cohesion Fund	Cohesion policy Total*
1989–1993	24.0	39.0	2.2	65.2
1994–1999	67.0	119.0	20.0	206.0
2000–2006	79.0	150.0	32.0	261.0
2007–2013	78.0	205.0	71.0	354.0
2014–2020	71.0	181.0	56.0	308.0
<b>Total 1989–2020</b>	<b>319.0</b>	<b>694.0</b>	<b>181.2</b>	<b>1,194.2</b>

Note: \* This total does not include the rural and fisheries funds that, in past programming periods, were part of cohesion policy.

Source: European Commission (2014: 188).

The 1988 reform also established some key principles – concentration, multi-annual programming, partnership and additionality. These principles are still at the heart of

1. Treaty of Rome, 25 March 1957.

2. Particularly the accession of the UK in 1973, of Greece and the Iberian countries in 1981 and 1986, and of the Eastern bloc in 2004–2007.

3. Single European Act (1986) OJ C L 169/3, 26 June 1987. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=EN>

4. The ESF supports employment and labour mobility, education, skills and lifelong learning, tackles poverty and social exclusion, and invests in measures for the enhancement of institutional capacities. The ERDF promotes the balanced development of EU regions through investments in innovation and research, digital agenda, SME competitiveness, and low-carbon economy. The Cohesion Fund, operational since 1993, promotes sustainable development in Member States with a Gross National Income (GNI) below 90% of the EU average. In 2014–2020 these countries are Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia.

today's cohesion policy (Piattoni and Polverari, forthcoming; Brunazzo 2016; Manzella and Mendez 2009; see Box 1 below).

**Box 1** The key principles of EU cohesion policy<sup>3</sup>

**Concentration** – Investments are concentrated in the least developed regions and countries (70% in the 2014–2020 period) and in selected investment priorities (in 2014–2020 the 11 Thematic Objectives derived from the Europe 2020 strategy, discussed later in this section).

**Programming** – Support is provided through multi-annual programmes based on *ex ante* analyses of need, strategic planning and evaluation.

**Additionality** – EU funds should not replace domestic funding. Member States agree with the European Commission the level of eligible public (or equivalent) spending to be maintained throughout the programming period. Compliance with this principle is checked by the Commission in the middle (2018) and at the end (2022) of the period.

**Partnership** – The development and implementation of programmes is undertaken with the active involvement of public authorities from different levels of government, of social and economic partners, and of civil society organisations.

Source: European Commission 'Regional Policy' website<sup>4</sup>.

Nevertheless, while the financial volume (relative to the EU budget) and main principles have remained largely stable over time, there have been many adjustments to the goals and operation of the policy over the decades. Introduced at the beginning of each seven-year programming cycle, these reforms have marked a progressive expansion of the policy's remit (Begg 2010). The last such reform, in 2013, was introduced on the back of the economic crisis and was particularly significant in that it sought to align cohesion policy with the goals of the Europe 2020 strategy, while also enhancing the linkages with Member States' National Reform Programmes established as part of the European Semester<sup>7</sup> (Huguenot-Noel *et al.* 2018). As such, currently, cohesion policy aims to deliver on 11 'Thematic Objectives' (TOs):

- the *European Regional Development Fund* primarily targets the TOs 1–4 (innovation and research, the digital agenda, SME competitiveness and the low-carbon economy);
- the *European Social Fund* focuses principally on TOs 8–11 (employment and labour mobility, social inclusion including combating poverty, human capital, and institutional and administrative capacity);
- the *Cohesion Fund* mainly supports transport and environmental infrastructure projects (TOs 5–7).<sup>8</sup>

5. Further principles relate to implementation, such as the 'shared-management' principle, under which the policy's implementation is shared between European Commission and Member State authorities (see [https://ec.europa.eu/regional\\_policy/en/policy/what/glossary/s/shared-management](https://ec.europa.eu/regional_policy/en/policy/what/glossary/s/shared-management)), and to sound financial management and transparency (general principles that apply to the EU budget as a whole).

6. See [https://ec.europa.eu/regional\\_policy/en/policy/how/principles/](https://ec.europa.eu/regional_policy/en/policy/how/principles/).

7. The linkage between cohesion policy and the European Semester is likely to be further strengthened in the 2021–2027 programming period, as the European Commission, in its 2019 Country Reports, has added a new Annex dedicated to 'Investment guidance on cohesion policy funding 2021–2027' which provides the preliminary view of Commission services on the priority investment areas and framework conditions for effective delivery of the 2021–2027 Cohesion Policy in each Member State.

8. For the 2014–2020 period, the ERDF has a total allocation of €278.9 billion, the ESF has an allocation of €120.7 billion (and the Youth Employment Initiative an additional €10.3 billion), the Cohesion Fund €74.8 billion. Source: <https://cohesiondata.ec.europa.eu/funds>.

## 1.2. Structure and implementation

Cohesion policy implementation takes place through ‘shared management’ between the European Commission and Member States, whereby responsibility for the management and delivery of the funds lies principally with Member States. They are called upon to establish overarching national strategies, agreed with the Commission (so-called Partnership Agreements) and, based on these, regional or national programmes. Both the Partnership Agreements and the individual programmes have to demonstrate coherence and synergy with other European policies and with the domestic policies of Member States.

The latest reform, for the 2014–2020 programming period, also introduced considerable operational innovations, intended to strengthen the effectiveness and strategic coherence of the policy, and to ‘shift the focus of programming and programme management from financial absorption to the achievement of results’ (Bachtler *et al.* 2016b: 20). Changes included the introduction of ‘*ex ante* conditionalities’ to ensure that the necessary conditions for successful programme delivery are in place; a new performance framework, under which programmes are required to establish measurable intermediate milestones and end-of-period targets; the strengthening of evaluation provisions and management systems; and, as already noted, the enhancement of strategic coherence with the Europe 2020 strategy through a Common Strategic Framework agreed at EU level, Commission-produced country-specific Position Papers (to guide the preparation of the Partnership Agreements), and consistency with the applicable Country-specific Recommendations (CSRs) and National Reform Programmes (Bachtler *et al.* 2016b).

## 1.3. The strengthening of the social dimension

The latest reform also marked an expansion of cohesion policy’s social remit. The economic crisis exacerbated not only interregional but also interpersonal disparities (i.e. disparities between individuals and groups of individuals, rather than across regions), leading to a renewed awareness that growth on its own is not sufficient to fight poverty and marginalisation. In addition, it was recognised that the latter, in turn, can have adverse political consequences for the EU and its Member States. As a response (discussed below), the 2014–2020 cohesion policy framework brought the social inclusion goals more overtly to the fore compared to previous programming periods. By contrast, in past policy cycles, social goals had been confined to the reduction of unemployment and the development of human capital (Fargion and Profeti 2016), somewhat secondary aspects compared to the goals of economic competitiveness and growth (Begg 2010).

The 2013 Common Provisions Regulation<sup>9</sup> strengthened the social dimension in a number of ways. First, as already stated, it introduced a Thematic Objective

9. The reform for the 2014–2020 period rests on a number of EU Regulations. The Common Provisions Regulation is the main one (Regulation (EU) No. 1303/2013). In addition, there is also one regulation for each fund, and there are additional regulations on European Territorial Cooperation and the European Grouping of territorial cooperation. See (Regulation (EU) No. 1301/2013 covering the ERDF; Regulation (EU) No. 1304/2013 covering the ESF; Regulation (EU) No. 1300/2013 covering the Cohesion Fund; Regulation (EU) No. 1299/2013 on European Territorial Cooperation, and Regulation (EU) No. 1302/2013 on a European Grouping of territorial cooperation.

dedicated explicitly to the promotion of social inclusion and to combating poverty and discrimination (TO9). Second, it earmarked 20% of the ESF (as a minimum) for social inclusion initiatives. Third, it set specific *ex ante* conditionalities on poverty, healthcare, Roma inclusion and early school-leaving, requiring Member States to adopt national or regional strategic policy frameworks on these policy themes.<sup>10</sup> Lastly, it included new (or reformed) instruments such as the Youth Employment Initiative (YEI), the European Employment and Social Innovation Programme (EaSI), and the Fund for European Aids for the most Deprived (FEAD).<sup>11</sup> Greater attention was also paid to the integration of vulnerable groups, especially migrants, in synergy with the Asylum, Migration and Integration Fund (AMIF), with AMIF intended to tackle the shorter-term needs of migrants and asylum-seekers (e.g. reception) and the European Structural and Investment (ESI) Funds targeting their social and economic inclusion in the long run (European Commission 2015; Polverari 2019).<sup>12</sup>

The jury is still out on the success of these recent reforms. Nevertheless, the proposals made by the Commission for the next programming period (2021–2027) appear to continue along the course set in 2013: a new ESF+ that is even more aligned with the European Semester; greater earmarking of measures fostering social inclusion (25%); and minimum investment thresholds for actions that support youth employment and the activation of young people (10% in those Member States with substantial numbers of youth not in employment, education or training, commonly referred to as NEETs) and the most vulnerable (4%). Enhanced strategic coherence is also pursued by merging the above-mentioned previously separate instruments – notably the ESF, YEI, EaSI and FEAD, and also the EU Health programme – under the new ESF+ (Lecerf 2019; European Commission 2018b).<sup>13</sup>

## 2. The economic impact of cohesion policy

Every three years, the European Commission produces a report that takes stock of the key achievements of cohesion policy, with a particular focus on progress towards the Treaty goal of achieving economic and social cohesion. The most recent report, published in 2017, looks at the policy's impact in relation to three key dimensions: a) the Treaty objective, mentioned above, of reducing regional disparities; b) the creation of 'European public goods' (e.g. different types of infrastructure, improved levels

10. This is in addition to 'general *ex ante* conditionalities' on the creation of the administrative capacities necessary to implement applicable anti-discrimination, disability and gender legislation (see Annex XI, Part 2, CPR).

11. The Fund for European Aid to the Most Deprived (FEAD) was established in 2014 to support EU countries' measures relating to the provision of food and/or basic material assistance to the most deprived. For more detail, see <https://ec.europa.eu/social/main.jsp?catId=1089>.

12. The AMIF has four strands: strengthening a common asylum system; legal migration and integration; return strategies; and specific actions and emergency assistance. Within the integration strand, which must account for at least one fifth of the AMIF allocation of each country, the Fund focuses particularly on short-term integration measures and is explicitly intended to be synergistic with the ESI Funds, especially with the European Social Fund.

13. The merger of the ESF with a range of previously separate instruments (YEI, EaSI, FEAD and the EU Health programme) was considered as the preferred option among different possible scenarios in order to maximise the usefulness of EU-level support and improve synergies between different instruments, especially 'with the aim of better delivering on the principles of the European Pillar of Social Rights' (European Commission 2018b: 10).

of education and skills, environmental protection, disaster risk reduction and social investments); and c) the positive spill-over effects generated through increased trade and territorial cooperation programmes (European Commission 2017a: xxiii).

The Commission bases its periodic assessments on studies and evaluations that are mostly contracted out to independent experts, notably the *ex post* evaluations undertaken at the end of each programming cycle. The last such evaluation, completed in 2016, related to the 2007–2013 programming period. The evaluation of the European Regional Development Fund and Cohesion Fund (Applica *et al.* 2016; European Commission 2016a), in particular, emphasises the magnitude of the policy's achievements over this period in terms of:

- *jobs created*: 1+ million throughout the EU;
- *growth*: €2.74 additional GDP for each € spent by the end of 2023 (equivalent to c. €950 billion), with the most significant impact in the EU12 but a positive and significant effect, albeit smaller, also found in net contributor countries;
- *additional public investments*: +6.5% of government capital expenditure on (EU) average, but reaching values above 50% in some EU12 countries; particularly crucial during the recent economic crisis in enabling Member States to continue investment programmes despite reduced government funding;
- a variety of *policy fields of intervention*: these include the modernisation and creation of different types of infrastructure, improvement of the urban environment and quality of life in cities, environmental and sustainable energy investments, research and development jobs, new company start-ups and many others (European Commission 2016a).

The *ex post* evaluation of the ESF, on the other hand, shows that 9.4 million recipients secured employment in the 2007–13 period, 8.7 million gained qualifications, and 13.7 million obtained other positive results, such as improving skills and competences (Panteia *et al.* 2016:50).

The impact on regional disparities is much lower compared to previous periods, due to the effects of the economic crisis. According to the Commission, cohesion policy delivered 'a steady process of convergence' over the 1994–1999 and 2000–2006 periods. While convergence during 2007–2013 was much smaller, it is argued that 'there would have been divergence without cohesion policy' (European Commission 2016a: 4).

To be sure, there are further studies other than those undertaken by or for the European Commission: the literature on the impact of cohesion policy is vast,<sup>14</sup> and conclusions vary to such an extent that '[o]ne of the major challenges for EU cohesion policy is that, after 25 years of implementing the policy, the evidence for its effectiveness is so inconclusive' (Bachtler *et al.* 2016a:11). These studies take various approaches to

14. For a comprehensive review of this literature see Davies 2017 and Fiaschi *et al.* 2018.

evaluating the achievements of cohesion policy. Assessments can focus on the micro-level of intervention, i.e. on recipients such as firms assisted or people trained; on the meso-level, i.e. on the policy's impact in a given recipient region (on growth, jobs and specific policy fields); and on the macro-level, i.e. on EU-wide growth, employment and regional catching-up.

As illustrated in a contribution which is probably the most comprehensive meta-evaluation to date (Davies 2017), methods and techniques vary in their level of observation and focus of enquiry, as do the conclusions reached: while macro- and microeconomic studies tend to agree that the policy delivers a positive impact, econometric studies present a marked diversity in their findings, largely depending on the technical choices made and datasets used.<sup>15</sup>

While cohesion policy seems to be successful in driving improvements in key indicators and supporting a better quality of life in recipient regions, it has not always been effective in helping regions in their economic transformation. Restructuring processes are often incomplete, infrastructure provision is sometimes hampered by a lack of resources for running and maintenance costs, and job creation is sometimes transient, for example because support to companies allowed some to remain market-viable in the short term, rather than innovate in the longer term (Bachtler *et al.* 2016a). The most recent literature is now turning its attention to structural transformations, productivity and ecosystems, to the need for cohesion policy to be place-sensitive, and to the context conditions that can support regional development policies in achieving their goals (Bachtler *et al.* 2019; European Commission 2017a; Rodríguez-Pose 2017).

### **3. The impact of cohesion policy on employment and social inclusion**

As stated in the previous section, most of the studies conducted over the past years on the (controversial) effects of cohesion policy have focused on regional and local economic development, with the social dimension rarely autonomously scrutinised. Furthermore, beyond the mere consideration that EU cohesion policy has created jobs, until recently only limited specific attention has been paid to the impact on subcategories of unemployed and economically deprived people.

Before we start analysing specific subsets of unemployed people, we should recall that cohesion policy stems from an overall vision that employment and economic development go hand in hand; jobless economic growth (i.e. economic growth not supported by similar job growth) was considered to be, if not impossible, very rare.

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15. Assessments on growth or convergence in this type of study range from positive and statistically significant (e.g. Di Cataldo and Monastiriotis 2018; Becker *et al.* 2010; Mohl and Hagen 2010) to positive but very small or statistically not significant (e.g. Esposti and Bussolletti 2008; Rodríguez-Pose and Fratesi 2004), to not statistically significant (e.g. Breidenbach *et al.* 2016; Dall'erba and Le Gallo 2008; Boldrin and Canova 2001), or conditional on factors such as local context, institutional quality, type of region, and geographical and economic structure (Bachtrögl *et al.* 2019; Percoco 2016; Rodríguez-Pose and Di Cataldo 2015; Rodríguez-Pose and Garcilazo 2015; Rodríguez-Pose and Novak 2013).



While attention has been paid to social issues ever since the introduction of the ESF, it has always been within the context of the overall rationale of cohesion policy, i.e. reducing regional disparities. The ESF was primarily aimed at making regional markets work better and making employability easier. Over the years, with the expansion of the Structural Funds (see Section 1), the ESF has expanded, too, becoming increasingly important for employment policy at national, regional and local levels. As a matter of fact, it has become a main point of financial reference in terms of vocational training and job search support for the EU countries, since some ESF resources are available to all Member States (yet in different proportions). Even more so in 2010, in the wake of the 2008 economic and financial crisis, European policies started to follow a transversal principle of ‘inclusive growth’, identified and supported in a Communication from the Commission (European Commission 2010). This also applied to cohesion policy, which, at the time, was in the middle of its 2007–2013 programming period.

### 3.1. Substantive impact

In the 2014–2020 programming period, the impact of the crisis was still very visible and debated, resulting in calls for greater involvement of European resources (particularly the ESF) to facilitate inclusive growth. As already noted, the ESF was explicitly linked to three Thematic Objectives: promoting sustainable and quality employment and supporting labour mobility; promoting social inclusion, combating poverty and any discrimination; and investing in education, training and life-long learning.<sup>16</sup> The three objectives were more specific than the previous ones and continued the strategic approach already adopted in the previous programming period (2007–2013). All countries were supposed to focus more specifically on the above-mentioned objectives, with mid-term evaluation exercises conducted in a number of countries. Nevertheless, most evaluations primarily considered the ‘absorption rates’, i.e. the capacity of the countries or regions to spend the EU funds, with less attention paid to the actual capacity to create new jobs (especially in an indirect manner) and to the types of jobs which could be created.

Focusing on the data provided by the European Commission, the figures look impressive: some 1.5 million jobs were created between 2007 and 2015 (considering both the ERDF and ESF projects, and assuming that the projects were not the same), while around one hundred million people were involved in ESF-funded activities (European Commission 2016a; Panteia *et al.* 2016).

Figures clearly vary among countries, but the issue of greatest concern is not the *variance* but rather the *reliability* of the data. In this regard, while the European Commission provides substantial crude data, it is more difficult to find reliable research capable of verifying whether and how the somewhat triumphalist reading of the Commission can be challenged – or made even more triumphalist.

16. In addition to TO11, which relates to improving the efficiency of public administration.

Focusing on Commission data, the *ex post* evaluation study devoted to the ESF Social Inclusion theme (European Commission 2016b) provides the following results for the 2007–2013 programming period:

- 6.1 million ‘participations’<sup>17</sup> were reported, of which 53% were women. Another 53% had a low level of educational attainment (ISCED 1–2);
- 47% of participants were unemployed – of whom 22% were long-term unemployed and 34% inactive;
- 24% were classified as young people, 11% as migrants, 9% as minorities, 16% as disabled and 21% as ‘other disadvantaged’ (covering a broad range of disadvantages defined at national or regional level);
- when calculated as a share of the overall population of disadvantaged groups in the EU, coverage of this population in ESF social inclusion priority areas ranged from 2.1% for the long-term unemployed to 0.3% for disabled individuals;
- at least 1.3 million positive results in ESF social inclusion activities in 27 Member States had been reported up to December 2013. Of these, 499,000 secured employment and 244,000 achieved a qualification, while 557,000 achieved other positive results.

As for scholarly research, one of the most interesting studies attempting to evaluate the impact of EU structural funds on unemployment focuses on youth unemployment (Tosun *et al.* 2017). The authors were particularly interested in understanding the net impact of the absorption of EU funds (particularly the ESF and ERDF) on youth unemployment rates. Their findings, although exploratory, are of great interest since they ‘show that the cumulative absorption of structural funds – irrespective of whether the ESF, the ERDF or the structural funds in total – does indeed have a significant effect on youth unemployment’ and, interestingly, ‘in terms of the magnitude, the effect of ESF absorption is greater than for ERDF and total funds absorption’ (Tosun *et al.* 2017: 159).

Youth unemployment – which has become particularly important since the launch of the Youth Employment Initiative in 2014 (e.g. European Court of Auditors 2017) – has also been studied by other authors. However, the focus is on single countries and therefore, although detailed and informative, of little help for us to draw general conclusions. For example, a study of the UK (Sanderson *et al.* 2016) showed that, at the individual level, a youth unemployment scheme (Talent Match) had only partially achieved the expected results. Clearly, youth unemployment is an extremely challenging issue in all EU countries, and it seems particularly problematic to assess the specific impact of EU intervention, since this is strongly intertwined with national, regional and even local levels of government, making any sort of evaluation very difficult.

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17. This is the wording used by the evaluators, implying that one individual could have participated in more than one ESF-funded initiative.

From a methodological perspective, the most innovative studies are those focusing on counterfactual reasoning – a methodology strongly supported by the European Commission’s Centre for Research on Impact Evaluation (CRIE, within the Joint Research Centre). In one of the first studies supported by the Centre, eight pilot projects were selected in 2013 for a counterfactual analysis. The cases selected were in different European countries where social conditions were particularly problematic – Portugal, Italy, Spain, Estonia and Lithuania. Although quite uneven, the results presented in the Synthesis Report (Elia *et al.* 2015) showed how much the outcomes of the funded activities<sup>18</sup> depended on conditions such as policy coordination and integration, network building, and programme duration.

### 3.2. Procedural impact

So far, we have focused primarily on *substantive* effects in terms of job creation or activation. Similar to other strands of EU employment policy research (such as the Open Method of Coordination; see Zeitlin and Pochet 2005), it should be underlined that some of the most important challenges are *procedural*, i.e. relating to national, regional and local decision-making and – more generally – to the multilevel governance of employment policy. Catalano *et al.* (2015), for example, show that in Italy the limited impact of ESF-funded projects at local level was due to the lack of administrative capacity and the ‘compartmentalisation’ policy characterising the Italian institutional context. In a piece of comparative research devoted to local German and Italian cases, Aurich-Beerheide *et al.* (2015) show that policy integration (i.e. the organisational links among different policy areas) is unevenly present, with more governance failures in Italy than in Germany.

In general, it seems that the findings with regard to the ESF and the impact of EU cohesion policy on national and regional employment policies are in line with the broader findings regarding the impact of EU cohesion policy overall. These, according to Fratesi and Wishlade (2017), underline the

importance of the context in determining the impact of cohesion policy, especially in relation to economic and geographical structure, as well as administrative capacity. Such assessments, which link the impact of cohesion policy to specific determinants, are more useful than those that limit themselves to the quantification of impacts (Fratesi and Wishlade 2017: 820).

Finally, looking at how poverty has been affected by EU cohesion policy, the picture becomes even more difficult to assess, since to our knowledge no study focuses explicitly on its impact on poverty rates. The reason may be the shared assumption that, if growth is guaranteed and regional disparities are reduced by virtue of EU cohesion policy, then poverty rates should also drop. But there is virtually no empirical evidence which may be called upon to make this claim empirically sound.

<sup>18</sup>. Post-secondary vocational training courses in Italy, training interventions for employment in Spain, adult vocational training activity in Estonia, hiring incentives in Italy, active labour market measures in Portugal, a large activation programme in Portugal, self-employment and graduate practice in Slovakia).

One of the reasons for this research gap is that poverty as such only gained prominence following the launch of the Open Method of Coordination regarding social inclusion (late 1990s); it was only in the European Commission's Communication (2010) on Europe 2020 that poverty goals – measured in terms of *people at risk of poverty*, AROPE – were included in the overall 2010–2020 strategy. One of the objectives of the Europe 2020 strategy was to reduce poverty by 20%, whereas the most recent data shows that, while the situation has not improved since 2010, it has at best remained the same (with about 118 million AROPE in 2016 and 113 million in 2017).

Taking a closer look at the national data provided by Eurostat (2019), we see that some of the countries benefiting most from EU cohesion policy are also among those where poverty is particularly high (such as Bulgaria and Romania, but also Italy). The same can be said when comparing EU regions according to their performance in terms of 'social progress', as measured by the recent EU-SPI index:<sup>19</sup> 'social progress in the EU is highest in Nordic and Dutch regions and lowest in Romanian and Bulgarian regions' and appears to be, in very broad terms (and with exceptions), inversely proportional to the regions' cohesion policy eligibility status (European Commission 2017a: 91–94). This is not surprising, given the focus of EU cohesion policy on those countries considered 'poor' under the per-capita-GDP indicator. Nevertheless, what seems particularly striking is that, over the past ten years, poverty has been reduced only to a limited extent. In all probability, the Europe 2020 target will not be achieved (Atkinson *et al.* 2017), and current EU cohesion policy seems *per se* insufficient to achieve substantial results, even in those countries and regions particularly targeted by EU funds – such as Romania, Bulgaria, Lithuania and Italy. In other words, while the links between cohesion policy and poverty reduction still need to be systematically explored, the limited evidence currently at our disposal (European Commission 2017a: 192–194) suggests that, so far, EU policy has had a negligible impact on reducing poverty. Finally, new spatial analyses of poverty are making a number of innovative instruments available to policymakers, allowing a much more precise mapping of poverty – as highlighted in the fairly recent World Bank publication (Simler 2016) with its monetary poverty maps. These promote knowledge and policy action aimed at alleviating poverty; they go beyond averages, pinpointing where poverty is geographically located.

The relationship between cohesion policy and social inclusion or poverty alleviation is set to be particularly important in the coming years, and therefore requires greater attention. In the near future, more targeted research is needed on this impact.

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19. The EU-SPI is an index built to measure social progress rather than economic performance based on a score for various aspects related to three dimensions: basic human needs, the foundations of well-being and opportunity (see European Commission 2017a: 91–94).

## Conclusion

Cohesion policy is arguably the most tangible manifestation of solidarity among European regions and Member States (and, where it invests the most, it is also recognised and perceived as valuable by European citizens).<sup>20</sup> As such, it is also increasingly viewed as a key political tool for creating and strengthening a European identity in the face of globalisation (Borz *et al.* 2018; Capello and Perucca 2019, 2017) and is increasingly considered to be one of the key levers to counteract rising levels of Euroscepticism (Bachtler *et al.* 2019).

Studies on the impact of cohesion policy have focused primarily on regional growth, with generally positive impacts noted. The same may apply to job creation, whereas a clear picture of the policy's direct impact on social inclusion and poverty alleviation is still to emerge. For this reason, European and national institutions and academics alike need to devote more specific attention in terms of policy evaluations.

Finally, if we look at the impact assessments, it seems particularly difficult to conduct an overall assessment since the *ex post* evaluations are undertaken in a segmented manner, with a distinction drawn between the impact of the ERDF/Cohesion Fund and that of the ESF. In the future, more comprehensive forms of evaluation should be encouraged, with a view to providing a broader picture of the economic and social impact of EU cohesion policy. The gathering of more specific data on the impact on poverty alleviation should also be supported.

Looking to the future, the European Commission's proposal for the 2021–2027 programming period puts a greater spotlight on social Europe, since one of the five new policy objectives is to support the implementation of the European Pillar of Social Rights (European Commission 2018a: 7).<sup>21</sup> Nevertheless, in order to attain greater social impact, more resources should be directly used to systematically fund social inclusion and poverty alleviation measures (such as carefully designed basic or minimum income schemes or the European child guarantee for vulnerable children advocated by the European Parliament).<sup>22</sup> There should also be an even greater focus on inclusive growth, with further support given to the administrative capacities of national and regional institutions in order to increase absorption rates, timely policy implementation and, crucially, results orientation. Of course, the social dimension can – and should – not be confined to cohesion policy: many other policies may be conducive or detrimental (such as 'austerity packages', i.e. policies aimed at imposing tough fiscal constraints on EU member states) to social inclusion. Nevertheless, EU cohesion policy funds could and should become, in the near future, an important financial factor in the reorientation of EU policies towards a more social Europe.

20. More than one third of EU citizens have heard of the policy, with peaks of 80% and almost 70% in Poland and the Czech Republic respectively. Those who have heard about it overwhelmingly consider that it has had a positive impact on the development of cities or regions (78%) (European Commission 2017b).

21. For a recent discussion, see Sabato *et al.* (2019).

22. For more detail and documentation on this new initiative, see <https://ec.europa.eu/social/main.jsp?catId=1428&langId=en>.

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# Conclusions: the twists and turns of two decades of EU social policymaking

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## Introduction

This 20<sup>th</sup>-anniversary edition of *Social policy in the European Union* (hereafter referred to as the *Bilan social*, its shorter name in French) analyses the main developments, over the past two decades, of what is often referred to as ‘Social Europe’.<sup>1</sup> Key questions addressed in this volume include: *what was the place of the social dimension during the financial and economic crisis? Who has driven, who has braked EU social policymaking? Which instruments does the EU have at its disposal for ‘market correcting’ policies? And last but not least, what are the next steps in the further implementation of the EU’s social dimension, especially in the context of the European Pillar of Social Rights?*

These conclusions are structured as follows. Section 1 provides an analytical chronology of the main developments of the EU’s social dimension over the past twenty years. Section 2 reflects on the key messages put across by the authors of the book’s chapters with their focus on long-term developments in key EU social policy areas: industrial relations; social protection and social inclusion; social security coordination and gender equality. This section also highlights how the EU increasingly intervenes in the social domain, using a variety of policy instruments. Section 3 discusses some of the recent debates regarding the EU’s social agenda under the new von der Leyen European Commission. Section 4 provides policy recommendations, drawing on the analyses presented in this book.

## 1. The EU’s social dimension: twenty years of trials and tribulations

Identifying stages in the development of the EU’s social dimension is a challenging exercise, not in the least because this ‘dimension’ encompasses a variety of policy areas<sup>2</sup> with sometimes differing temporal developments.<sup>3</sup> For analytical and pedagogical reasons, we nevertheless find it useful to capture the development of the EU’s social

1. For a discussion of concepts such as ‘Social Europe’ and the ‘European social model’, see Pochet (2019) and Crespy (2019).
2. Including some policy areas which have not been discussed in this volume, notably health and safety at work, but see Vogel (2018).
3. This is for example reflected in the chapters by Tricart and Vanhercke (this volume), who identify somewhat different stages to describe the historical development of the European Social Dialogue and the Open Method of Coordination, respectively.

dimension in three main periods, drawing on Pochet (this volume) and Verdun and d'Erman (this volume).

### 1.1. From the Treaty of Amsterdam to the revised Lisbon Strategy: the 'social period' (1997–2005)

The years 1997–2005 are often referred to as the 'social period' (Pochet, this volume), an outcome of the criticism levelled against the Maastricht Treaty. This period featured a particular context. First, the 1995 enlargement to Austria, Finland and Sweden saw three affluent countries with strong welfare models and net contributors to the budget joining the EU. Second, between 1997 and 2003, the majority of EU Member States had social democratic or socialist governments, alone or in coalition with other parties: in 1999, no fewer than eleven out of fifteen national governments were headed by social democratic parties. The combination of both factors resulted in a new approach to social issues: convergence towards best practices, rather than a push for harmonisation through legislation. At the same time, Nordic enlargement allowed the Commission to widen the scope of gender policy to include matters around work-life balance (Guerrina, this volume).

This social period can broadly be seen as a continuation of the previous decade: the late 1980s and the 1990s, a decade marked by 'the first instances of social policy being pursued independently of economic integration' (Verdun and d'Erman, this volume). Social milestones of the 1990s included the Maastricht Agreement on Social Policy (1992), the Treaty of Amsterdam (1997) and the implementation of its new Employment chapter via the European Employment Strategy (EES), which can be seen as an Open Method of Coordination (OMC) *avant la lettre*. These milestones were followed by the launch of the Lisbon Strategy (2000) which legitimised the launching of OMCs in a wide variety of policy areas: in several cases, a key motivation of the social policy players was to define a level playing field *vis-à-vis* their economic counterparts (Crespy 2019; Vanhercke 2016).

At the same time, and despite formidable institutional and political hurdles, the EU continued to accumulate substantial regulatory mandates in employment, social and anti-discrimination policy (Vandenbroucke with Vanhercke 2014). This was the case for *gender equality* at work<sup>4</sup> (2002/73/EC) and equality with regard to access to services (2004/113/EC). It was also the case with workplace health and safety: the European Framework Directive on Safety and Health at Work (89/391 EEC) spawned a host of directives on specific hazards, such as exposure to chemical agents (98/24/EC), biological agents (2000/54/EC) and electromagnetic fields (2004/40/EC).<sup>5</sup> The European Commission stretched the interpretations of 'health and safety' as far as possible to develop an agenda on working conditions and workers' rights, which included, during this 'social period', the highly contested Working Time Directive

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4. More particularly regarding access to employment, vocational training and promotion, and working conditions.

5. Other directives pertain to exposure to carcinogens or mutagens at work (2004/37/EC), risks from explosive atmospheres (1999/92/EC), risks arising from vibration (2002/44/EC) and risks arising from noise (2003/10/EC).

(2003/88/EC). As regards equal treatment, legislation pertained to racial or ethnic origin (2000/43/EC) and employment (2000/78/EC). Finally, Regulation 883/2004 extended the material scope of European social security legislation to pre-retirement benefits and paternity benefits (Cornelissen and De Wispelaere, this volume).

The ‘Delors era’ (1985-1995) was also the golden age of the European Social Dialogue, resulting in several major agreements between the social partners, *inter alia* on parental leave (1995), part-time work (1997) and fixed-term contracts (1999), three agreements which were later transposed into European directives (Tricart, this volume). There was also some progress in European sectoral social dialogue and cross-industry dialogue, resulting in ‘autonomous’ (or voluntary) agreements, i.e. agreements implemented by the national social partners in areas such as telework (2002) and stress (2004) (Pochet, this volume; Tricart, this volume).

Another major event during this period was the proclamation (in 2000) of the EU Charter of Fundamental Rights, which was integrated into the Lisbon Treaty in 2009. Finally, as part of the debate on the role of wages in a monetary union, various forms of wage coordination emerged at European level. The Cologne process (1999), involving the European Central Bank (ECB), the Commission, the Member States and the social partners, was the first (and in fact the last) attempt of this kind at European level.

It should be noted that even during this ‘social’ period, progress on developing Social Europe was difficult: health and safety at work was side-lined in the social agenda, and the new ‘gender mainstreaming’ approach launched in 1997 proved difficult to implement (see Guerrina, this volume and Section 2.4). In a similar vein, the golden period of social dialogue was also a time of uncertainties, sometimes of disillusionment – for example, the negotiations on temporary agency work ended in failure in 2001 (Tricart, this volume).

At the end of this period, the tide was turning against the social dimension of Europe for various reasons. First, social democratic parties were losing elections, gradually being supplanted – in national parliaments and governments and in the European Parliament – by conservative and right-wing parties. The EU’s legislative machinery in the social field equally slowed down as a result of EU enlargement to Central and Eastern Europe in 2004, while the effectiveness of ‘soft’ policy coordination was increasingly being called into question by academics and policymakers alike (Crespy 2019; Vanhercke, this volume).

## 1.2. From the enlargements to the crisis: the European social dimension called into question (2005–2015)

From 2005 onward, the progressive decline in EU social policymaking was accelerated by a series of important historical developments: the enlargement to Central and Eastern Europe, the rise of right-wing governments, and, most notably, the 2007–2008 financial and economic crisis.

The first development, the successive big-bang EU enlargements to the countries of Central and Eastern Europe (in 2004, 2007 and 2013) added thirteen new Member States, with no additional budget to ensure economic, social and territorial convergence. Moreover, research underlines the limited role of social policy issues during the enlargement negotiations (de la Porte 2001). The second development was the political shift towards centre-right or right-leaning national governments: in the 2004 European elections, the right-leaning parties grouped together in the European People's Party (EPP) gained a sweeping victory over the social democratic and socialist parties (S&D), a feat repeated in 2009. As a result, the second Barroso Commission (2010–2014) was disproportionately right-leaning, with only six social democratic commissioners out of 27.

The third and arguably the most important factor was the global financial crisis that began in 2007–2008 and quickly developed into a sovereign debt crisis in many EU Member States. National fiscal policies – with their focus on taxation and spending decisions – came under increased scrutiny as the EU developed new forms of economic governance to address the failings of monetary union in the context of the crisis. The effects of EMU were thus indirect but potent: while supranational prescriptive recommendations for national budgetary decisions were aimed at maintaining the stability of the euro, domestic political debates on how to achieve compliance with the Stability and Growth Pact involved deliberations on where public spending should be cut, with social policies often losing out (Verdun and D'Erman, this volume). In this context, the ECB seized the opportunity to play a key role and promote structural reforms; its recommendations were often driven by financial austerity considerations and frequently clashed with domestic needs for higher levels of public spending on social programmes (*ibid.*). Reforms were often linked to the liberalisation and de-regulation of labour markets (Crespy 2019).

The worst global economic crisis since the Great Depression was arguably one of the more visible and important large-scale events influencing the institutional arrangements applicable to the EU's social dimension. The 2007 financial crisis 'thus became, albeit indirectly, a secondary crisis of social policy' (Verdun and d'Erman, this volume), not only because of the negative prospects for a stronger Social Europe, but also because it led to a downgrading of the existing level of social rights for workers and citizens (Crespy 2019; Crespy and Schmidt 2018). While it seemed at the time of its launch in 2010 that employment and social issues in the Europe 2020 Strategy had gained in visibility, initial experiences under the European Semester, which effectively got going in 2011, seemed to confirm critics' worst fears that the new integrated EU policy coordination framework would result in a paradigm shift: the subordination of social cohesion objectives to fiscal consolidation, budgetary austerity and welfare retrenchment imposed by economic policy players (Vanhercke, this volume).

Taken together, the three historical developments described above implied a period of trials and tribulations for the EU's social dimension which lasted nearly a decade. This was particularly the case with the European Social Dialogue: despite being 'part of the Union's DNA' (Tricart, this volume), it gradually evolved into a 'dialogue of the deaf' under the Barroso Commission (2004–2014). This period was marked by the

Commission's distrust of, and even growing hostility toward, the progress of social legislation resulting from agreements between the European social partners. It added to the tougher position of BusinessEurope and the difficulties encountered by the trade unions in creating a favourable transnational balance of power (see also Crespy 2019). As described by Vanhercke (this volume), another EU policy instrument went through a turbulent period under the Barroso Commission: the Open Method of Coordination (OMC). Indeed, following a damning assessment by Wim Kok (2004) of the first years of the Lisbon Strategy, the post-Lisbon enthusiasm for the OMC came to a rather abrupt end. The re-launched Lisbon II Strategy from 2005 onwards focused on jobs and growth, largely disregarding the social and environmental pillars of the initial strategy. With a wide range of OMC processes being simplified or even suppressed, the hitherto separate Social Inclusion, Pensions, and Health and Long-Term Care OMCs were merged (streamlined in the EU jargon) into a single Social Protection and Social Inclusion OMC (henceforth 'Social OMC') on the periphery of the Lisbon II Strategy (*ibid.*).

It is perhaps not so surprising that, in this new economic and political context, the Court of Justice of the EU (CJEU) began challenging one of the fundamental principles underlying European social policy: equal treatment (within a Member State) between permanent workers and mobile European workers from other Member States. Four game-changing cases (*Laval* and *Viking* in 2007, *Rüffert* and *Luxembourg* in 2008) simultaneously widened the already broad definition of potential restrictions on the free movement provisions, seemingly embracing a full 'market without rules' approach. In doing so, the CJEU seemed to have given precedence to market freedoms over social objectives (Garben, this volume; Ghailani 2008, 2009). These cases *de facto* allowed for social dumping, not between countries with differing standards and levels of protection but within a country between workers of different nationalities (Pochet 2019). Garben (this volume) points out that, perhaps 'in response to the criticism levelled at its hardened stance towards labour standards, the CJEU has readjusted its position to the benefit of national social regulatory autonomy in two more recent rulings'. However, these 'do not alter the point of principle in *Viking* and *Laval* that collective action undertaken by workers has to respect the free movement rights of companies in the internal market' (*ibid.*).

The fact that, as of 2005, Europe no longer had a central social policy paradigm does not mean that Social Europe has been completely sacrificed on the altar of economic and monetary policies. Indeed, as the chapters in this book demonstrate, this period was also characterised by some key advances in the social sphere. For instance, in 2010, Regulation 1408/71 on the coordination of social security was extended to third-country nationals, offering them the same protection, in terms of social security, as EU citizens moving within the EU (Cornelissen and De Wispelaere, this volume). Even though O'Dwyer (2018: 749) points out that 'gender inequalities have persisted and worsened under the EU's new economic governance regime', Guerrina (this volume) draws our attention to no less than three directives that gave renewed momentum to the European equality agenda in the post-Lisbon period: these address gender equality for self-employed workers (2010/41/EU); parental leave (2010/18/EU); and combating trafficking (2011/36/EU). One could add the Recast Equal Treatment Directive (2006/54/EU) to this list.



As regards social dialogue, the ‘running out of steam’ under the Barroso Commissions did not prevent some further progress, including a joint analysis of changes in the labour market (2007) and the conclusion of autonomous agreements on harassment and violence at work (2007) and inclusive labour markets (2010). Another key advance during this period took place in the context of the Semester: Zeitlin and Vanhercke (2018) argue that a partial but progressive ‘socialisation’ of the Semester took place between 2011 and 2016, leading to a) increasing emphasis on social objectives in the Semester’s priorities and key messages, including the Country-Specific Recommendations (CSRs); b) intensified social monitoring and review of national reforms; and c) an enhanced decision-making role for EU social and employment players. It should be added that, following difficult discussions with the Member States, Commission President Barroso himself managed to convince the heads of states and government to accept the first-ever numerical EU poverty and social exclusion target, i.e. to lift at least 20 million people out of the risk of poverty and exclusion by 2020, compared to 2008. Other significant political initiatives in this period were the Social Investment Package and the Youth Guarantee, both launched by Commissioner László Andor in 2013.

As regards the structural funds, a particularly significant reform was introduced in 2013: cohesion policy was aligned with the goals of the Europe 2020 Strategy and the European Semester (Graziano and Polverari, this volume). Equally importantly, the 2013 Common Provisions Regulation strengthened the social dimension in a number of ways. First, it introduced a Thematic Objective dedicated explicitly to the promotion of social inclusion and to combating poverty and discrimination (TO9). Second, it earmarked a minimum of 20% of the European Social Fund (ESF) for social inclusion initiatives. Third, it set specific *ex-ante* conditionalities on poverty, healthcare, Roma inclusion and early school-leaving, requiring Member States to adopt national or regional strategic policy frameworks on these policy themes (*ibid.*)<sup>6</sup>.

In other words, despite EU enlargement, right-wing governments in a majority of Member States (in favour of using cost-containment and austerity policies to manage the crisis) and the EU’s new economic governance, social affairs players were able to advance, to some extent, their policy agenda. Vanhercke (2013) referred to a certain amount of ‘under-the-radar’ social policy activity by European officials and social stakeholders, pointing to the gradual return of social issues in a period still largely dominated by austerity. These advances in the social domain notwithstanding, the impact of the historical developments described above demonstrates how fragile the social domain is: it is ‘simultaneously intertwined with, and subservient to, the forces of EU economic governance’ (Verdun and D’Erman, this volume).

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6. The 2013 Common Provisions Regulation also included new (or reformed) instruments such as the Youth Employment Initiative (YEI), the European Employment and Social Innovation Programme (EaSI), and the Fund for European Aids for the most Deprived (FEAD) (Graziano and Polverari, this volume).



### 1.3. The Juncker Commission: a social policy revival, with some caveats (2015–2019)

In a speech to the European Parliament in October 2015 during which he enunciated his ambition for the EU to achieve a ‘Social Triple A’ rating, Commission President-Elect Juncker stated that the Semester should not be considered merely an economic and financial process but should necessarily take into account the social dimension, including in the CSRs (Juncker 2015). In a post-crisis context largely dominated by Brexit discussions, Juncker promised and delivered a revival of the EU’s social dimension, notably through the solemn proclamation of a European Pillar of Social Rights (EPSR) in November 2017. The EPSR can be seen as a game changer: even though its motivation remained within the paradigm of economic growth, its text promptly empowered the Commission to develop a new EU social agenda. In a relatively short time span, this led to the adoption (in most cases following long and difficult negotiations with the Member States) of several directives (on work-life balance and on transparent and predictable working conditions), the establishment of a European Labour Authority and a Council Recommendation on access to social protection for workers and the self-employed. Section 3 below discusses how the EPSR, following its political adoption by the new von der Leyen Commission, continues to provide a framework for ‘a strong social Europe for just transitions’.

As discussed by Vanhercke (this volume), the strong pressure exerted by the Juncker cabinet to immediately integrate the European Pillar of Social Rights in the ongoing cycle of the Semester (including the Employment Guidelines) gave leverage to social affairs players, particularly in DG EMPL, to call for greater consideration of social and employment challenges in the coordination process. For instance, the 2018 Joint Employment Report (JER) presented a new Social Scoreboard for monitoring Member States’ performance in relation to key principles of the EPSR via twelve headline indicators. The Juncker Commission also introduced a series of significant innovations to a) the conception and timing of key Semester documents; and b) the organisation of Commission Directorates dealing with the process (notably reinforcing DG EMPL). These contributed to the further socialisation of the Semester’s substantive policy content as well as its governance procedures. The main new feature of the 2019 European Semester was the strengthening of the links between the Semester and EU funding (Vanhercke, this volume).

Under the Juncker Commission, the issue of health and safety, notably regarding occupational cancers, seems to have come back in from the cold, even if Vogel (2018) warns that ‘one swallow doesn’t make a summer’. The Juncker Commission also relaunched the European Social Dialogue in 2015 and created the conditions for the social partners to be more closely involved in the governance of the European Semester (Sabato *et al.* 2017). The social partners concluded an autonomous agreement on active ageing (2017). In 2016, the Commission also proposed further significant changes to European social security legislation, in particular in the areas of applicable legislation, unemployment and long-term care. The proposal also contained a series of provisions aimed at fighting fraud and abuse: at the time of writing, the proposal remains blocked in Council (Cornelissen and De Wispelaere, this volume).

The proposals made by the Juncker Commission for the next programming period (2021–2027) also seem to reinforce the social dimension: a new ESF+ to be even more aligned with the European Semester; greater earmarking of funds for measures fostering social inclusion (25%); and minimum investment thresholds for measures supporting youth employment and the activation of young people and the most vulnerable. One of the five new policy objectives is to support the implementation of the European Pillar of Social Rights (Graziano and Polverari, this volume).

In view of these and other initiatives, the Juncker Commission explained that it was one of the most, if not *the* most, socially-minded Commissions since the early 1990s. The jury is still out as to whether this admittedly stark contrast with the Barroso Commissions was part of well-developed plan to create a strong social dimension, or rather the realisation that this was a ‘last chance’ for the Commission to ‘rebuild its social credentials’ (Garben, this volume; Pochet, this volume) after years of austerity policies and upheaval in the Member States, including the 2016 Brexit vote and the rise of nationalism.

Even if it is true that the Juncker Commission created a social policy revival, there are some caveats. For instance, certain scholars and social stakeholders are less optimistic about the ongoing socialisation of the Semester: the design of the Semester has institutionalised the EU’s less prescriptive (‘soft’) approach to social policy areas long assumed to be Member States’ prerogatives, including such sensitive areas as healthcare. Dawson (2018: 207) points to an important paradox in the socialisation thesis: it ‘hopes to rescue the European Semester by capturing its processes for social voices. What, though, of the danger that social voices are themselves captured, or “socialised into” the Semester’s wider logic of competitiveness and market fitness?’.

Moreover, questions are being raised as regards the pertinence of the EPSR Social Scoreboard, while legitimate concerns are being raised over the high proportion of social and employment policy CSRs issued under the Stability and Growth Pact (SGP) and Macroeconomic Imbalance Procedure (MIP). As a result, they fall under the formal jurisdiction of the ECOFIN Council, taking them outside the reach of Social Affairs Ministers. Another important caveat applies to the European Social Dialogue: despite its ‘new start’ in 2015, this cornerstone of the EU’s social dimension is still in crisis, with the employers increasingly refusing to negotiate and the Commission continuing to discourage the legislative implementation of agreements reached by collective bargaining at European level, most recently regarding an agreement concerning the central administration sector (Tricart, this volume).

## **2. Developments in the key social policy areas over the past two decades**

This section looks at the key thoughts from the book’s various chapters, focusing on how key EU social policies have been handled by the EU through a variety of policy instruments: EU law, social dialogue, policy coordination and EU funding.

## 2.1. Creating social rights: social security coordination and social dialogue

Writing about the achievements, controversies and challenges of European social security coordination, Cornelissen and De Wispelaere (this volume) point out that the figures on the number of people benefiting from the European coordination regulations reveal a hidden ‘European welfare state’. Indeed, a sophisticated European social protection system for mobile persons, based on high-quality coordination techniques, has been developed over a period of 60 years. Interestingly, in some aspects, the Coordination Regulations provide social protection going beyond mere coordination, creating certain rights which citizens would not otherwise have. However, over the past 20 years, and especially since the 2008 crisis, some of these provisions have been called into question due to fears of ‘welfare tourism’ and ‘social dumping’.

Given the context of these sensitive debates, the Commission put forward a proposal in 2016 to revise the coordination rules. Nearly four years later, the text is still under negotiation and stuck in the Council, showing the complexity and sensitivity of the issues at stake. Some of the key controversies and challenges discussed in the chapter concern the export of unemployment and family benefits, the aggregation of insurance periods for unemployment benefits, access to minimum subsistence benefits for inactive people and the rules determining the applicable social security legislation (including in the context of intra-EU postings). However, the authors emphasise, these regulations are still in the making and, whatever the outcome, they will be no more than a further episode in the 60-year-long history of adaptations to the coordination regulations to keep up with the times. In addition to raising the issue of the non-take-up of social security rights by migrant workers, the authors raise this key question: *is it really logical that a person who works only to a marginal extent in another Member State is subject to the social security legislation of that Member State?*

Another key instrument for creating social rights, notably for workers, has been the European Social Dialogue. However, as Tricart (this volume) demonstrates, ever since its golden age under the Delors Commissions (1985–1995) – when there was agreement between the EU institutions and the social partners on the need for such an instrument to complete the single market – social dialogue has been in constant decline. This reached its nadir under the Barroso Commissions (2005–2014), a period dominated by the financial crisis, during which the EU organised its governance around a neoliberal economic rationale. This gradually reduced social concertation to a ‘cosmetic’ exercise, undermining the impact of collective bargaining at European level. In fact, after having played a vital role for many years, the Commission switched to providing very selective support, i.e. only to social partner initiatives in line with its policies.

Although Tricart (this volume) writes positively about the developments under the Juncker Commission, which tried to revitalize the dialogue, he points out how fragile this attempt is: see, for example, the tensions between the social partners regarding the Commission’s REFIT and ‘Better Regulation’ initiatives and the stormy debates on many issues, notably on the occupational health and safety agreement in the hairdressing sector, which was to become a symbol of Commission hostility to agreements emerging from the sectoral social dialogue. More generally, according to the author, the new

European Commission should change its attitude towards the legislation emerging from European collective negotiations, also with a view to restoring trust among the parties concerned.

## 2.2. The Court of Justice: still balancing economic and social rights?

The preeminence of the economic over the social dimension, especially during the crisis years, is similarly reflected in the role played by the CJEU over the past twenty years. As Garben (this volume) demonstrates, social rights have regularly been downplayed when they clash with fundamental economic rights or freedoms in the internal market and the Charter, and in particular with the freedom to conduct a business. Judgments such as *Viking*, *Laval*, *Alemo-Herron* and *AGET* generate an asymmetry, giving precedence to economic interests over the fundamental social rights of workers. Such judgments are problematic not only from a social perspective but also because highly sensitive political decisions are being taken by the judiciary. Economic rights thus achieve a constitutional status, almost completely separate from political processes, thereby posing a serious democratic problem. In her chapter, the author calls for an interpretation of social and economic rights primarily oriented towards ensuring the necessary (pre-)conditions for a robust and healthy long-term democracy, in which human dignity is meaningfully protected. She demonstrates how these abstract concepts can be transposed into specific elements of (improved) legal interpretation of the economic and social rights under discussion in the aforementioned cases.

## 2.3. The hard governance of soft governance

In his chapter, Vanhercke (this volume), describes the Open Method of Coordination (OMC) as a flexible and constantly metamorphosing policy instrument. He distinguishes six stages (or 'lives') in the development of the OMC on Social Protection and Social Inclusion (Social OMC): a) *experimenting*: the proliferation of OMCs after the method was coined by the Lisbon European Council in 2000; b) *streamlining*: the rolling back and growing teeth of the Social OMC in 2005–2006; c) *capacity building*: developing the OMC's learning tools 'in splendid isolation' from the revised Lisbon Strategy; d) *marginalisation* of the Social OMC at the start of the Europe 2020 Strategy and the European Semester; e) *reinvigoration*: the Social Protection Committee 'rescues' its process, paving the way for the initial socialisation of the Semester; and finally f) *maturity*: the further socialisation of the Semester under the Juncker Commission.

The chapter concludes that whether the OMC will continue to play a significant role in the EU's post-2020 socio-economic governance will ultimately not depend on its hardness or softness, but on whether key domestic and EU players continue to use it strategically to further their ambitions. Only as an integral part of the post-Europe 2020 Strategy can the Social OMC maintain its influence: promoting upward social convergence and ultimately supplementing and counterbalancing budgetary and macro-economic coordination. Such a strategy is, however, not without risks (*ibid.*).

## 2.4. Twenty years of gender mainstreaming: 'add women and stir'?

In her chapter, Guerrina (this volume) explains that the introduction of gender mainstreaming (GM) in the Treaty of Amsterdam (1997) offered a space for ensuring that gender, equality and diversity were integrated into all policy fields. However, the failure of policymakers to deploy the most basic tools associated with this approach (e.g. gender impact assessments) in times of crisis highlights some of the limitations of GM. And yet, the principle of gender equality has been incorporated into the EU's public communication narrative and is part of how the organisation presents itself: despite the significant gap between the EU's rhetoric and practice with regard to gender equality, the idea of the EU as a promoter of women's rights has become one of its foundational myths.

The last twenty years have been marked by huge opportunities as well as disappointments for those promoting gender equality. Gender mainstreaming (GM) is the preferred policy strategy and approach, particularly in the area of employment policy. However, GM requires political will and commitment to be effective. In a way, in the post-Amsterdam era we have seen the limitations of an approach to equality rooted in economic rationalities. This functionalist logic separates the principle of equality from that of social justice, stressing the neutrality and apolitical nature of the principle of mainstreaming. This has proved to be an effective strategy in times of growth, particularly as a way of supporting mainstream policies. However, it ignores the fact that it feeds into a specific gender regime, with associated structures and practices. Though the principle of gender equality has become embedded in EU processes and structures, the way GM and equality have been interpreted by the institutions has not led to any transformational change of the European economy. Austerity and Brexit provide illustrations of the biases in favour of a neo-liberal economic model that can only include gender in a superficial way. For the author, the European Pillar of Social Rights similarly represents a highly commodified approach to equality. More than twenty years since the inclusion of this principle in the EU *acquis*, there is still little evidence that the EU has moved beyond the 'add women and stir' approach to equality. Intersectional approaches to gender, treating it as a structure of power, highlight the limits of this approach, particularly in times of crisis (*ibid.*).

## 2.5. EU cohesion policy: in search of its social impact

EU cohesion policy, and in particular the European Social Fund, is one of the key pillars of the EU's social dimension: Cohesion policy is arguably the most tangible manifestation of solidarity among European regions and Member States. Where it invests the most, it is also recognised and perceived as valuable by European citizens. As discussed by Graziano and Polverari (this volume), since its creation in 1957, the ESF has been considerably expanded, becoming the key source of funding for vocational training and job-seeking support. It has become even more pivotal in the wake of the 2008 economic and financial crisis, the Europe 2020 Strategy and the European Semester, with spending of EU funds being increasingly made conditional on respecting the objectives of these overarching frameworks.

Yet there is still no clear picture of cohesion policy's direct impact on various categories of individual recipients. There is a particularly large gap in the understanding of its impact on poverty reduction and social inclusion. This may be linked to the assumption that, if growth is guaranteed and regional disparities are reduced by means of EU cohesion policy, then poverty rates can also be expected to drop. But there is virtually no empirical evidence to back up this claim. The authors therefore call for a comprehensive and systematic impact assessment to be carried out, going beyond single case studies and embracing all Structural Funds in an integrated manner. Moreover, based on their research, they recommend that future EU strategies, including cohesion policy, should focus more on 'inclusive growth', with further support given to fostering the administrative capacities of national and regional institutions in order to increase absorption rates and encourage timely policy implementation and results orientation. If well-conceived, cohesion policy can be viewed as a key political tool for creating and strengthening a European identity in the face of globalisation as well as being one of the key levers for counteracting rising levels of Euroscepticism (*ibid.*).

### **3. The three transitions and the further strengthening of the EU's social dimension**

#### **3.1. A work programme for the new European Commission**

This section briefly discusses some of the main ideas recently put forward by the EU with regard to the social dimension, clearly present in the ambitious agenda presented by Ursula von der Leyen, at that time still a candidate for the post of President of the European Commission, in July 2019, signalling that the market and the economy go hand in hand with social fairness and prosperity (von der Leyen 2019). This mainstreaming of social objectives is also clearly visible in the allocation of portfolios (in particular 'An Economy that works for People', 'Jobs and Social rights', and 'Democracy and Demography') and supporting services in the new European Commission.

In January 2020, the new von der Leyen Commission published its first key document outlining the main ideas and instruments to be used in working towards 'a strong social Europe for just transitions' (European Commission 2020a). This acknowledges that 'social justice is the foundation of the European social market economy and is at the heart of our Union' (*ibid.*: 1). The document suggests that the EU is facing three main transitions<sup>7</sup> – climate neutrality, digitalisation and demographic change – which the Commission has undertaken to tackle, also with a view to 'fully meeting the United Nations' Sustainable Development Goals' (SDG) (*ibid.*). The European Pillar of Social Rights is presented as the overall framework for ensuring that these transitions are 'socially fair and just': the Pillar is to be implemented through an Action Plan (to be announced by early 2021) that turns the Pillar's rights and principles into reality. Progress towards the principles will continue to be monitored through the European Semester which will integrate, as of 2020, the SDG's and will be guided by an Annual Sustainable Growth Strategy. The two first transitions addressed in the Communication

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7. Beyond these three main challenges and drivers, many other initiatives are announced in this strategic document.



(climate neutrality and digitalisation) are well-known (see the European Green Deal proposed in December 2019). However, the Commission seems to pay specific attention to the third dimension, that pertaining to demography. In order to address this third major transition, the issues of pensions and long-term care services are prioritised.

Four main areas are under consideration in the Commission's 'strong social Europe for just transitions' Communication: a) equal opportunities and jobs for all; b) fair working conditions; c) social protection and social inclusion; and d) promoting European social values in international trade.

### 3.1.1. Equal opportunities and jobs for all

How should *equal opportunities and jobs for all* be tackled in a greener, digitalised and ageing economy? The Commission's main emphasis is on upskilling, reskilling and education.<sup>8</sup> Although these are not new items on the Commission's agenda – and are among the least controversial – they are now being revisited in the light of these three important transitions. With a view to supporting 'economic reconversion', several initiatives and instruments are expected to be tabled, including a Just Transition Fund (as part of the European Green Deal Investment Plan) aimed at providing support to those regions most affected by the ecological transition and a Modernisation Fund to support carbon-dependent regions in their market and social transformation. With a view to creating more jobs, the Commission has also announced a more comprehensive industrial strategy as well as a specific strategy for SMEs (both to be presented in the first quarter of 2020).

The European Regional Development Fund, the European Social Fund Plus (ESF+) and the Cohesion Fund continue to play a crucial role in the Commission's proposal for the next multiannual financial framework (MFF). The Commission also calls for an InvestEU Programme, including for social infrastructure projects and investments in education and skills. The Commission has also announced an action plan for the social economy by 2021. Last but not least, under the heading of 'fostering equality', the Commission will propose (in the second half 2020) a new European Gender Equality Strategy aimed at closing the gender pay and pension gap; it will also promote women's access to the labour market, including in senior positions. Under this heading, the Commission has also announced a new a European Disability Act, while measures are scheduled for fostering the economic and social integration of third-country nationals.

### 3.1.2. Fair working conditions

The second area covered by the Communication concerns fair working conditions: a major initiative announced by the Commission is the launch of a first-stage consultation of social partners on how to ensure fair minimum wages for workers. As stated by Jobs and Social Rights Commissioner Schmit, this idea is a 'paradigm shift' for the Commission, as in the past 'EU officials have tended to ask Member States for cuts

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8. The Commission will update the Skills Agenda for Europe in the first quarter of 2020 and establish a new education and training cooperation framework with the Member States and reinforce the Youth Guarantee.



in salaries and ‘now, that logic has been reversed’ (Euractiv 2020). Note that the Commission Communication stipulates that minimum wages ‘should be set according to national traditions, through collective agreements or legal provisions’. Linked to the second transition listed above, the Commission also intends to present a Digital Services Act and to organise a Platform Work Summit, expected to upgrade the liability and safety rules for digital platforms and the services and products offered by them. Linked to the issues of digitalisation, the Commission will review the occupational safety and health strategy. Furthermore, it is worth mentioning that the question of (un)fair taxation (especially taxation of platforms) is also on the new Commission’s agenda. However, given the EU’s limited competencies in this sensitive area, no specific proposals have yet been announced. The Commission will also explore ways to promote social dialogue and collective bargaining – perceived as extremely important to the success of the three transitions – *inter alia* by supporting the capacities of unions and employer organisations at EU and national level.

### **3.1.3. Social protection and social inclusion**

In the third area covered, social protection and social inclusion, the Commission’s agenda is also quite ambitious, with prominence attached to the revitalised idea of a European Unemployment Benefit Reinsurance Scheme (initially launched in 2012 by Social Affairs Commissioner László Andor under the Barroso Commission). Other proposals relate to the implementation of the 2018 Recommendation on access to social protection for workers and the self-employed, and a Europe’s Beating Cancer Plan.

The new Commission puts important emphasis on the impact of demographic change (a Report on this topic is announced by the first quarter of 2020) and ageing. A Commission Green Paper (scheduled for late 2020) is set to launch a debate on the long-term impacts of ageing, notably on access to affordable and quality long-term care, and on how to foster active ageing. Under the sub-heading ‘poverty and social exclusion’, the Communication announces the idea of a Child Guarantee to make sure that children have access to the services they need. Note that, as regards homelessness, the Communication merely states that the phenomenon ‘is increasing in most Member States’. Note also that the Communication does not mention further work on the coordination of social security systems, an issue currently deadlocked in the Council of Ministers (see Section 2.1).

### **3.1.4. European social values in international trade**

The Commission Communication also addresses the promotion of European social values in international trade: European trade policy should include more of a ‘fair trade agenda’ and ‘take a tough stance’ on the enforcement of internationally agreed standards on labour rights. The Commission will appoint a Chief Trade Enforcement Officer and suggests a zero-tolerance approach to child labour, an idea warmly welcomed by the European Trade Union Confederation (ETUC 2020). The Commission will also strengthen dialogue with the Western Balkans to foster the implementation of the European Pillar of Social Rights in this region.

As was the case with the European Pillar of Social Rights, the Commission has launched a broad and long consultation (until November 2020) open to EU and national institutions, social partners and civil society organisations, with the objective ‘to jointly build an Action Plan that reflects all contributions and that is proposed for endorsement at the highest political level’ (European Commission 2020a: 13).

### 3.2. Initial reactions from stakeholders and the economic governance review

The European Commission’s ambitious plan to develop a strong social Europe for just transitions is very much needed in the current context of uncertainty for the European Union. These transitions are unavoidable and should be managed in a way that ‘no one is left behind’ and which makes it possible to counter the threats of nationalism. With Brexit confirmed, the new Commission will have to convince the remaining EU citizens that the EU is a genuinely inclusive space. The Commission’s ambitious plan will need support from the other EU institutions and, most importantly, from the Member States. As the new Social Affairs Commissioner Nicolas Schmit noted, social policy is a ‘shared competence’: the EU executive ‘will propose directives where needed’, but it is also up to countries to drive the agenda forward (Euractiv 2020).

Moreover, the outcome of many of the announced initiatives will also partially depend on the European social partners’ commitment to engage in negotiations. As is clear from Tricart (this volume), this cannot be taken for granted. While the trade unions welcomed the Commission’s ambitious plan, they also point to ‘missing’ initiatives, such as a clear commitment to improve health and safety at work and a clearer status for non-standard workers (ETUC 2020). BusinessEurope, in turn, supports the objective of a social market economy that works for people, but believes that the way forward is to improve the performance of labour markets and social systems in all Member States by giving the necessary space for social dialogue solutions at EU and national levels. However, when it comes to such a concrete yet sensitive measure as a minimum wage, their response is clear: the employers consider this a matter for national competence and are strongly opposed to EU legislation thereupon. For the employers’ organisation, the European Semester remains the key tool for coordinating reforms and delivering on the Pillar (BusinessEurope 2020). For its part, the European Anti-Poverty Network (EAPN 2020) stresses that the European Green Deal doesn’t seem to recognise that those companies bearing the greatest responsibility for creating the climate emergency should be taxed accordingly, under the ‘polluter pays’ principle. The EAPN is also concerned that the only concrete EU initiatives highlighted are the Child Guarantee and that on Roma equality and inclusion, both crucial, but not sufficient: what is needed instead is an integrated EU anti-poverty strategy and a renewed, more ambitious EU target on reducing poverty. In its initial comments on the Commission Communication, the Social Platform (2020) stipulates several minimum conditions for an adequate minimum wage (*inter alia* that it should have a minimum threshold of at least 60% of the median national wage) and expresses the hope that the Commission will extend its consultation beyond the social partners to include the views of civil society organisations.

In this context, another recent initiative should be closely monitored: the economic governance review launched by the European Commission in February 2020. This economic review – while emphasising the importance of economic and fiscal convergence and the role of the Two-Pack and the Six-Pack – acknowledges that the economic governance instruments are flawed, inefficient and too complex. In a footnote, the review states that ‘the employment and social situation has improved across the board but has not recovered yet to the pre-crisis levels in several Member States’ (European Commission 2020b: 5). The review recognises the essential role of public investments as a necessary condition for supporting sustainable economic growth and for long-term sustainability.

Importantly, this economic governance review is also accompanied, for the first time, by a public debate on the EU’s framework for economic and fiscal surveillance. As for the social dimension of the EU, the review draws several parallels with the new EU context: the Green Deal and the aforementioned Communication on a strong social Europe for just transitions. Importantly, the document points out that it should be considered to what extent the existing framework for economic and fiscal surveillance ‘can support economic, environmental and social policy needs related to the transition towards a climate-neutral, resource efficient and digital European economy’ (*ibid.*: 17). This is certainly an invitation for social players – including Member States’ representatives in the Employment Committee, the Social Protection Committee and the EPSCO Council – to make the case (including by drawing on available monitoring tools such as the EPM and the SPPM) for the social dimension to no longer be considered the poor cousin of the economic dimension.

With regard to many of the initiatives cited in this section, including those linked to the three transitions, we have at our disposal, at the moment of writing, not much more than the title and the good intentions of the European institutions. We therefore invite readers to look out for the next *Bilan social* for an in-depth analysis of what could be an ambitious plan – or a failure – to relaunch the social dimension.

## 4. Key messages and recommendations

Based on the chapters in this volume,<sup>9</sup> the following key messages and recommendations are addressed to national and EU decisionmakers as well as to social stakeholders.

### 4.1. Ensuring appropriate resources

- Prospects for the EU’s social dimension depend, as always, on the political negotiations and developments underlying integration. Any progress toward deeper integration in the social realm that wants to go beyond the coordinative mechanisms in place, will require deliberate and difficult political action. The EU should **support the capacities of unions and employer organisations** (at EU and national level) as well as of other social stakeholders.

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9. The editors are indebted to the authors of the respective chapters for sharing these ideas with us.

- The European Social Dialogue is part of the EU's DNA, and yet it is in dire straits. The European Commission should show a firm and **credible commitment to**, and invest the necessary resources for, restoring the trust needed to relaunch a real dialogue between the social partners.
- More **targeted research** is needed on the different social impacts of cohesion policy across the wide range of interventions and recipients it supports. To enable this, comprehensive and systematic impact assessments should be carried out, going beyond single case studies and embracing all structural funds. Specific attention should also be paid to generating finer-grained data on poverty.
- To achieve a greater social impact, more resources should be directly used to systematically **fund social inclusion and poverty alleviation** measures. Future EU strategies, *inter alia* cohesion policy, should have an even greater focus on 'inclusive growth', with further support given to fostering the administrative capacities of national and regional institutions in order to increase absorption rates, timely policy implementation and results orientation.

#### 4.2. The social dimension of EMU

- Given the recent history of the Great Recession, the EU needs powerful automatic macroeconomic stabilisers. A future detailed proposal for a **European Unemployment Benefit Reinsurance Scheme** should be given political priority in order to protect citizens from external shocks and reduce the pressure on public finances during such events.
- With a view to tackling the asymmetry between the economic and social dimensions of the EU and of the EMU, a **Social Imbalances Procedure** (SImp) should be launched, drawing on existing tools and practices within the European Semester and involving three stages: the identification of social imbalances, a Multi-annual Action Plan (MAP), and EU interventions (technical and financial support as well as a flexible interpretation of the SGP for social investments).

#### 4.3. Balancing economic and social rights

- The approach of the Court of Justice of the EU needs to change. But this needs to be preceded by a **fundamental discussion** within the legal community about the respective places of social and economic rights in the EU Treaties and how this relates to the requirement of democratic legitimacy. We need to come to a coherent adjudication framework guided by the principles of (not primarily economic) constitutionalism and democracy in equal measures.

- The interpretation of fundamental rights, especially social and economic ones, should primarily be oriented towards ensuring the necessary (pre-)conditions for a robust and healthy long-term democracy in which human dignity is meaningfully protected. This abstract insight can be operationalized to provide concrete elements of **improved legal interpretation** of the economic and social rights underpinning *Viking*, *Laval*, *Alemo-Herron* and *AGET*.

#### 4.4. Social security coordination

- Substantial amendments to the Coordination Regulations should only be made if they are **really necessary**. This involves carrying out an *ex-ante* legal and socio-economic impact assessment of the current rules and possible amendments.
- The coordination system needs to adapt, in the near future, to two key points. Firstly, changes in the nature of the labour market have an impact on the rules determining the **applicable social security legislation**. Secondly, the Coordination Regulations have not sufficiently kept pace with the introduction of **new forms of social security** in Member States.

#### 4.5. Gender equality

The forthcoming European Gender Equality Strategy should be seized as an opportunity for

- **Gender impact assessments:** the *ex-ante* analysis or assessment of a law, policy or programme, enabling policymakers to identify, in a preventative way, the likelihood of a given decision having negative consequences on gender equality;
- **Gender budgeting:** the gender-based assessment of budgets incorporating a gender perspective at all levels of the budgetary process and the restructuring of revenues and spending to promote gender equality.

#### 4.6. Social policy coordination

- For the Social OMC to stay relevant under the EU's next overarching strategy (post-Europe 2020), a clear **political affirmation of its overall objectives**, also in relation to the European Pillar of Social Rights and the SDG, is warranted. At the same time, the Social OMC needs to be an integral part of the post-Europe 2020 Strategy in order to maintain its influence.
- Social affairs players should seize the momentum created by the new European Commission's focus on demography to push for the launch of **OMC-type exchanges on long-term care**, a topic that has so far been largely dominated

by DG ECFIN and the concomitant financial perspective, largely ignoring the problem of access to care.

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# Twenty years of European social policy: key events from 1999 to 2018

**Boris Fronteddu and Denis Bouget**

## Introduction: background and sources

In celebration of the 20<sup>th</sup> anniversary of the annual review *Social policy in the European Union: state of play* (hereafter referred to as the *Bilan social*, its French title), we have collated and summarised the key events in European Union social policy from 1999 to 2018. Our main source is the set of chronologies published each year in the *Bilan social* since 2001. These were initially drafted by Christophe Degryse, editorial director until 2009, then by Cécile Barbier, researcher at the OSE, from 2010 to 2017. Boris Fronteddu created succinct chronologies for the years 1999 and 2000 for the purpose of this chapter. The full 2018 chronology, summarised here, has been produced by Boris Fronteddu and Denis Bouget and is **available online**.<sup>1</sup>

Each year, the *Bilan social* contains a 20-page chronology listing more than a hundred events, publications and decisions. To draw up a chronology covering 20 years (1999-2018), we had to make a selection of these entries, choosing the key political

### Note to the reader

Some pointers on how to read the chronology. Generally speaking, each year is summarised, with no source given. As of 2015, the chronology of key events in a particular year is published in the *Bilan social* of the next year. For example, the 2017 chronology is published in the 2018 *Bilan social* book. Most social policy directives are decided upon by the Council and the European Parliament; when this is the case, therefore, it is not explicitly mentioned. Only Council directives are specifically identified as such.

The dates when the directives were adopted are included in their title. The source given is a reference to the Official Journal of the European Union (OJ) in which each was published, with the date of publication. For framework agreements, we refer to the signing of these agreements by the social partners, and their transposition into directives.

The official titles of the Court of Justice of the European Communities and the Commission of the European Communities changed with the entry into force of the Treaty of Lisbon (2009). We do not generally give internet links; the source should make it easy to find the text in question.

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1. *The European Union in 2018: key events*, available online at [bit.ly/ETUIBilan1999-2019](http://bit.ly/ETUIBilan1999-2019)

texts and, above all, texts making up part of the European social regulatory framework: regulations, directives, decisions and social policy case law from the Court of Justice of the European Union. The ‘Summaries of EU Legislation’ on the EUR-Lex website (a portal providing access to EU law) also helped us to trace the history, sometimes over many years, of pieces of legislation which have played a key role in the development of European social policy.

We also referred to publications by Amandine Crespy (2019), Philippe Pochet (2019) and Jean Lapeyre (2017) to help us identify long-term trends in social policy.

1999

**1 January:** as part of the third stage of Economic and Monetary Union, the euro becomes the official currency in eleven Member States (DE, AT, BE, ES, FI, FR, IE, IT, LU, NL, PT), with the conversion rates to the previous currencies set definitively (OJ L 139 of 11 May 1998, 1-8).

**15 March:** the Commission of the European Communities (hereafter, the European Commission), under its President Jacques Santer, resigns following a report by independent experts revealing certain malfunctions, and fearing a motion of censure in the European Parliament (EP) (IP/99/179).

**1 May:** entry into force of the Treaty of Amsterdam. Including the Social Protocol, the Treaty establishes equality between men and women. Henceforth, measures concerning equal treatment and equal pay between men and women will be adopted by a qualified majority, through the co-decision procedure. The Treaty also defines human health protection as a cross-cutting principle in all Community policies (OJ C 340 of 10 November 1997: 1-144).

**28 June:** the Council adopts Directive 1999/70/EC concerning the framework agreement on fixed-term work, signed on 18 March by the social partners: the European Trade Union Confederation (ETUC), the Union of Industrial and Employers’ Confederations of Europe (UNICE) and the European Centre of Employers and Enterprises providing Public Services and Services of general interest (CEEP). The aim of the agreement is to tackle discrimination against workers on fixed-term contracts and to prevent abuse arising from the use of successive fixed-term contracts (OJ L 175 of 10 July 1999: 43-48).

**22 July:** following the European elections, the European Parliament has 626 members. Turnout is 49.5 %, with the European People’s Party (EPP) winning 233 seats (37.2% of the total), the Party of European Socialists (PES) 180 (28.7%), and the European Liberal Democrat and Reform Party Group (ELDR) 50 (8 %) (EP, Results of the European elections – 1999 – European Union).<sup>2</sup>

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2. See <http://www.europarl.europa.eu/about-parliament/fr/in-the-past/previous-elections>

**16 September:** Romano Prodi, from the Italian Christian Democratic party, is appointed President of the European Commission (OJ L 192 of 24 July 1999: 53-54).

**21 September:** as a result of the *Albany* judgment of the Court of Justice of the European Communities (hereafter the Court of Justice of the European Union, CJEU), representatives of employees and employers may agree collectively to set up a single sectoral pension fund and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector (CJEU, case C-67/96).

**15-16 October:** the first Civil Society convention organised at European level takes place at the European Economic and Social Committee (ECSC), with a view to defining ‘organised civil society’ (EESC, *The civil society organised at European level. Proceedings of the first Convention*, Brussels, 15 and 16 October 1999).

**26 October:** pursuant to the CJEU *Sirdar* judgment, the armed forces of the Member States must, in general, respect the principle of equal treatment of men and women. Nevertheless, Community law contains strictly limited exceptions when gender is a major determinant for carrying out an activity (CJEU, case C-273/97).

## 2000

**15 February:** pursuant to the CJEU judgment *Commission v France*, employed persons and self-employed persons working in a Member State other than the state of residence are not subject to the social security legislation of the state of residence (CJEU, case C-34/98).

**24 March:** the European Council adopts the Lisbon Strategy 2000–2010, which aims to make the EU ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustained economic growth with more and better jobs and greater social cohesion’. The strategy sets political, economic and social targets, particularly in the fields of education, training and combating climate change. To this end, the Council intends to extend and strengthen the Open Method of Coordination (OMC) (Conclusions, 24 March 2000).

**23 June:** the EU and the 77 African, Caribbean and Pacific (ACP) countries sign the Cotonou Agreement (2000-2020). Replacing the Lomé Agreements first signed in 1975, the Agreement outlines plans for EU-ACP relations over the next 20 years. The agreement is based on development cooperation, as well as political, economic and trade cooperation (OJ L 317 of 15 December 2000: 3-353).

**28 June:** the European Commission adopts a new Social Policy Agenda, setting out guidelines for a multiannual strategy to ‘modernise the European social model’. The Commission invites the social partners to ‘play their part fully at all levels’ (COM (2000) 379 final).

**29 June:** adoption of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The text prohibits any direct or indirect discrimination based on the ethnic origin of the person and authorises specific positive discrimination measures (OJ L 180 of 19 July 2000: 22-26).

**3 October:** pursuant to the CJEU *Simap* judgment, ‘on call’ time for members of a ‘primary care team’ must be considered as working time if they are physically present at health centres. However, for doctors who, when on call, solely need to be contactable at any time, only the time when they are actually engaged in primary care activities should be considered as working time (CJEU, Case C-303/98).

**27 November:** adoption of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This text establishes a general framework to combat all forms of discrimination at work, and in relation to membership of certain bodies. It underlines the importance of social dialogue in tackling discrimination (OJ L 303 of 2 December 2000: 16-22).

**7-9 December:** proclamation of the EU Charter of Fundamental Rights at the Nice European Council. The Council adopts the Social Policy Agenda, and the Intergovernmental Conference agrees on a draft Treaty of Nice. Social protection and inclusion are brought into the Open Method of Coordination (OMC) system (Conclusions, 7-9 December 2000).

2001

**22 February:** the European Commission adopts its first ‘scoreboard on implementing the social policy agenda’, listing the progress made in the field of social policy, in line with the Social Policy Agenda adopted at the European Council in Nice (COM (2001) 104 final).

**26 February:** signature of the Treaty of Nice, preparing for enlargement covering ten new Member States. Co-decision is extended to a wide range of areas, such as measures to combat discrimination or economic and social cohesion. The qualified majority process is reformed and extended to 27 new policy areas, including common trade policy and judicial cooperation in civil matters. The Treaty also facilitates the use of enhanced cooperation (OJ C 80 of 10 March 2001: 1-87).

**12 July:** in its *Smits and Peerbooms* judgment, the CJEU confirms that medical activities fall within the scope of the freedom to provide services, while emphasising the sector’s undeniable particularities. These can, in this case, justify the prior authorisation system established by the Netherlands for reimbursement by the Dutch sickness insurance fund of care provided in a non-contracted health establishment located in another Member State (CJEU, case C-157/99).

**8 October:** following 31 years of negotiations, the Employment and Social Affairs Council (EPSCO) adopts regulation (EC) No 2157/2001 on the statute for a European company (SE), and directive 2001/86/EC on worker participation. An SE is a public limited-liability company with minimum capital of 120,000 euros. Transnational information and consultation of workers are guaranteed in this new business structure (OJ L 294 of 10 November 2001: 1-32).

**14-15 December:** the European Council, meeting in Laeken under the Belgian Presidency of the Council of the European Union, adopts the Declaration on the Future of the European Union, and convenes a convention to prepare for the next Intergovernmental Conference, paving the way for a major reform of the EU (Conclusions, 14 and 15 December 2001).

## 2002

**11 March:** adoption of Directive 2002/14/EC establishing a general framework for informing and consulting employees in companies. The text sets out minimum procedural rules for informing and consulting workers on a company's economic situation and employment (OJ L 80 of 23 March 2002, 29-34).

**11 March:** adoption of Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities. The text sets minimum health and safety standards for workers in the sector. Self-employed drivers are excluded from the scope of the directive (OJ L 80 of 23 March 2002: 35-39).

**16 July:** the ETUC, CEEP and UNICE/UEAPME<sup>3</sup> sign an autonomous agreement on telework. This agreement has a number of aims, *inter alia* to define the concept of telework to improve its quality and to guarantee teleworkers the same rights as employees working at a company site. The agreement also emphasises the voluntary nature of telework (*Framework agreement on telework*, 16 July 2002).

**23 September:** adoption of Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. It defines sexual harassment and stipulates the removal of upper limits for damages in most cases. The directive requires the Member States to establish equal opportunities agencies (OJ L 269 of 5 October 2002: 15-20).

**23 September:** adoption of Directive 2002/74/EC amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The directive amends the definition of the state of insolvency to bring it into line with the new legislative trends in Member States (OJ L 270 of 8 October 2002: 10-13).

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3. European Association of Craft, Small and Medium-Sized Enterprises.

**23 September:** adoption of a programme of Community action in the field of public health (2003-2008). This programme, with a budget of 312 million euros, aims to improve information and knowledge on public health, to strengthen the capacity of the public authorities and health systems to react to threats quickly and in a coordinated manner, and to promote health and prevent disease (OJ L 271 of 9 October 2002: 1-12).

**6 November:** the European Commission adopts Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 of the Treaty establishing the European Community. The regulation provides for exemptions for State aid for employment. Member States have to check the compatibility of their State aid with the criteria and modalities established by the Commission (OJ L 337 of 13 December 2002: 3-14).

## 2003

**4 March:** the Council adopts the decision establishing a Tripartite Social Summit for growth and employment. 'The task of the Summit shall be to ensure ... that there is a continuous concertation between the Council, the Commission and the social partners. It will enable the social partners at European level to contribute, in the context of their social dialogue, to the various components of the integrated economic and social strategy, including the sustainable development dimension' (Art. 2) (OJ L 70 of 14 March 2003: 31-33).

**27 March:** adoption of Directive 2003/18/EC amending Council directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work. The directive creates a general ban on activities exposing workers to asbestos fibres and strengthens prevention measures for workers de facto exposed to the product (demolition work, removal of asbestos, etc.) (OJ L 97 of 15 April 2003: 48-52).

**13 May:** reversing its previous case law (*Smits* judgment of 12 July 2001, referred to above), the CJEU concludes, in its *Müller-Fauré* judgment, that the evidence and arguments put to the Court do not show that removal of the requirement for prior authorisation would undermine the essential characteristics of the Netherlands sickness insurance scheme. The principle of freedom to provide services precludes legislation which requires the insured to obtain prior authorisation, even under a benefits-in-kind scheme, in the case of non-hospital care provided in another Member State by a non-contracted provider (CJEU, Case C-385/99).

**22 July:** adoption of Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society and of directive 2003/72/EC on the involvement of employees. Cooperative societies operating in at least two Member States can now sign up to this new judicial entity to facilitate their administrative and bureaucratic procedures (OJ L 207 of 18 August 2003: 1-36).

**24 July:** pursuant to the CJEU *Altmark* judgment, financial subsidies to public services do not constitute State aid under Community law (CJEU, case C-280/00).

**9 October:** pursuant to the CJEU *Jaeger* judgment, time spent on call by doctors, when their presence is required at the hospital itself, should be considered as working time, even if they are authorised to rest at their working place during periods when their services are not required (CJEU, case C-151/02).

**16 October:** the heads of state and government of the euro area appoint Frenchman Jean-Claude Trichet to the post of President of the European Central Bank for eight years (OJ L 277 of 28 October 2003: 16).

**4 November:** adoption of Directive 2003/88/EC concerning certain aspects of the organisation of working time. This directive sets minimum standards for daily and weekly rest, breaks, maximum weekly working time and the duration of night work, and establishes derogations subject to particular conditions (OJ L 299 of 18 November 2003: 9-19).

## 2004

**27 January:** the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) sign two joint agreements. The first of these aims, in particular, to facilitate the interoperability of workers, to guarantee a sufficient level of safety and to tackle social dumping. The second is intended to strike a balance between, on the one hand, the protection of workers' health and safety, and, on the other, the flexibility of rail transport services (OJ L 195 of 27 July 2005: 18-21).

**29 April:** adoption of Regulation (EC) No 883/2004 on the coordination of social security systems. The purpose of the regulation is to facilitate the free movement of persons through ensuring the portability of their rights to social security benefits (OJ L 166 of 30 April 2004: 1-123).

**1 May:** the European Union opens its doors to ten new Member States (Poland, the Czech Republic, Hungary, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Cyprus and Malta) and becomes the 'Europe of 25' (OJ L 168 of 1 May 2004).

**1 June:** launch of the European health insurance card. The card replaces the forms which were previously needed for medical treatment in a Member State other than the State of residence (OJ L 276 of 27 October 2003: 19-21).

**20 July:** following the European elections, the European Parliament now has 732 members. The turnout is 45.5%, with the European People's Party winning 268 seats (36.6% of the total), the Party of European Socialists (PES) 200 seats (27.3%) and the Alliance of Liberals and Democrats for Europe (ALDE) 88 seats (12%) (Results of the European elections – 2004 – European Union).<sup>4</sup>

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4. <http://www.europarl.europa.eu/about-parliament/en/in-the-past/previous-elections>



**8 October:** the European social partners sign an autonomous agreement on work-related stress. Its purpose is to make employers more aware of work-related stress and equip them to detect and prevent it (*Framework agreement on work-related stress*, 8 October 2004).

**22 November:** the Portuguese José Manuel Barroso, member of the EPP, is appointed President of the European Commission (OJ L 333 of 9 November 2004: 12-13).

**13 December:** adoption of Directive 2004/113/EC concerning equal treatment of women and men outside the field of work. The directive aims to combat direct and indirect gender discrimination. Differences of treatment are only justified if they pursue a legitimate aim, such as protection against sexual violence (OJ L 373 of 21 December 2004: 37-43).

## 2005

**1 April:** the European Trade Union Institute, the European Trade Union College and the Trade Union Technical Bureau for health and safety (TUTB) merge to form the European Trade Union Institute for research, education, and health and safety (the ETUI – European Trade Union Institute<sup>5</sup>).

**28 June:** the Council adopts two regulations, Regulation (EC) No 1055/2005 and (EC) No 1056/2005. The former amends Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, while the latter amends Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. This completes the revision of the Stability and Growth Pact, creating greater flexibility within this excessive deficit procedure (OJ L 174 of 7 July 2005: 1-9).

**18 July:** the Council adopts Directive 2005/47/EC on the Agreement between the CER and the ETF on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector (see 27 January 2004) (OJ L 195 of 27 July 2005: 15-18).

**7 September:** adoption of Directive 2005/36/EC on the recognition of professional qualifications. This directive aims to ensure simplified and automatic recognition of professional qualifications obtained in a Member State other than the host Member State, thereby facilitating the free movement of workers and the provision of services in a country other than that where the qualifications were acquired (OJ L 255 of 30 September 2005: 22-142).

**4 October:** the European Confederation of Independent Trade Unions (CESI) obtains the status of European social partner thanks to its representativeness in the field of central public administration (CESI, 04-10-2005: *CESI recognised as social partner*).

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5. <https://www.etuc.org/en/4-european-trade-union-institute>

**21 November:** the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) and the Employers' Group of professional farming organisations in the European Union (GEOPA-COPA) sign an agreement on the reduction of workers' exposure to the risk of work-related musculo-skeletal disorders (MSD) in agriculture (EFFAT and GEOPA, Sectoral agreement EA (05)220F1, 21 November 2005).

**28 November:** the European Commission adopts a Decision on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (such as health establishments). Such State aid is not illegal as long as it is provided as compensation for a public service obligation. The level of the State aid must not exceed the amount needed to compensate for this obligation (OJ L 312 of 29 November 2005: 67-73).

## 2006

**25 April:** signing of the first European 'multi-sector' agreement on workers' health. The agreement is intended to protect workers exposed to crystalline silica and to minimise exposure and to increase knowledge on its impact on human health.

**5 April:** adoption of Directive 2006/25/EC on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents. This directive sets minimum prevention standards for workplace design, workers' equipment and the procedures and methods used (OJ L 114 of 27 April 2006: 38-59).

**4 July:** the CJEU hands down its *Adelener* judgment interpreting a clause in the framework agreement of 18 March 1999 on fixed-term work. This clause implies that there must be 'objective reasons' for the renewal of successive fixed-term contracts (CJEU, Case C-212/04).

**1 November:** founding congress of the International Trade Union Confederation (ITUC) in Vienna. This confederation is the result of the merger of two large international bodies, the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL) (ITUC-CSI, Programme of the ITUC).

**5 December:** launch of the Community Programme for Employment and Social Solidarity (PROGRESS), the new integrated programme for employment and social solidarity. With its budget of 700 million euros for the period 2007–2013, the programme aims to support the objectives set forth in the social policy agenda and the EU's overall employment and growth strategy (OJ L 315 of 15 November 2006: 1-8).

**12 December:** adoption of Directive 2006/123/EC, the so-called 'services directive'. This text crystallises the political tensions of the past two years, as it implies greater competition in the European services sector. In the final version, the 'country of origin principle' is replaced by the 'principle of freedom to provide services' (OJ L 376 of 27 December 2006: 36-68).

**20 December:** creation of the European Globalisation Adjustment Fund (EGF) in support of workers laid off in a context of greater global economic competition. Its budget is not to exceed 500 million euros (OJ L 406 of 30 December 2006: 1-6).

## 2007

**1 January:** Slovenia adopts the euro as its currency, thereby becoming the 13<sup>th</sup> Eurogroup Member State (OJ L 195 of 15 July 2006: 25-27).

**1 March:** the European Agency for Fundamental Rights begins its work. Its task is to provide expertise to the Member States and their institutions on the protection of fundamental rights (OJ L 53 of 22 February 2007: 1-14).

**15 March:** adoption of Regulation (EC) No. 561/2006 on the harmonisation of certain social legislation relating to road transport. This regulation aims to promote convergence of the legislation on working conditions for professional drivers. It introduces a compulsory rest time of at least 45 consecutive hours every two weeks and increases the daily rest requirement (OJ L 102 of 11 April 2006: 1-14).

**19 March:** the Pan-European Regional Council (PERC) of the International Trade Union Confederation (ITUC) holds its founding assembly in Rome (ITUC-CSI, *Founding of the PERC gives hope to European workers*, 20 March 2007).

**19 April:** pursuant to the CJEU *Stamatelaki* judgment, a Member State may not exclude private hospitals in another Member State from the system of reimbursement of hospital costs by a national social security institution to the persons insured with it. Other measures, such as a requirement for prior authorisation or the setting of reimbursement scales, are, however, possible (CJEU, Case C-444/05).

**26 April:** the ETUC, BusinessEurope, UEAPME and CEEP sign an autonomous agreement on harassment and violence at work (*Framework agreement on harassment and violence at work*, 26 April 2007).

**14 June:** in its judgment *Commission v United Kingdom*, the CJEU allows the use, in British occupational safety legislation, of the ‘reasonably practicable’ clause: the employer’s health and safety obligations may be limited by economic considerations (CJEU, case C-127/05).

**21-22 June:** the European Council meeting in Brussels approves the entry of Cyprus and Malta into the euro area on 1 January 2008 (Conclusions, 21-22 June 2007).

**25 June:** the European Parliament (EP) and the Council sign the first two applications for financial aid from the European Globalisation Adjustment Fund, for Peugeot (PSA) and Renault (OJ L 294 of 13 November 2007: 21-22).

**15 November:** the new European company BASF SE, established in Ludwigshafen (Germany), concludes an agreement on worker participation. This agreement represents significant progress towards far-reaching mandatory involvement of workers in a European company, through BASF's European Works Council and the representation of its workers on the company's supervisory board (ETUC, *BASF SE pioneers stronger worker consultation in Europe*, 22 November 2007).

**6 December:** the European home affairs ministers approve the extension of the Schengen Area to nine new Member States: Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and the Czech Republic, as of 21 December 2007 (OJ L 323 of 8 December 2007: 34-39).

**11 December:** the CJEU's *Viking* judgment confirms that the right to collective action is a fundamental right, recognised in international and Community legislation. It can justify restrictions to the fundamental freedom of establishment guaranteed in the EU Treaty, particularly if this is to protect workers and their employment conditions. However, the Court limits the scope of this justification in a way which could hamper the exercising of the right to collective action, particularly in cross-border situations (CJEU, Case C-438/05).

**12 December:** solemn proclamation of the EU Charter of Fundamental Rights. A reference to the Charter will be included in the Lisbon Treaty (OJ C 303 of 14 December 2007: 17-35).

**13 December:** official signing of the Lisbon Treaty. Anti-discrimination policies become a regulatory competence, to be decided by qualified majority voting or by the co-decision procedure. Legislation on the social protection of migrant workers can be applied to both employed and self-employed workers. The EP's oversight role *vis-à-vis* the Commission is strengthened (OJ C 306 of 17 December 2007).

**18 December:** in its *Laval* judgment, the CJEU recognises the presence in Community law of a fundamental trade union right to organise strikes to protest against social dumping. Nevertheless, the judgment condemns the blockade of sites organised after the failure of pay talks for the Latvian workers at the site in question, as this is not a legitimate way to compel the company to join a collective agreement (CJEU, case C-341/05).

## 2008

**1 January:** Cyprus and Malta adopt the euro as their currency. The euro is now the common currency of 15 of the 27 EU Member States (IP/o8/2 and IP/o8/6).

**12 February:** in its *Bupa* judgment, the Court of First Instance recalls that Member States have considerable leeway in defining services of general economic interest (CJEU, Case T-289/03).

**3 April:** the CJEU, in the *Rüffert* case, establishes that a Member State is not entitled to require companies established in other Member States to apply a collective agreement which is not applicable throughout its territory (CJEU, case C-346/06).

**15 April:** pursuant to the CJEU's *Impact* judgment, the unjustified use of successive fixed-term contracts is illegal. This judgment provides workers on fixed-term contracts with better protection of their rights by EU law (CJEU, case C-268/06).

**17 June:** adoption of Regulation (EC) No 592/2008 amending Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The text updates annexed provisions to take account of legislative changes in certain Member States (OJ L 177 of 4 July 2008: 1-5).

**7 July:** the European Commission adopts Regulation (EC) No 800/2008, which automatically authorises State aid promoting employment and growth. This regulation harmonises pre-existing exemptions and extends the categories of State aid covered by these (OJ L 214 of 9 August 2008: 3-47).

**15 September:** the American bank Lehman Brothers, the fourth largest investment bank in the United States, officially files for bankruptcy. Its collapse leads to steep falls on stock markets, with the world ultimately plunging into one of the worst economic and financial crises ever known (*The Financial Times*, 'Lehman Brothers files for bankruptcy', 16 September 2008).

**27-28 September:** the financial crisis reaches the EU. The Belgian, Luxembourg and Netherlands authorities organise a concerted action to rescue Fortis, the Dutch-Belgian banking and insurance company (European Commission, case No. COMP/M.5384 – BNP Paribas/Fortis, 3 December 2018).

**3 October:** the European Commission publishes Recommendation 2008/867/EC on the active inclusion of people excluded from the labour market. This is structured around three complementary objectives: adequate income support, inclusive labour markets, and access to quality services (OJ L 307/11 of 18 November 2008: 11-14).

**19 November:** adoption of Directive 2008/104/EC on temporary agency work. The directive aims to guarantee equal treatment between temporary agency workers and workers on open-ended contracts, with regard to essential working conditions, access to collective equipment and entitlement to training (OJ L 327 of 5 December 2008: 9-14).

**14 November:** the euro area enters recession (Euractiv, 14 November 2008).<sup>6</sup>

**12 December:** Switzerland becomes the 25<sup>th</sup> member of the Schengen Area (OJ L 53 of 27 February 2008: 50-79).

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6. <https://www.euractiv.com/section/euro-finance/news/eurostat-euro-zone-officially-enters-recession/>

## 2009

**1 January:** Slovakia joins the euro area, becoming its 16<sup>th</sup> member (OJ L 195 of 24 July 2008: 1-3)

**10 March:** pursuant to the *Hartlauer v Austria* judgment, the authorisation regimes imposed by the Austrian authorities for the setting up of independent outpatient clinics constitute a restriction to the freedom of establishment (CJEU, case C-169/07).

**6 May:** adoption of Directive 2009/38/EC on the establishment of a European Works Council or procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. The directive aims to strengthen the provisions applying to European works councils, particularly in cases of restructuring, mergers, or acquisitions, and to increase the number of European works councils in transnational companies (OJ L 122 of 16 May 2009: 28-44).

**18 June:** the Council adopts Regulation (EC) No 546/2009 updating the rules for the European Globalisation Adjustment Fund to the context of the economic and financial crisis (OJ L 167 of 29 June 2009: 26-29).

**18 June:** adoption of Directive 2009/52/EC, the ‘sanctions’ directive, setting out minimum rules for sanctions and measures to be taken against employers of illegally staying third-country nationals. The directive targets the exploitation of such workers (OJ L 168 of 30 June 2009: 133-141).

**18 June:** the ETUC, BusinessEurope, UEAPME and CEEP adopt a revised framework agreement on parental leave, extending its duration by at least three or four months, some of which becomes non-transferable. Workers are entitled to specially-adjusted working conditions on return from parental leave. The social partners or Member States are free to determine how much notice must be given to the employer of the employee’s intention to exercise the right to parental leave (*Framework Agreement on Parental Leave (revised)*, 18 June 2009).

**14 July:** following the European elections, the new European Parliament has 736 members. At 42.9%, turnout continues to fall. The EPP wins 265 seats (36% of the total), the Progressive Alliance of Socialists and Democrats (S&D) 184 seats (25%) and ALDE 84 (11.4 %) (EP, Results of the European elections – 2009 – European Union<sup>7</sup>).

**17 July:** the European Hospital and Healthcare Employers’ Association (HOSPEEM) and the European Federation of Public Service Unions (EPSU) sign a framework agreement on prevention from sharp injuries in the hospital and healthcare sector. This agreement covers all workers in the sector, including trainees, apprentices, workers in related services, as well as agency and temporary workers.

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7. <http://www.europarl.europa.eu/about-parliament/en/in-the-past/previous-elections>

**16 September:** adoption of Regulation (EC) No 987/2009 laying down the procedures for implementing regulation (EC) No 883/2004 on the coordination of social security systems. This regulation foresees the application of one sole legislation, equal treatment, portability of rights and the aggregation of insurance periods (OJ L 284 of 30 October 2009: 1-42).

**1 December:** entry into force of the Treaty of Lisbon, entitled the Treaty on the Functioning of the European Union (TFEU).

## 2010

**10 February:** José Manuel Barroso starts a second term of office as President of the European Commission (OJ L 20 of 26 January 2010: 5-6).

**8 March:** the Council adopts Directive 2010/18/EU implementing the revised framework agreement on parental leave concluded by BusinessEurope, UEAPME, CEEP and ETUC and repealing directive 96/34/EC (see 18 June 2009) (OJ L 68 of 18 March 2010: 13-20).

**25 March:** the ETUC, BusinessEurope, UEAPME and CEEP sign an autonomous agreement on inclusive labour markets. Its aim is to establish a general framework to ease entry into the labour market, particularly through awareness campaigns, cooperation with education and training systems, and individual competence development plans (*Framework agreement on inclusive labour markets*, 25 March 2010).

**28 April:** adoption of Regulation (EU) No 437/2010 increasing financial support from the European Regional Development Fund (ERDF) for the renovation and reconstruction of housing for marginalised communities, including Roma communities (OJ L 132 of 29 May 2010: 1-2).

**2 May:** first Economic Adjustment Programme (also called ‘bailout package’) assistance plan for Greece. In return for a 110-billion euro loan over three years, Greece must commit to structural reforms: an end to pay-related benefits and a three-year pay-freeze, greater labour market flexibility and an increase in VAT.

**10 May:** adoption of Directive 2010/32/EU implementing the framework agreement on prevention from sharp injuries in the hospital and healthcare sector, concluded by HOSPEEM and EPSU (OJ L 134 of 1 June 2010: 66-72).

**16 June:** adoption of Regulation (EU) No 539/2010 providing easier access to the structural funds as a response to the economic crisis (OJ L 158 of 24 June 2010: 1-6).

**17 June:** the European Council opens accession negotiations with Iceland (Conclusions, 17 June 2010).



**17 June:** the European Council adopts the ‘Europe 2020 strategy’, giving priority to employment, research and innovation, combating climate change, education, social inclusion and the fight against poverty (Conclusions, 17 June 2010).

**7 July:** adoption of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. The purpose of this text is to provide better social protection to self-employed workers, by means of, *inter alia*, maternity and pension benefits (OJ L 180 of 15 July 2010: 1-6).

**7 December:** the Council adopts implementing Decision 2011/77/EU on granting Union financial assistance to Ireland. By means of an 85-billion euro assistance programme negotiated with the Troika, a loan worth 22.5 billion euros will be made available to Ireland via the European Financial Stabilisation Mechanism (EFSM) (OJ L 30 of 4 February 2011: 34-39).

## 2011

**1 January:** Estonia becomes the 17<sup>th</sup> member of the euro area (OJ L 196 of 28 July 2010: 24-26).

**12 January:** the European Commission publishes the first Annual Growth Survey as part of the European Semester and, more broadly, of the Europe 2020 strategy (IP/11/22).

**14 February:** adoption of Regulation (EU) No. 211/2011 on the European Citizens’ Initiative. As of its entry into force on 1 April 2014, it will allow EU citizens to ask for legislative proposals to be submitted on a particular issue (OJ L 65 of 11 March 2011: 1-22).

**9 March:** adoption of Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare. This text completes the legislation on coordination of social security systems, defining Member States’ responsibilities in dispensing, paying for and reimbursing cross-border healthcare (OJ L 88 of 4 April 2011: 34-39).

**24–25 March:** the European Council adopts the Euro Plus Pact, together with a limited revision of the TFEU Treaty, to include the arrangements for setting up the European Stability Mechanism (ESM). This mechanism replaces the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM) (Conclusions, 24 and 25 March 2011).

**13 April:** the General Court of the EU annuls part of Regulation (EC) No 983/08 on funding the EU’s ‘Food distribution programme for the most deprived persons’ (PEAD). The programme was attacked by Germany on the grounds that it no longer derived from the Common Agricultural Policy but from social policies which fall under the competences of the Member States (EGC, Case T-576/08).

**3 May:** by means of an implementing decision, the Council approves the economic adjustment programme for Portugal. The programme involves a 78-billion euro loan to Portugal from the EU (provided through the ESM and the EFSF) and the IMF. The loan is conditional on reforms including a wage freeze for civil servants, tax increases and privatisations (OJ L 159 of 17 June 2011: 88-92).

**24 June:** the European Council appoints the Italian Mario Draghi as President of the ECB for eight years as of 1 November 2011 (OJ L 173 of 1 July 2011: 8).

**21 July:** the euro area Heads of State or Government agree on the second assistance plan for Greece and on an extension for the EFSF (European Council, Statement by the euro area Heads of State or Government and EU institutions).

**8-16 November:** the Stability and Growth Pact is radically reformed by a set of five regulations and one directive,<sup>8</sup> making up the ‘Six-Pack’ which comes into force on 13 December. These new pieces of legislation are intended to strengthen budgetary surveillance of Member States and to ensure that they do not run up excessive deficits (OJ L 306 of 23 November 2011).

**20 December:** the European Commission adopts Decision 2012/21/EU on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. This text extends the selection criteria used for public calls for tender (OJ L 7 of 11 January 2012: 289-296).

## 2012

**9 January:** the European Commission raises 3 billion euros on the financial markets via the European Financial Stabilisation Mechanism, to be allocated to Ireland and Portugal, two countries receiving EU financial assistance (MEMO /12/138).

**2 February:** the euro area Member States sign an intergovernmental treaty establishing the European Stability Mechanism (ESM). The ESM’s powers to act are strengthened and merged with the European Financial Stability Facility, created two years previously (Treaty establishing the European Stability Mechanism (ESM), European Union, DOC 12/3, 1 February 2012).

**21 February:** the euro area finance ministers announce a new financial assistance agreement for Greece, worth 130 billion euros, in return for a reduction in the minimum wage and continued labour market reforms (*Eurogroup statement*, 21 February 2012).

**2 March:** the European Council grants Serbia the status of candidate country for accession to the EU (Conclusions, 2 March 2012).

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8. Regulations (EU) No. 1173/2011, (EU) No. 1174/2011, (EU) No. 1175/2011, (EU) No. 1176/2011, (EU) No. 1177/2011 and directive 2011/85/EU.

**25 April:** the European Commission adopts Regulation (EU) No 360/2012 describing the conditions under which support given to providers of general economic interest services is to be understood as not constituting State aid in the meaning of Article 107 TFEU (OJ L 114 of 26 April 2012: 8-13).

**29 June:** the euro area countries decide to grant large-scale financial assistance for recapitalising the Spanish banking sector, up to a potential amount of 100 billion euros (Euro area summit statement, 29 June 2012).

**29 June:** the European Council opens accession negotiations with Montenegro (Conclusions, 29 June 2012).

**6 September:** the European Central Bank (ECB) announces the launch of a new programme, 'Outright Monetary Transactions' (OMT), to buy up the public debt of euro area Member States (ECB, *Technical features of Outright Monetary Transactions*, 6 September 2012).

**25 October:** adoption of Regulation (EU) No 1024/2012 on administrative cooperation through the internal market information system. This text sets out the rules on the system's usage and codifies the use and exchange of European citizens' personal data between Member States (OJ L 316 of 14 November 2012: 1-11).

**20 November:** the IMF publishes the conclusions of the 6<sup>th</sup> quarterly review of the programme for Portugal, enabling the disbursement of a new 2.5-billion euro instalment, as part of the 78-billion euro international bailout plan for the country (EC, *The Economic Adjustment Programme for Portugal Sixth Review – Autumn 2012*, December 2012).

## 2013

**20 February:** the European Commission publishes a communication entitled 'Towards Social Investment for Growth and Cohesion' – including implementing the European Social Fund 2014–2020'. This document provides guidelines for Member States to meet the Europe 2020 targets, particularly through EU financial support (COM (2013) 83 final, 20 February 2013).

**21 March:** the ECB puts pressure on the Cypriot government to agree to the implementation of an EU/IMF programme; it threatens to cut, on 25 March, the credit line which is keeping the Cypriot banking system afloat (ECB, *Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus*, 21 March 2013).

**25 March:** among the conditions to be met by Cyprus in return for a 10-billion euro loan, the Eurogroup and the IMF impose losses on non-guaranteed deposits exceeding 100,000 euros. This is the first time that savers are asked to contribute – a 'bail-in' (Eurogroup Statement, 25 March 2013).

**22 April:** with the situation of young people on the European labour market deteriorating, the Council publishes a recommendation on the creation of a ‘youth guarantee’ (2013/C 120/01; OJ C120/1 of 26 April 2013: 1-6).

**21 May:** as part of the reform of the Stability and Growth Pact, the EP and the Council adopt Regulations (EU) No 472/12 and 473/13 – a ‘Two-Pack’ on top of the ‘Six-Pack’ (OJ L 140 of 27 May 2013).

**1 July:** Croatia becomes the 28<sup>th</sup> EU Member State (OJ L 112 of 24 April 2012).

**3 July:** according to the Council of Europe’s European Committee of Social Rights (ECSR), Sweden is violating the revised European Social Charter, particularly with reference to posted workers following adoption of the ‘Lex Laval’ in the wake of the CJEU’s *Laval* judgment (ECSR, LO and TCO v Sweden, Complaint No. 85/2012, decision on the admissibility and the merits of the Complaint, 3 July 2013).

**27 September:** Cyprus receives a loan instalment of 1.5 billion euros, through the ESM, to recapitalise its banking sector (OJ L 250 of 20 September 2013: 40-44).

**22 October:** adoption of the decision on serious cross-border threats to health, repealing decision 2119/98/EC. The decision is intended to strengthen coordination and cooperation between Member States with a view to improving prevention and better combating serious diseases (OJ L 293 of 5 November 2013: 1-15).

**20 November:** adoption of Directive 2013/55/EU amending directive 2005/36/EC on the recognition of professional qualifications, and regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System. The adoption of this directive results in the creation of a European Professional Card (OJ L 354 of 28 December 2013: 132-170).

**17 December:** adoption of six regulations on the implementation of cohesion policy 2014-2020: EU 1299/2013, EU 1300/2013, EU 1301/2013, EU 1302/2013, EU 1304/2013, EU 1305/2013 (OJ L 347: 259-548).

## 2014

**21 January:** accession negotiations are launched between Serbia and the European Union (Council of the EU, First Accession Conference with Serbia, 5486/14, 21 January 2014).

**12 February:** the International Monetary Fund announces the disbursement of 910 million euros to Portugal; since it first provided financial assistance in May 2011, it has loaned 25.1 billion euros to the country (IMF, Press release No 14/55, 12 February 2014).

**26 February:** adoption of Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ L 94 of 28 March 2014: 375-390).

**19 March:** the European Commission accepts the first European Citizens' Initiative (ECI). The organisers of 'Right2Water' ask it to ensure that all EU citizens enjoy the right to water and sanitation, to exclude water supply and management of water resources from internal market rules and liberalisation, and to increase its efforts to achieve universal access to water and sanitation around the world' (COM (2014) 177 final).

**16 April:** adoption of Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (OJ L 128 of 30 April 2014: 1-7).

**15 May:** Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an inter-corporate transfer (OJ L 157 of 27 May 2014: 1-22).

**26-27 June:** the European Council grants Albania candidate country status (Conclusions, 26-27 June 2014).

**1 July:** in the European elections, 751 MEPs are elected, on a turnout of 42.6%. The European People's Party (EPP) wins 221 seats (29.4% of the total), and the Progressive Alliance of Socialists and Democrats (S&D) 191 (25.4 %). For the first time, the European Conservatives and Reformists, with 70 seats (9.3%), come in ahead of the Alliance of Liberals and Democrats for Europe (ALDE), thus becoming the third biggest European party (EP, Results of the European elections – 2014 – European Union).<sup>9</sup>

**1 November:** the Luxembourger Jean-Claude Juncker, a member of the EPP, takes office as President of the European Commission (OJ L 299 of 17 October 2014: 29-31).

**11 November:** according to the CJEU, the 'citizens' rights directive' and the regulation on coordination of social security systems do not preclude national legislation which excludes nationals of other Member States from enjoying certain 'special non-contributory cash benefits', insofar as those nationals of other Member States do not have a right of residence in the host Member State (CJEU, case C-333/13).

## 2015

**22 January:** the ECB announces an expanded asset purchase programme. This programme, presented as European-style 'quantitative easing', begins in March 2015, with purchases of 60 billion euros per month of private and public sector securities (ECB, *Introductory statement* – Mario Draghi, *President of the ECB*, Frankfurt, 22 January 2015).

**4 February:** the ECB suspends acceptance of Greek debt as a guarantee, forcing Greek banks to resort to emergency liquidity to finance their activities; this requires

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9. See <http://www.europarl.europa.eu/about-parliament/en/in-the-past/previous-elections>

agreement from the ECB's Governing Council, but also means higher borrowing costs (ECB, *Eligibility of Greek bonds used as collateral in Eurosystem monetary policy operations*, Press release, 4 February 2015).

**25 June:** adoption of Regulation (EU) No 2015/1017 establishing the European Fund for Strategic Investments, to be set up in close partnership with the European Investment Bank (EIB) (OJ L 169 of 1 July 2015: 1-38).

**5 July:** referendum in Greece on the draft programme proposed by the Troika. The 'no' vote wins with 61.3% of the votes cast, with turnout at 62% (Agence Europe, Europe Daily Bulletin No. 11351, 5 July 2015).

**6 July:** in response to the Greek 'no', the ECB maintains Greek banks' access to the 89 billion euros of emergency liquidity assistance. The ECB refuses all Greek requests to increase this amount, severely limiting financial relations between Greece and the other euro area countries (ECB, ELA to Greek banks maintained, 6 July 2015).

**19 August:** adoption of the third economic adjustment programme for Greece. The financial aid, a maximum of 86 billion euros, is from the ESM. The programme is planned to continue up until 20 August 2018 (OJ L 2019 of 20 August 2015: 12-16).

**15 September:** the CJEU confirms its *Dano* case law by declaring legally valid the German legislation refusing access to social assistance for European citizens who have moved to and settled in a host Member State without being able to meet their own needs (CJEU, case C-67/14).

## 2016

**1 January:** Regulation (EU) No 806/2014 on the Single Resolution Mechanism (SRM) becomes fully operational. The SRM implements Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms in the euro area. The directive, which applies throughout the Union, aims to stop the public authorities bailing out banks (OJ L 225 of 30 July 2014: 1-90).

**8 March:** in relation to the Five Presidents' Report,<sup>10</sup> the European Commission launches a public consultation on the European Pillar of Social Rights. The Pillar, the legal nature of which is unclear, is aimed first and foremost at the euro area countries, though it is open to all other Member States (COM (2016) 127 final).

**10 May:** the national parliaments of Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia trigger the so-called 'yellow card' procedure with regard to the European Commission proposal to amend Directive 96/71/EC on the posting of workers (COM (2016) 505 final, 20 July 2016).

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**10.** European Commission, *The Five Presidents' Report: completing Europe's Economic and Monetary Union*, 22 June 2015.

**12 May:** the Council, the European Parliament and the European Commission adopt a new interinstitutional agreement, entitled ‘better regulation’, with a view to improving the quality and results of European legislation. The agreement establishes a set of tools to improve the quality of Union legislation: the use of regular impact analyses; public consultations; *ex post* evaluations of existing legislation to assess its effectiveness, its relevance, its consistency and its added value (OJ L 123 of 12 May 2016: 1-14).

**23 June:** the British people vote on whether the United Kingdom should remain in the EU. The question asked is ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ Turnout is 72.2%, and 51.9% of the voters answer ‘leave the European Union’. This is the beginning of ‘Brexit’ (Gov.UK, Brexit).

**30 October:** the European Union and Canada sign a Comprehensive Economic and Trade Agreement (CETA). The agreement stipulates the reduction or abolition of most customs duties and non-tariff barriers. It also triggers strong opposition from many organisations which object to the agreement for social and environmental reasons (OJ L 11 of 14 January 2016: 23-1079).

## 2017

**15 June:** the Eurogroup releases a loan instalment for Greece. After new austerity measures are adopted by the Greek parliament in May, the Eurogroup envisages public debt relief for Greece at the end of the aid plan if it turns out to be ‘unsustainable’ (*Eurogroup Statement on Greece*, 15 June 2017).

**17 November:** the European Pillar of Social Rights is proclaimed and signed by the Council, the European Parliament and the European Commission at the Gothenburg Social Summit for fair jobs and growth. It becomes the driving force behind the European Semester’s social dimension (OJ C 428 of 13 December 2017: 10-15).

**20 December:** the CJEU rules that the service connecting ‘Uber’ non-professional drivers with passengers must be classified as a ‘service in the field of transport’. Member States may, therefore, regulate the conditions applicable to the provision of this service.

## 2018<sup>11</sup>

**21 February:** the CJEU, ruling on the stand-by time of a Belgian firefighter, confirms that this time should be considered working time, even if the employee is on stand-by at home, in line with Belgian labour law (CJEU, Case C 518/15).

**22 February:** the CJEU rules that, in the case of a collective redundancy, pregnancy is not a sufficient reason to prevent redundancy. Conversely, neither should pregnancy (or the fact of having recently given birth) become a priority criterion when deciding on redundancies (CJEU, case C-103/16).

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11. As indicated in footnote 1, a full-blown chronology for 2018 is available online at [bit.ly/ETUIBilan1999-2019](http://bit.ly/ETUIBilan1999-2019)



**21-22 June:** the Eurogroup announces the end of the third financial bailout plan for Greece and agrees to grant it a final loan of 15 billion euros (*Eurogroup Statement on Greece*, 22 June 2018).

**28 June:** adoption of Directive 2018/957/EU on the posting of workers. The principle of ‘equal pay for equal work in the same place’ is still the underlying doctrine of the new directive. Posted workers in a country will receive the same allowances and reimbursements as nationals. Posting is limited to one year. The transport sector is excluded from the scope (OJ L 173 of 9 July 2018: 16-24).

**28 June:** adoption of Directive 2018/958/EU on a proportionality test before adoption of new regulation of professions. This text establishes rules on the execution of proportionality tests by Member States before creating or amending regulations applicable to professions (OJ L 173 of 9 July 2018: 25-34).

**6 September:** the CJEU rules that posted workers who replace other posted workers cannot be considered an exception to the rule: all workers fall under the social security regime of the country where they work, not that of their country of origin (CJEU, case C-527/16).

**4 October:** the CJEU rules that time spent on parental leave may not be considered as a period of actual work when used as a reference period to establish the number of days of a worker’s annual leave (CJEU, case C-12/17).

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All links were checked on 28 November 2019.

## List of abbreviations

<b>ALDE</b>	Alliance of Liberals and Democrats for Europe
<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>ASP</b>	Agreement on Social Policy
<b>BEPG</b>	Broad Economic Policy Guidelines
<b>BusinessEurope</b>	Confederation of European Business (now: UNICE)
<b>CEEP</b>	European Centre of Employers and Enterprises providing Public Services and Services of general interest
<b>CESI</b>	European Confederation of Independent Trade Unions
<b>CJEU</b>	Court of Justice of the European Union
<b>COP</b>	Conference of the Parties (United Nations)
<b>CSR</b>	Country-specific Recommendation
<b>DG</b>	Directorate General
<b>DG ECFIN</b>	Directorate General for Economic and Financial Affairs (European Commission)
<b>DG EMPL</b>	Directorate General for Employment, Social Affairs and Inclusion (European Commission)
<b>EaSI</b>	Employment and Social Innovation Programme
<b>EC</b>	European Community
<b>ECB</b>	European Central Bank
<b>ECIR</b>	European Centre for Industrial Relations
<b>ECLI</b>	European Case Law Identifier
<b>ECOFIN</b>	Economic and Financial Affairs (Council)
<b>EEA</b>	European Economic Area
<b>EEC</b>	European Economic Community
<b>EES</b>	European Employment Strategy
<b>EFSD</b>	European Financial Stability Facility
<b>EFTA</b>	European Free Trade Association
<b>EHIC</b>	European Health Insurance Card
<b>EIGE</b>	European Institute for Gender Equality
<b>EMCO</b>	Employment Committee
<b>EMF</b>	European Monetary Fund
<b>EMU</b>	Economic and Monetary Union
<b>EP</b>	European Parliament
<b>EPAP</b>	European Platform Against Poverty
<b>EPC</b>	Economic Policy Committee
<b>EPP</b>	European People's Party

<b>EPSCO</b>	Employment, Social Policy, Health and Consumer Affairs (Council)
<b>EPSR</b>	European Pillar of Social Rights
<b>EPSU</b>	European Public Service Union
<b>ERDF</b>	European Regional Development Fund
<b>ES</b>	European Semester
<b>ESF</b>	European Social Fund
<b>ESM</b>	European Stability Mechanism
<b>ESPN</b>	European Social Policy Network
<b>ETF</b>	European Transport Workers' Federation
<b>ETUC</b>	European Trade Union Confederation
<b>ETUI</b>	European Trade Union Institute
<b>EU</b>	European Union
<b>EWL</b>	European Women's Lobby
<b>FEAD</b>	Fund for European Aid to the most Deprived
<b>FRA</b>	Fundamental Rights Agency
<b>GB</b>	Gender Budgeting
<b>GDP</b>	Gross Domestic Product
<b>GM</b>	Gender Mainstreaming
<b>HIVA</b>	Research Institute for Work and Society (KULeuven)
<b>HOSPEEM</b>	European Hospital and Healthcare Employers' Association
<b>ILO</b>	International Labour Organisation
<b>IMF</b>	International Monetary Fund
<b>ISG</b>	Indicators Sub-Group (SPC)
<b>ITUC</b>	International Trade Union Confederation
<b>MIP</b>	Macro-economic Imbalance Procedure
<b>NRP</b>	National Reform Programme
<b>OJ</b>	Official Journal (of the European Union)
<b>OMC</b>	Open Method of Coordination
<b>OSE</b>	European Social Observatory
<b>PROGRESS</b>	Programme for Employment and Social Solidarity
<b>S&amp;D</b>	Progressive Alliance of Socialists and Democrats
<b>SDG</b>	Sustainable Development Goals
<b>SPC</b>	Social Protection Committee
<b>SPPM</b>	Social Protection Performance Monitor
<b>SRM</b>	Single Resolution Mechanism
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TO</b>	Thematic Objective
<b>TSS</b>	Tripartite Social Summit for Growth and Employment
<b>UEAPME</b>	European Association of Craft, Small and Medium-sized Enterprises
<b>UNICE</b>	Union of Industrial and Employers' Confederations of Europe (formerly BusinessEurope)
<b>YEI</b>	Youth Employment Initiative

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## **Social policy in the European Union 1999-2019: the long and winding road**

Edited by Bart Vanhercke, Dalila Ghailani and Slavina Spasova  
with Philippe Pochet

When Paul McCartney wrote his hit 'The long and winding road' in 1969, he obviously had other thoughts than European social policy in mind. But the metaphor is an appropriate description of the development of European social policy over the last twenty years, the subject of this 20th-anniversary edition of *Social policy in the European Union: state of play*. It accurately reflects the twists and turns of a social policy paradigm permanently overshadowed by market and financial considerations.

Despite many optimistic statements by the EU leaders, social policy remains a 'nice to have' (if and when the economic and political context allows for it), not a 'must have'. At the mercy of changing player coalitions, the development of social policy happens through a variety of policy instruments discussed in this book. It is also shaped by ever-changing challenges: digitalisation, demographic change and, increasingly, climate change. Nevertheless, as charted by this book, progress and political struggles towards a genuine 'Social Europe' have been and continue to be on the agenda of various players. But as a lesson of the past, we should not expect progress to be quick or linear: the road is going to be long and winding!

This book takes you on that exciting journey.

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