

Acknowledgements

The authors would like to thank student assistant Simona de Heer for her valuable research support during the writing phase of this deliverable.



Want to learn more about what we are working on?

Visit us at:

Website: <https://ethos-europe.eu>

Facebook: www.facebook.com/ethosjustice/

Blog: www.ethosjustice.wordpress.com

Twitter: www.twitter.com/ethosjustice

Hashtag: #ETHOSjustice

Youtube: www.youtube.com/ethosjustice

European Landscapes of Justice (web) app: <http://myjustice.eu/>

This publication has been produced with the financial support of the Horizon 2020 Framework Programme of the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.

Copyright © 2018, ETHOS consortium – All rights reserved ETHOS project

The ETHOS project has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No. 727112

About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

ETHOS WP6 is concerned with the European barriers to economic equality between countries and citizens and the various forms of non-institutional and institutional struggles for justice in Europe. Deliverable 6.2 focused on the official discourses and non-institutional resistance in the context of the 2008 crisis. The present deliverable concerns a legal report on the extent to which fundamental social rights as enshrined in the European Charters can or cannot constitute a counterweight to austerity measures in times of crisis. To this end, this task will draw specific attention to the question how social justice is institutionalized in law and legal practice in Europe by examining whether and, if so, how fundamental social rights have been applied regarding the most vulnerable groups in society in the wake of the crisis, and which future challenges exists in terms of strengthening fundamental social rights in crisis times.

A doctrinal methodology is conducted by looking at legal practice and at developments at EU level, including the case law of the European Court of Justice (CJEU) and decisions of the European Committee of Social Rights (ECSR), the legislative practice of the EU and other legal measures strengthening fundamental social rights. This will be done through desktop research of key legal instruments, their interpretation by legal bodies (i.e. CJEU, ECSR, national courts), other EU and CoE documents, and doctrinal writings of legal scholars on the European Charters in relation to social (in) justice and equality.

This deliverable specifically focuses on the two main systems of protection of social rights in Europe: on the one hand the EU Charter of Fundamental rights, that has incorporated a Solidarity Title IV covering various social and workers' rights, including the right to fair working conditions, protection against unjustified dismissal, and access to health care, social and housing assistance. All EU Member States are bound to this document - except for the United Kingdom and Poland who have secured Protocol No. 30, which foresees that the Solidarity Chapter of the EU Charter envisaging social rights cannot create justiciable rights, except to the degree that such rights are already protected under national law. The EU Charter's potential for social rights protection is limited by the fact that it contains merely principles instead of self-standing rights; they lack a horizontal direct effect and are only applicable when 'acting in the scope of' Union law (Article 51 Charter). On the other hand, the European Social Charter as adopted by the Council of Europe will be examined. The scope of this document is broader in terms of State parties that are covered, but also more comprehensive in terms of social rights contained therein. Relevant within the ETHOS context is that this document – unlike the EU Charter – is also binding upon Turkey.

In light of the foregoing, this study has identified the following specific goals:

- a) characterizing and identifying the main social and economic rights as enshrined in the EU Charter and European Social Charter, which could be relevant to resist the distributive frailties of the welfare state and the effects of the economic crisis for the most vulnerable groups of citizens;
- b) contributing to a better understanding of the legal mechanisms, which have been applied by the courts (European Court of Justice (CJEU), the European Committee of Social Rights (ECSR) and national courts) to deal with social rights as enshrined in both Charters in order to achieve social justice;
- c) examining whether and if so, which legal measures have been adopted to strengthen and effectuate fundamental social rights as laid down in the Charters studied.

It will be illustrated that the economic and financial crisis in Europe and the austerity measures adopted in

ETHOS

response that have negatively affected the respect for fundamental rights, in particular for social and economic rights. Especially vulnerable groups such as the elderly, youth, persons with disabilities and migrants have been undermined in effectively enjoying their fundamental rights. This report will moreover show that up until now the European Court of Justice (CJEU) has taken a cautious approach in dealing with national cases that challenged austerity measures on the basis of fundamental rights. This illustrates that the EU's social status has been seriously undermined during the Euro zone crisis. Recently launched measures that are aimed to guarantee social rights, such as the European Social Pillar, are conceived as a recognition that the EU's commitment in the Eurozone crisis has neglected its social dimension.

Against this background, this deliverable has identified the following policy recommendations that could allow Europe to move towards a more effective social rights protection for European citizens:

- elevation of so-called social principles – which do not constitute self-standing rights – into real enforceable rights that have the same equal status as civil and political rights;
- the Court of Justice could recognize more explicitly the significance of the CoE Social Charter in fundamental social rights protection at EU level;
- the EU legislator should involve the European Social Charter in legislative proposals as initiated by the European Commission;
- more awareness should be created on the use of the EU Charter in the judicial domain, particularly when it comes to the application of this instrument by national judges;
- the EU should prioritize the EU's accession to the European Social Charter to better integrate its internal market rationale with its social dimension.

Through the doctrinal analysis, it is illustrated that some of these policy changes are not easy to adopt, because the EU needs consent from its Member States to do so. In a politically divided area such as social policy and employment, which largely falls within the competence of Member States to decide upon (within the meaning of Article 5 TFEU), it remains to be seen whether Member States are ready for such a change. In any case, the idea that social rights are also human rights that must be protected and respected at any time, but especially in times of crisis, should be made more visible at European level.

Table of Contents

Acknowledgments	2
Change log	3
Executive Summary.....	4
List of Abbreviations	8
Table of Figures.....	9
Introduction.....	10
Research question and methodology	12
1. Background to social rights protection in the European legal order.....	13
1.1. Impact of the Lisbon Treaty on social rights protection in the EU	13
1.2. Paving the way towards a ‘social market economy’ in the Union	15
1.3. The Solidarity Chapter IV and the EU’s competence in the social domain	15
1.4. Impact of international documents promoting social rights: CoE Social Charter and its status in the European legal framework	17
2. The role of the (CJ)EU and the ECSR concerning austerity measures in times of crisis.....	20
2.1. The (in) applicability of EU law during the financial crisis and the role of the CJEU	22
2.2. The competence of the CJEU to adjudicate on austerity measures.....	24
2.3. An alternative in challenging austerity measures through Article 19(1) TEU	26
2.4. The impact of the ECSR on the protection of social rights in times of crisis	27
3.1. Application of social rights instruments at national level in crisis context: the EU Charter.....	29
3.2. Application of the European Social Charter at national level	30
4. Future challenges for social rights protection in times of crisis.....	31
4.1. The tension between economic freedoms and fundamental social rights in the EU legal order	32
4.1.1. Reactions after <i>Viking</i> and <i>Laval</i>	34
4.2. Social rights protection and recent EU citizenship case law: <i>Dano</i> and <i>Chavez-Vilchez</i>	37
4.3. Limitations in the application of the EU Charter	38
4.3.1. Justiciability of social rights in the EU: rights vs. principles dichotomy within the EU Charter	39
4.3.2. The question of horizontal direct effect of the Charter provisions in the social area	40
4.4. EU accession to the European Social Charter.....	42
5.1. Evaluation and recommendations.....	44

5.2. The principle of solidarity in the EU’s current public debate.....45

6. Conclusion47

7. Bibliography.....49

8. Table of cases and legislation.....52

9. Appendix55

ETHOS

List of Abbreviations

AG	Advocate-General
CoE	Council of Europe
CoE Commissioner	Council of Europe Commissioner for Human Rights
CJEU	European Court of Justice
ECB	European Central Bank
EFSM	European Financial Stability Mechanism
ESC	European Social Charter
ESM	European Stability Mechanism
EU	European Union
EU Charter	Charter of Fundamental Rights of the EU
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
FRA	European Union Agency for Fundamental Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary fund
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations Human Rights Council

Table of Figures

Table 1: Level of ratification of CoE Social Charter in the EU-28 (page 18)

Appendix

Table 1: Level of convergence between the CoE Social Charter and EU Charter (page 55)

Introduction

The financial and economic crisis of 2008 triggered countries to reduce their budgets, and these budget cuts have increasingly affected people's social protections.¹ In Cyprus for example, citizens suffered tremendously from their savings being seized in order to repay the debt.² The European Union's (hereafter: EU) response to the crisis was to adopt new measures in the field of economic governance, which aimed to institute austerity by imposing limits on public spending and mandatory changes to labour markets, resulting in more flexibility and lower wages.³ During this process, fundamental rights and the rule of law have been negatively affected.⁴ It is particularly in the context of austerity measures in times of crisis that social rights can play a pivotal role to protect citizens.⁵ In order to improve the implementation of social and economic rights at the European level, analogous to the civil and political rights as laid down in the ECHR, the so-called 'Turin process' was launched by the Council of Europe (CoE) Secretary General on 17-18 October 2014.⁶ It aimed to strengthen the Treaty system of the European Social Charter within the CoE and its relationship with EU law, and included recommendations for concrete political actions to achieve this.⁷ Establishing a link between EU law and CoE instruments, in particular the Social Charter and the ECHR is now more than ever vital since both the economic and political crises that Europe suffered from in the last years has undermined democracies of Member States and human rights and left many groups of citizens in a fragile position, especially the most vulnerable groups of persons.⁸

At European level there are two distinctive international organizations that are relevant in terms of promoting and guaranteeing fundamental social rights of European citizens, each with their own legal systems. On the one hand, there is the European Union (EU) that has implemented its own human rights instrument, the EU Charter, which became binding as of 2009 with the entry into force of the Lisbon Treaty. Although the EU Charter contains a comprehensive set of fundamental rights by including civil, political, economic and social rights, social rights seem to be second-division compared to economic rights.⁹

In the EU, fundamental rights had already been recognized by the European Court of Justice (CJEU) as general principles of Community law as long ago as the 1960s, with *Stauder* and *Internationale Handelsgesellschaft* forming the landmark cases.¹⁰ The Lisbon Treaty of 2007 brought the expansion of the

¹ A. Ivanković Tamamović, 'The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 21.

² *Ibid.*, p. 21 and 22.

³ J. Fraczyk, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, pp. 480-481.

⁴ *Ibid.*

⁵ S. Douglas-Scott and N. Hatzis, 'EU law and social rights', in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 509.

⁶ CoE, 'The Turin process of the European Social Charter', 2017, available at <https://www.coe.int/en/web/turin-european-social-charter/turin-process> [accessed on 22 September 2018].

⁷ CoE, 'Legal protection and effective enforcement of social rights in the Council of Europe member States', 2018, available at https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcPOwda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false [accessed on 24 October 2018].

⁸ M. Schmitt, 'The Charter of Fundamental Rights of the EU' (2016), available at <https://rm.coe.int/16806f53e6>, p. 3 [accessed on 11 December 2018].

⁹ See to this extent the following line of case law, which will be discussed in more detail in section 4: Case 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-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809; CJEU Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR O 1989; CJEU Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. See also for a more elaborate view on this matter: S.A. de Vries, (2013). 'Balancing fundamental rights with economic freedoms according to the European court of Justice', *Utrecht Law Review* 1.

¹⁰ CJEU Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114; CJEU Case C-26/69 *Erich Stauder v City of Ulm – Sozialamt* ECLI:EU:C:1969:57.

ETHOS

European Union fundamental rights protection to a higher level.¹¹ Union law has taken an essential step in the development of social rights protection, in particular through its now binding Charter of Fundamental Rights of the EU (hereafter: the EU Charter). As argued by Micklitz, through the Lisbon Treaty the social drive of the constitutionalisation process of the Union reached its climax, mainly as a result of the reinforcement of the EU's values and social objectives and of the recognition of the EU Charter as a binding instrument of EU law, in particular with its specific Title on solidarity.¹² Many of the social and economic rights laid down in the EU Charter are either 'based or correspond to' the rights laid down in the CoE European Social Charter as revised in 1996.¹³ The EU Fundamental Rights Agency (hereafter: FRA), the Union's independent body that aims to promote fundamental rights for everyone, has argued in its latest report that the role and use of the EU Charter at national level was mixed and rather superficial. Unfortunately, there are no improvements in its applications by the judiciary or in the national legislative processes. Above all, it has proved difficult for national key actors to identify government policies that aim to promote the EU Charter in times of crisis, meaning that this vital instrument for the protection of fundamental social rights at EU level is not being exploited to its full potential.¹⁴

On the other hand there is the Council of Europe (CoE), which has been a promoter of human rights for a very long time. It considers civil, political, social and economic rights to be basic and intrinsic rights for everyone in Europe, and promotes a 'Social Constitution of Europe'.¹⁵ Despite its increased visibility and relevance to the areas covered by EU law, the CoE Social Charter has largely been disregarded when it comes to the more recent developments on the protection of fundamental social rights in the EU legal order.¹⁶ Moreover, the CJEU almost always refers to the CoE Social Charter incidentally, never in any substance, and often in the same way as it refers to the 1989 Community Charter of the Fundamental Social Rights of Workers.¹⁷ A lack of coordination between these two main systems that promote social rights can lead to conflicting obligations imposed on the Member States, respectively under EU law and the European Social Charter.¹⁸ The latter can for example result in problems with regard to the uniform application of EU law.¹⁹

¹¹ S.A.de Vries, 'EU and ECHR: Conflict or Harmony?', *Utrecht Law Review* 9 (2013).

¹² H. Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law', in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds.), *The Role of the Courts in Developing a European Social Model* (DJØF Publishing, 2010) ; see also S. Giubonni, 'The rise and fall of EU labour law', *European Law Journal* 24:7 (2018).

¹³ S. Douglas-Scott and N. Hatzis, 'EU law and social rights', in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 498. See for a full overview of the correspondance of social rights established in the EU Charter and the CoE Social Charter: O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 March 2018].

¹⁴ FRA, *Fundamental Rights Report 2018*, available at <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018> [accessed on 1 October 2018], p. 35.

¹⁵ H. Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law', in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds.), *The Role of the Courts in Developing a European Social Model* (DJØF Publishing, 2010) ; see also S. Giubonni, 'The rise and fall of EU labour law', *European Law Journal* 24:7 (2018).

¹⁶ O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 September 2018].

¹⁷ U. Khaliq, *The EU and the European Social Charter: never the twain shall meet?* Cambridge Yearbook of European Legal Studies 196 (2014) p. 176

¹⁸ O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 September 2018], p. 50.

¹⁹ Ibid.

Research question and methodology

The main question of concern that this deliverable aims to answer is whether and how fundamental social rights as laid down in the EU Charter and the CoE Social Charter have been applied in Europe and Turkey²⁰ in the context of the austerity measures taken in times of crisis, and which future challenges exist in effectuating fundamental social rights of European citizens. To this end, this deliverable conducts a doctrinal inquiry by looking at national legal practice and at legal developments at EU level, including the case law of the CJEU, the legislative practice of the EU and other legal measures strengthening fundamental social rights. This will be done by means of desktop research of key legal instruments, their interpretation by legal bodies (i.e. CJEU, ECSR, national courts), other EU and CoE documents, and doctrinal writings of legal scholars on the European Charters in relation to social (in) justice. The case law analysis will in particular contribute to map the CJEU's role in the latest developments concerning the application and enforcement of the Charter in the Member States; the mobilization strategies of the Charter at the CJEU and the Social Charter at the ECSR, and to contribute in understanding whether and how these instruments have been applied in times of crisis.

Building upon judicial interpretation in areas of the social domain such as collective action, social benefits, and anti-discrimination, this deliverable aims to assess how social rights have been interpreted by these primary judicial bodies and to what extent the social and economic rights contained in both Charters have constituted and could constitute a counterweight to austerity measures in times of crisis. It is important to stress from the outset that despite the fact that the judicial discussion is increasingly interconnected with political and economic debates in the austerity context, this report predominantly focuses upon the legal practice, and its implications for diminishing social injustice in times of crisis. For a more detailed description on the economic and political debates in relation to the austerity context one could take a look at deliverables 6.2 (*comparative report on distributive justice claims in public and economic debates*) and 6.4 (*comparative report on role of social dialogue to promote labour justice*).²¹

The following sections will draw particular attention to the legal status of these instruments within the European legal order by examining briefly the background of social rights in the European legal order. The second section examines the impact of both instruments in the context of the austerity measures taken in the wake of the economic crisis, with a particular focus on the role of the CJEU and the ECSR in this matter. The third section examines how both the EU Charter and the CoE Social Charter have been applied so far at national level. The fourth section analyses how both instruments could be utilized in the future in order to enhance social rights protection in times of crisis. This part will in particular shed a light on how fundamental social rights are balanced with fundamental economic freedoms in the European legal order and will illustrate that social rights, which can be at stake due to austerity measures can be restricted when they come into conflict with economic freedoms. It moreover examines the limitations of – in particular – the EU Charter when it comes to effectuating social rights in times of crisis. Lastly, the report will give some recommendations on how these instruments could be utilized in order to better promote, respect and protect fundamental social rights of European citizens, including a brief conclusion. As such, this deliverable allows us to illustrate what still remains to be done so that social fundamental rights as laid down in the EU and Social Charter can become a reality for everyone in Europe, especially in times of crisis.

²⁰ Note that for Turkey only the CoE Social Charter is applicable as it is not bound to the provisions of the EU Charter.

²¹ See: <https://www.ethos-europe.eu/publications> for the full reports on these deliverables

1. Background to social rights protection in the European legal order

1.1. Impact of the Lisbon Treaty on social rights protection in the EU

Traditionally, the development of a legal framework of basic minimum social rights protection in the Union has been interpreted as a justification of the protection against a distortion of competition, thereby providing a safety net against using low social standards as a tool to gain competitiveness.²² As argued by Ashiagbor, this instrumental justification can be explained from the fact that the Union lacked a clear competence over social policy at that time, making it necessary to establish a so-called link between social rights established at EU level and the Community's economic goal of market integration.²³ Apart from the principle of equal payment that is now enshrined in Article 157 TFEU, the EU and its predecessors did not have competence in the social domain, so social rights were interpreted by the Court through a justification to restrict economic freedoms.²⁴ The insertion of Article 114 of the Treaty of the Functioning of the European Union (hereafter TFEU, ex Article 119 EC) had an aim rooted in competition law, i.e. to avoid distortions of competitions between undertakings established in different EU Member States.²⁵ The slow shift from a competition law oriented policy towards a social policy at Community level (now: EU) and the recognition of the need for a clearer 'social policy' dimension proves a clear development of the EU towards, as Ashiagbor argues, a constitutional policy.²⁶

When the Lisbon Treaty entered into force on 1 December 2009, the EU Charter received the same legal status as the Treaties through Article 6(1) TFEU. The EU Charter is a major innovation in the development of human rights at EU level, bringing all five categories of rights - civil, political, economic, social and cultural - into one single document. Noteworthy in this context is that the provisions of the EU Charter are only binding upon the Member States when they are implementing Union law within the meaning of Article 51. The EU Charter does not extend the competences of the EU beyond the competences given to it in the EU treaties. Its first paragraph stipulates that Member States can invoke the rights established in the Charter *only* when they are implementing Union law.²⁷ Moreover, Article 51(2) Charter stipulates that this instrument "does not extend the field of application of Union law."²⁸

The CJEU played – and still plays – a pivotal role in defining the scope of the EU Charter. In its landmark judgment *Akerberg Fransson* it argued that the rights as laid down in the EU Charter must be respected in all situations in which national legislation falls 'within the scope of EU law' and it hereby equated 'implementation' with 'scope of application'.²⁹ The latter can either involve circumstances when Member States implement or enforce EU legislation³⁰, but also when they derogate from Union law.³¹ With regard to the specific facts of the case, this finding entailed that criminal proceedings brought in Sweden, for under-declaring tax, triggered the application of the Charter rights, in particular since one of the taxes

²² See e.g. CJEU Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

²³ D. Ashiagbor, 'Economic and social rights in the European Charter of fundamental rights', *European Human Rights Law Review* 1 (2004), p. 63.

²⁴ D. Ashiagbor, 'Economic and social rights in the European Charter of fundamental rights', *European Human Rights Law Review* 1 (2004), p. 63. See for example CJEU Case C-112/00 *Schmidberger Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004], ECLI:EU:C:2004:614.

²⁵ D. Ashiagbor, 'Economic and social rights in the European Charter of fundamental rights', *European Human Rights Law Review* 1 (2004), p. 63.

²⁶ *Ibid.*, p. 64.

²⁷ Article 51(1) Charter.

²⁸ Article 51(2) Charter.

²⁹ See Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, par. 21.

³⁰ Case 5/88 *Wachauf* [1989] ECLI:EU:C:1989:321, pars. 17–19.

³¹ See Case 260/89 *ERT* [1991] ECLI:EU:C:1991:254, par. 43.

ETHOS

concerned was VAT, which is regulated at EU level in specific legislation and contributed to the EU's own funds.³² In particular, when we look at primary EU law, Article 4(3) TEU obliges all 28 Member States to undertake all necessary measures to collect VAT. In addition, Article 325 TFEU (ex. Article 280) requires the Member States "to counter fraud and any other illegal activities affecting the financial interest of the Union."³³ Even though the CJEU extended the scope of the EU Charter in its *Fransson* judgment, it restricted the scope again in the *Siragusa* ruling. This case concerned an Italian planning order, in which the CJEU held that this order did not trigger the application of Article 17 of the EU Charter, since the national law at issue on the protection of landscapes did not have any corresponding obligations under EU law.³⁴

The EU Charter recognizes the indivisibility of human rights, which entails the idea that human rights are human rights, regardless of how one chooses to categorize these rights. This instrument is innovative compared to other human rights documents as it contains civil-political rights on the one hand and socio-economic rights on the other hand and does not make a distinction between these categories.³⁵ A majority of the social and economic rights are contained in Title IV on Solidarity, many which of which address the rights of workers. This chapter recognizes a number of rights, which correspond to the rights contained in the European Convention on Human Rights (ECHR) and the European Social Charter.³⁶ Although not a full opt-out, both Poland and the United Kingdom secured clarifications about how the EU Charter would interact with national law in their countries, thereby limiting the extent that European courts would be able to rule on issues related to the EU Charter if they are brought to courts in Poland or the UK. More specific, these Member States have secured a Protocol No. 30, which foresees that the Solidarity Chapter cannot create justiciable rights, except to the extent that such rights are protected under national law.³⁷ Article 1(2) of the Protocol stipulates:

"In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights [...] except in so far as Poland and the United Kingdom has provided for such rights in its national law."³⁸

When closely looking at the text of this provision, it is the extension of rights that is prohibited, but not their application. In addition, Fraszzyk argues that the rights contained in the Solidarity Chapter IV of the EU Charter can still be enforced as general principles of EU law within the meaning of Article 6 (3) TEU. It can therefore be presumed that the Protocol does not constitute an opt-out *de facto*.³⁹

The EU Charter has become of great interest for litigants (ranging from employees, NGOs, and trade unions) that want to challenge austerity measures that have been adopted in the wake of the crisis, thereby assuming that these litigants have a *locus standi* before the CJEU.⁴⁰ As will be shown throughout this paper, it is not always easy to challenge austerity measures on the basis of EU Charter provisions. In fact, the CJEU

³² See Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105 ; see also J. Fraszzyk, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 478.

³³ Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, pars. 25-26.

³⁴ Case C-206/13 *Cruciano Siragusa v Regione Sicilia* ECLI :EU:C:2014:126, pars. 27-28.

³⁵ S. Douglas-Scott and N. Hatzis, 'EU law and social rights', in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 497.

³⁶ For example, the right of workers to information and consultation within the undertaking as enshrined in Article 27 EU Charter is also laid down in Article 21 of the Social Charter.

³⁷ O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [accessed on 28 September 2018], p. 34.

³⁸ Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

³⁹ J. Fraszzyk, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 479.

⁴⁰ R. O'Gormann, (2011). "The Weakness of Social Rights Protection", *German Law Journal*, p. 1859.

has taken a cautious approach with regard to the application of the EU Charter in the austerity context, thereby often arguing that the situation did not fall ‘within the scope’ of Union law and hence that the Charter provisions did not apply.⁴¹

1.2. Paving the way towards a ‘social market economy’ in the Union

The insertion of Article 3(3) TEU has added an explicit social objective to the EU legal order, stipulating that the union shall establish “*a highly competitive social market economy, aiming at full employment and social progress.*”⁴² Unlike the Amsterdam Treaty (1997), Article 3(3) TEU refers to ‘full employment’ rather than ‘a high level of employment’. Notably, it is the first time ever that the EU legislator has referred to a so-called ‘social market economy’ in the Treaties. Article 3(3) continues by stipulating that the Union “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.”⁴³ The term ‘social justice’ has been inserted for the first time in the Lisbon Treaty, and the EU legislator has thereby explicitly raised attention and importance to social rights in the hierarchy of EU values. In November 2017 the European Pillar of Social Rights was launched, jointly proclaimed by the EU Parliament, Council, and Commission. This Pillar sets out twenty ‘principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe’, which are structured around three categories: equal opportunities and access to employment; fair working conditions; and social protection and inclusion.⁴⁴ It is thereby not intended to create new social rights and principles, but instead to complement the existing competences of the EU in the field of social policy. In this light, Douglas-Scott and Hatzis have argued that the Pillar could be regarded as an official recognition that the EU’s commitment in the Eurozone crisis neglected the social dimension of the EU.⁴⁵ Nonetheless, they question whether this Pillar is adequate enough to provide for a real counterweight to the EU’s predominant focus on economic freedoms, which could result in social rights being a second-division category in the EU as opposed to civil and political rights.⁴⁶

1.3. The Solidarity Chapter IV and the EU’s competence in the social domain

The Charter’s chapter on Solidarity IV, in which important social rights and principles have been laid down, constitutes one of the most debated parts of this instrument. During the drafting phase of the EU Charter it was difficult to reach a consensus on the content of this chapter since social policy predominantly falls within the discretion of Member States to decide upon. However, as Bojarski notes, a three-fold compromise was eventually made. First of all, the preamble of the EU Charter has provided for an explicit mentioning of solidarity as a universal value upon which the Union is found.⁴⁷ Secondly, a consensus was found by only including those social rights, which the EU Member States have unanimously accepted. These were to be

⁴¹ This was for example the case in the following cases: Case C-333/13 *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig* ECLI:EU:C:2014:2358; CJEU Case C-64/16 ECLI:EU:C:2018:117; CJEU Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149; Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036.

⁴² See TEU, available at <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/4-article-3.html> [accessed on 25 October 2018].

⁴³ See TEU, available at <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/4-article-3.html> [accessed on 25 October 2018].

⁴⁴ European Pillar of social Rights (2017), available at https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

⁴⁵ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, pp. 514-515.

⁴⁶ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 515.

⁴⁷ Charter of Fundamental Rights, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

ETHOS

formulated in a restrictive and open manner.⁴⁸ Lastly, to avoid the risk that these EU Charter rights would be hampered in a certain way and to guarantee that this instrument would be a so-called ‘living instrument’ that would evolve according to developments in the various areas, Article 53 of this instrument now provides that the level of protection recognized by Union law, international law, international agreements and by Member States’ constitutions may not be restricted through the interpretation of the EU Charter.⁴⁹ Nevertheless, the CJEU placed a disclaimer to this rule in the *Melloni* judgment.⁵⁰ The CJEU held in *Melloni* that Article 53 of the Charter can *only* have such an impact if “[...] the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”⁵¹ Important to mention in this context is that the *Melloni* ruling applies to all (national) fundamental rights, and is therefore also relevant in the social domain as the ruling might restrict national fundamental rights that might be effective in combating austerity.

The question whether higher national fundamental rights standards may apply to a case at hand is increasingly linked to the level of harmonization in a certain policy area. In cases, which are entirely determined by Union law (such as in *Melloni*) where a conflict arises between EU law and higher national fundamental rights standards, the EU harmonization measure will have precedence over the conflicting national rule. It may then be presumed that the EU legislator has balanced the EU interests with the national interests extensively.⁵² Nevertheless, when the EU legislator has partially harmonized a certain area, such as in the social domain, and Member States still enjoy a certain margin of discretion, they are free to apply more protective standards of fundamental (social) rights. Two conditions need to be fulfilled: first of all, the level of protection that is provided for in the EU Charter may not be compromised.⁵³ In this sense, the EU Charter functions as a minimum standard: Member States may not apply a lower national standard of fundamental rights protection than the EU Charter provides for.⁵⁴ Secondly, the application of the national fundamental right should not compromise the ‘primacy, unity and effectiveness’ of Union law. These EU principles thereby function as a maximum standard.⁵⁵ In this respect, Frascyk argues that the *Melloni* ruling reinforces the idea that various national (higher) fundamental rights standards that might otherwise be efficient in combating austerity measures would lose their effect *if* they would jeopardize the primacy, unity and effectiveness of EU law.⁵⁶

When it comes to the social rights laid down in the EU Charter, Chapter IV includes *inter alia* the right of collective bargaining and action (Article 28), the right of access to placement services (Article 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), social security and social assistance (Article 34), health care (Article 35), environmental protection (Article 37) and consumer protection (Article 38).⁵⁷ These rights are based on or in accordance with the rights contained in

⁴⁸ L. Bojarski et al., ‘The Charter of fundamental rights as a living instrument’, available at http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_guidelines.pdf, accessed on 24 September 2018, p. 16.

⁴⁹ *Ibid.* This case concerned an Italian national convicted for bankruptcy fraud, tried in absentia and sentenced to ten years in prison, arguing that Article 47 of the Charter was violated.

⁵⁰ J. Frascyk, ‘EU fundamental rights and the Charter’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 481.

⁵¹ CJEU Case C-399/11 *Melloni v. Ministerio Fiscal* [2013], par. 60.

⁵² See to this extent also: J. Vervaele, (2013) ‘The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU’, *Review of European Administrative Law* 2, p. 52.

⁵³ CJEU Case C-399/11 *Melloni v. Ministerio Fiscal* [2013] 2, par. 60.

⁵⁴ L.M.F. Besselink, (2014) ‘The parameters of Constitutional Conflict after Melloni’, *European Law Review* 3, p. 18.

⁵⁵ CJEU Case C-399/11 *Melloni v. Ministerio Fiscal* [2013] 2, par. 60.

⁵⁶ J. Frascyk, ‘EU fundamental rights and the Charter’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 481.

⁵⁷ Charter of Fundamental Rights, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

the European Convention on Human Rights (hereafter: ECHR) and the European Social Charter (ESC).⁵⁸ For example, the right of workers to information and consultation within the undertaking, as laid down in Article 27 is also translated in Article 21 of the ESC. This area of law has also been regulated within primary EU law: e.g. Article 154 and Article 155 TFEU (ex. Article 138 and 139 EC) on social dialogue within management and labour at European level. Article 30 of the EU Charter lays down the right for every worker to be protected against unjustified dismissal. Individuals can access these rights in all situations in which they fall ‘within the scope of EU law’.⁵⁹ However, what will become clear throughout the course of this chapter is that the legal status of social rights in the EU Charter is rather fragile, since many social rights have the status of principles, which are not directly enforceable before courts.⁶⁰ In such cases, one should look at the implementation measures laid down by Union law and national law.⁶¹

In addition to the EU Charter, numerous other international instruments have been adopted to strengthen social rights of European citizens. The following section will take a closer look at the second main system for the protection of social rights in Europe, i.e. the CoE Social Charter.

1.4. Impact of international documents promoting social rights: CoE Social Charter and its status in the European legal framework

Before 1992, there was a clear absence of reference to fundamental rights in EU primary law. It was the CJEU that enabled jurisprudence to emerge on this topic already in the late 1960s, with the *Internationale Handelsgesellschaft* the landmark case. In the latter case, the CJEU argued that “[r]espect for fundamental rights form an integral part of the general principles of European Community law [...]”.⁶² By proclaiming its capacity to refer to fundamental rights in the EU legal order, the CJEU continued its efforts to identify a number of sources from which it could draw inspiration concerning those fundamental rights that needed to be protected at EU level.⁶³ The latter included international treaties, which were signed by the EU Member States, together with national constitutional traditions that were common across the Member States.⁶⁴ One of these international treaties from which the Court drew inspiration in its cases related to social rights protection is the Council of Europe (hereafter CoE) European Social Charter, which was adopted in 1961 in addition to the well-known 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR).⁶⁵ The latter instrument was intended to be the counterpart to the ECHR in the area of economic and social rights.⁶⁶ This instrument draws specific attention to the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants. It requires that enjoyment of social and economic rights must be guaranteed without discrimination. The European Committee on Social and Economic Rights (ECSR) monitors the conformity of Member States’ national law and practice with the

⁵⁸ D. Ashiagbor, ‘Economic and social rights in the European Charter of fundamental rights’, *European Human Rights Law Review* 1 (2004), p. 66.

⁵⁹ See Case C-617/10 Åkerberg Fransson [2013] ECLI:EU:C:2013:105.

⁶⁰ An example of such a right is: Article 34 of the Charter, which stipulates: “[t]he Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.”

⁶¹ L. Bojarski et al., ‘The Charter of fundamental rights as a living instrument’, available at http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_guidelines.pdf, accessed on 24 September 2018, p. 18.

⁶² CJEU Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, par. 4.

⁶³ R. O’Gormann, ‘The weakness of social rights protection at the European Union level’, *German Law Journal* 10, p.1835.

⁶⁴ *Ibid.*, p. 1836.

⁶⁵ The European Social Charter was signed by thirteen States of the CoE in Turin on 18 October 1961 and entered formally into force on 26 February 1965 (CETS n° 35; 529 UNTS 89).

⁶⁶ G. J.J. Heerma van Voss, ‘De invloed van het EU-recht op het Nederlandse arbeidsovereenkomstenrecht’, p. 618, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/29619/W%202014-2%20De%20invloed%20van%20het%20EU-recht%20op%20het%20Nederlandse%20arbeidsovereenkomstenrecht.pdf?sequence=1> [accessed on 10 March 2018].

ETHOS

European Social Charter, a body consisting of 15 independent experts in the field of social policy and law.⁶⁷ The Social Charter did not have much impact until its revisions in 1996. One of the main reasons for this was that it seemed to explicitly exclude the option to be invoked before national judicial bodies, thereby making it difficult for potential litigants to invoke the rights enshrined in this instrument.⁶⁸ Despite its increased visibility and relevance to fields covered by the European Union (EU), the Social Charter has to a large extent been disregarded in the more recent developments concerning the protection of fundamental social rights in the EU legal order.⁶⁹

All 28 Member States are parties either to the 1961 Social Charter or the 1996 Revised Social Charter. The map below illustrates the ratification level by the EU Member States of these instruments:

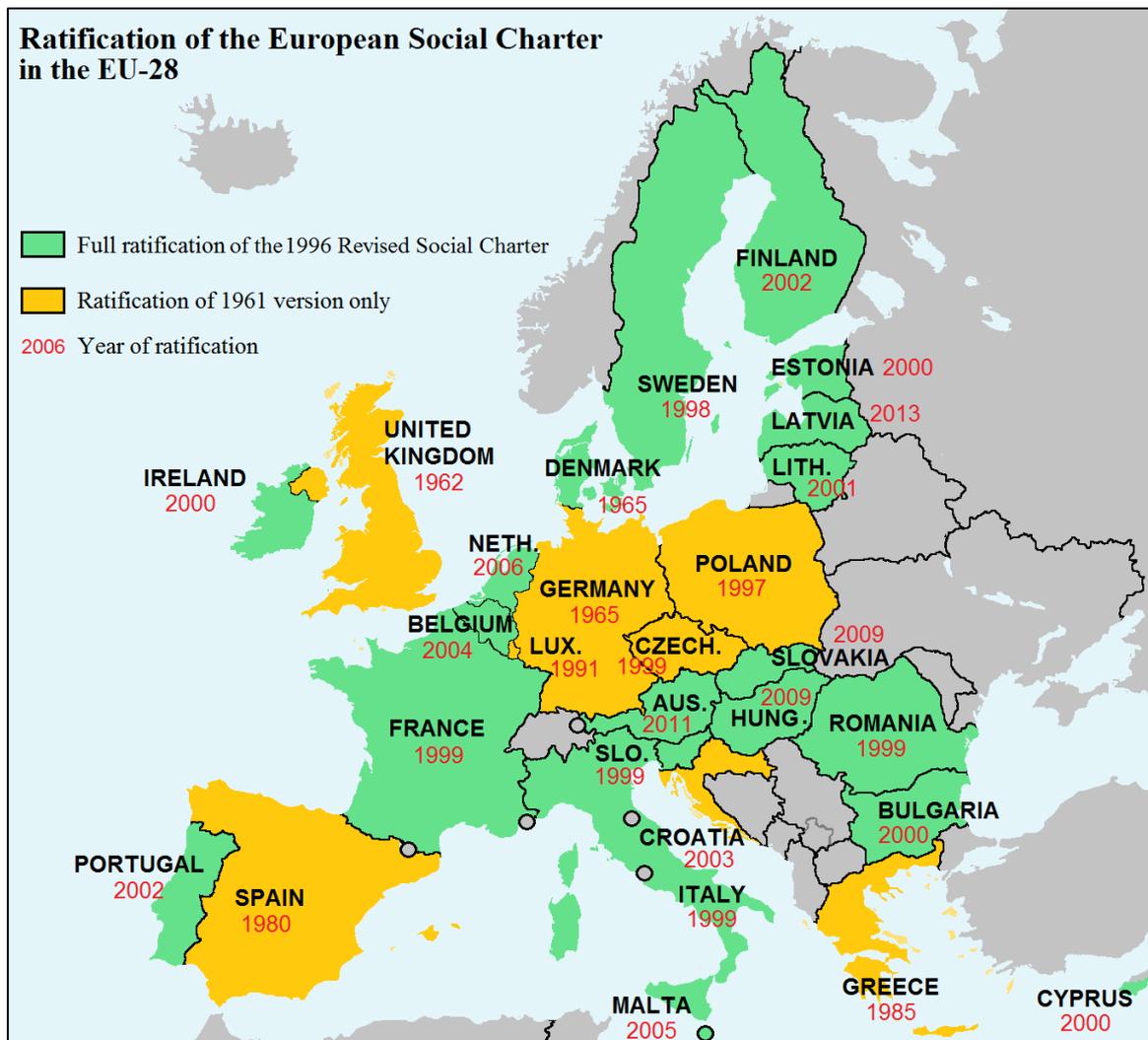


Figure 1. Ratification of 1961 CoE Social Charter and 1996 Revised Social Charter by the EU-28⁷⁰

⁶⁷ See to this extent: https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-ECSR_EuropeanCommitteeonSocialRights-eng.pdf.

⁶⁸ O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 September 2018], p. 7.

⁶⁹ Ibid.

⁷⁰ Own Map, data retrieved from: O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 March 2018], p. 9.

After the ratification of the Social Charter (the original revised version and its related protocols), its provisions have become a source of law thereby recognizing the rights of citizens and setting out obligations to State parties.⁷¹ The Social Charter regulates the mechanisms for monitoring adherence to these socio-economic rights in two ways. One consists of the reporting system that is applicable to all State parties of the revised Social Charter. The other mechanism concerns the collective complaints procedure that is only applicable to State parties that have ratified the 1995 Protocol or to States that have made a specific declaration at the moment they signed the Social Charter, in line with the procedure as laid down in the 1995 Protocol. The collective complaints procedure enables certain categories of trade unions, employers' organizations and international NGOs to assess whether a state is not implementing the Social Charter and to thereby call States to make legislative and policy changes. This procedure is collective in two ways: first of all, individual victims of a violation of social rights may not bring complaints in this procedure.⁷² Secondly, the complaint can only concern a general situation and can thus not deal with individual situations (e.g. the right to housing is not provided for migrants as a group in general).⁷³ In these circumstances, review of the reports of States on their implementation of the Charter leads to binding recommendations by the European Committee of Social Rights (ECSR).⁷⁴ The latter institute decides upon both the reporting system and the collective complaint procedure. As things stand, 15 Member States have accepted the jurisdiction of the ECSR.⁷⁵ Despite the fact that this collective procedure has a number of limitations, Harris argues that it has proven to be effective, especially in light of the contribution of the decisions by the ECSR to the development of international human rights law and their precedent with respect to setting standards for complaints in which social and economic rights have been at stakes due to austerity measures taken in times of crisis.⁷⁶

The Social Charter is unique compared to other (social) fundamental rights instruments in the sense that it allows parties to refrain from accepting all the rights laid down therein.⁷⁷ A number of the provisions contained in the Social Charter are, just as in other socio-economic instruments, formulated in rather unspecific language. Nevertheless, scholar Khaliq argues that many of the provisions that are concerned with labour rights are formulated in sufficiently precise wording in order to be invoked before courts, and the European Committee of Social Rights plays a pivotal role in defining the scope of obligations of these

⁷¹ It provides for the following relevant social rights: the effective right to work (art. 1), equal conditions of work (art. 2), health and safety at work (art. 3), equitable remuneration (art. 4), promoting freedom of association of workers and employers (art. 5), collective bargaining (art. 6), the protection of children and adolescents (art. 7), the protection of female workers (art. 8), vocational guidance and training (arts. 9 and 10), protection of health (art. 11), social security (art. 12), social and medical assistance (art. 13), social service benefits (art. 14), vocational training and vocational and social rehabilitation of the physically or mentally handicapped (art. 15), social, legal and economic protection of the family, mothers and children (arts. 16 and 17), the exercise of a gainful occupation in the territory (art. 18) and, finally, protection and assistance for migrant workers and their families (art. 19). See to this extent also: U. Khaliq, *The EU and the European Social Charter: never the twain shall meet?* Cambridge Yearbook of European Legal Studies 196 (2014), p. 174.

⁷² See Article 1, Additional Protocol. The categories that can bring collective complaints are (i) international organisations of employers and trades unions that have observer status with the Charter Governmental Committee; (ii) international NGOs with consultative status with the Council of Europe where they have been and put on a list for this purpose; and (iii) representative national employers and trade union organisations. A State may separately make a declaration allowing representative national NGOs to bring a complaint against it within the meaning of Article 2.

⁷³ See Explanatory Report 3 (2006) *HRR* 204, par.31.

⁷⁴ ATD Fourth World, 'Using the European Social Charter to defend social rights', 20 March 2018, available at <http://www.atd-fourthworld.org/using-european-social-charter-defend-social-rights/> [accessed on 14 October 2018].

⁷⁵ Di Carmen Salcedo Belyran, 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', *DS* n. 4 (2016), p. 9.

⁷⁶ D.J. Harris, (2009). 'Collective complaints under the European Social Charter' In: K.H. Kaikobad & M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*, p. 5.

⁷⁷ U. Khaliq, *The EU and the European Social Charter: never the twain shall meet?* Cambridge Yearbook of European Legal Studies 196 (2014) p. 174.

provisions.⁷⁸ In addition, it is important to stress that the provisions as contained in the Social Charter only apply to nationals of the States concerned and to nationals of other State parties that are lawfully residing in or working in that State party. Unlike the European Convention of Human Rights (ECHR), the provisions of the Social Charter hence do not extend to all persons within the jurisdiction of the State concerned. Within the EU free movement context, the provisions of the Social Charter apply to all EU nationals that have invoked their free movement rights.⁷⁹

Despite the fact that the EU Charter contains a number of social rights and principles, this list is less comprehensive compared with that of the European Social Charter. One proof thereof is that the EU Charter does not contain a right to a fair remuneration, while the Social Charter does provide for this in Article 4. Besides, unlike the Social Charter the EU Charter does not guarantee a right to social welfare services (Article 14 of the Social Charter) or a right to childcare services as laid down in Article 17 in the Social Charter.⁸⁰ For a systematic overview of the level of convergence between the provisions laid down in the CoE Social Charter and the EU Charter one could take a look at the appendix.

The CJEU has referred to the provisions of the Social Charter in the 1976 *Defrenne* case to incorporate the prohibition of discrimination on the grounds of sex as one of the general principles of Union law.⁸¹ In this case however, the prohibition of discrimination on the grounds of sex was regarded a civil right rather than a social right. *Defrenne* was in fact one of the few cases in which the CJEU referred to articles of international treaties such as the CoE Social Charter to justify its discovery of general principles of Union law.⁸² Since the *Defrenne* ruling, the EU legislator has strengthened the principle of equal pay for equal work or work of equal value with legal measures, that have incorporated a more general principle of gender equality in employment matters.⁸³ The EU legislator adopted a broader range of provisions that prevent discriminatory conduct (for example Article 13 TFEU, which allows EU institutions to ‘take appropriate action to combat discrimination’ on various grounds) and secondary legislation in the form of directives to implement the principle of non-discrimination on the basis of gender⁸⁴, age, disability, religion and belief and sexual orientation.⁸⁵

2. The role of the (CJ)EU and the ECSR concerning austerity measures in times of crisis

Greece was the first Member State in the Eurozone area that was seriously affected by the financial and economic crisis of 2008. As things stand, the Member State still suffers from strict austerity measures. Greece was shortly followed by Portugal and Ireland, and thereafter Italy, Cyprus and Spain were hit. Slovenia, one of the last Member States to join the euro zone area, was also being forced to bail-out its

⁷⁸ U. Khaliq, The EU and the European Social Charter: never the twain shall meet?’ Cambridge Yearbook of European Legal Studies 196 (2014), p. 174.

⁷⁹ Ibid.

⁸⁰ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 498.

⁸¹ CJEU Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56, pars. 26-28.

⁸² R. O’Gormann, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1836.

⁸³ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 494.

⁸⁴ See for example Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

⁸⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

ETHOS

banking sector, but it did not resort to borrowing from international institutions.⁸⁶ Of the non-euro zone Member States, Hungary, United Kingdom and Latvia have also been affected as a result of the economic crisis.⁸⁷ One of the effects of the crisis was that important bodies in for example Latvia, Greece, Ireland and the United Kingdom that were entrusted with safeguarding fundamental (social) rights, suffered from increased budget and staff cuts.⁸⁸ Furthermore, Ombudsman offices in some EU Member States such as Spain and Slovakia had to shut down their decentralized offices.⁸⁹ In some Member States, austerity measures have resulted in legislation that aimed to reduce pensions and funding of access to various social benefits. In Cyprus for example, citizens suffered tremendously from their savings being seized in order to repay the debt. In this context, Ivanković-Tamamović argues that in an indirect way, fundamental social rights were jeopardized as a result of withdrawal of funding in the non-governmental sector.⁹⁰

Despite the fact that some policy measures have been adopted in the last years to address the issue of foreign debt and its effect on the enjoyment of fundamental rights, these have not been designed as long term solutions that correspond with political commitments as laid down in various international resolutions.⁹¹ For example, the EU implemented some soft law instruments at the height of the crisis, affecting certain social areas at national level. One example thereof is the Euro Plus Pact (hereafter: EPP), which came to existence in March 2011, and was signed by all 17 Euro zone members and the other EU Member States, except for the Czech Republic, Hungary, Sweden and the United Kingdom. Its aim was to enhance economic governance by focusing on four key areas: employment, competitiveness, sustainability of public finances and strengthening financial stability. In this context, the European Commission made some recommendations, including Country Specific Recommendations regarding flexicurity, pension, health care, social benefits and taxes (e.g. Belgium had to implement active labour policies for older workers and vulnerable groups; Bulgaria was obliged to combat poverty and social exclusion).⁹² These recommendations have a soft law basis and are thus not legally binding as such as to trigger the application of the EU Charter rights.⁹³

Having said that, numerous efforts have been taken by litigants to invoke the EU Charter of Fundamental Rights and the CoE Social Charter to challenge austerity measures taken by Member States. Litigants that have tried to invoke the provisions of these instruments range from citizens in labour disputes, to trade unions, NGOs and associations.⁹⁴ The next sections will take a closer look at the role of both the CJEU and the ECSR in dealing with austerity measures that have had an impact on citizens' fundamental social rights in times of crisis.

⁸⁶ See to this extent: Reuters, 2013 'Saved a state bail-out, Slovenes question hefty banking bill', December 2013, available at <https://www.reuters.com/article/us-slovenia-banks/saved-a-state-bailout-slovenes-question-hefty-banking-bill-idUSBRE9BE0J220131215> [accessed on 15 October 2018].

⁸⁷ A. Ivanković Tamamović, The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 20.

⁸⁸ Ibid., p. 21.

⁸⁹ Ibid., p. 21 and 22.

⁹⁰ A. Ivanković Tamamović, The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 22.

⁹¹ Ibid., p. 23. For example the Monterrey Consensus of the International Conference on Financing and Development and the Millennium Declaration.

⁹² See to this extent: European Commission, 'Background on the Euro Plus pact: Information prepared for the European council 2011, available at <https://www.gib.nrw.de/service/downloaddatenbank/background-on-the-euro-plus-pact>.

⁹³ J. Fraszky, 'EU fundamental rights and the financial crisis', in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 476.

⁹⁴ Ibid., p. 482.

2.1. The (in) applicability of EU law during the financial crisis and the role of the CJEU

The question that is important from the outset is to what extent EU law is applicable to national austerity measures adopted in the wake of the financial crisis. The CJEU has been largely reluctant to challenge and expose the austerity measures that have been taken in times of crisis to legal scrutiny.⁹⁵ In many cases it lacked jurisdiction since the Member States were not ‘implementing Union law’. One of the landmark cases that confirmed this hesitance is the Court’s judgment in the *Pringle* case, which concerned the legality of the European Stability Mechanism (ESM) Treaty.⁹⁶ The ESM Treaty is a treaty under public international law concluded by the Members of the Eurozone, with the aim of creating a permanent crisis mechanism to safeguard the stability of the Eurozone area. It is the response to the on-going sovereign debt crisis (i.e. commonly referred to as the ‘Eurozone’ crisis) suffered by a number EU Member States that have the euro as a currency.

Even though the application of the EU Charter was not the main point to be addressed in the *Pringle* case, the CJEU did argue the following regarding the scope of the EU Charter in the context of national austerity measures:

“It must be observed that the Member States are *not* implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.”⁹⁷

More specifically, the Court argued that Article 122(2) TFEU, which provides the Union the competence to grant *ad hoc* financial assistance to Member States that are threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control did not provide for an appropriate legal basis for the establishment of a European Stability Mechanism. It argued in this matter that “the fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty.”⁹⁸ In this sense, application of the EU Charter - in this case the right to an effective remedy as provided under Article 47 - is excluded since the ESM does not fall within the scope of EU law. This position is rather difficult to maintain for a number of reasons: first of all, as argued by Barnard, the Court’s findings are not in line with the stronger application of the Charter rights in other social policy areas, in particular in the area of equal treatment between men and women in the supply of services of which the *Test-Achats* case is a primary example - despite it concerning an area in which the application of EU law was clearly more inevitable.⁹⁹ In the latter case, the CJEU Grand Chamber ruled that a provision, which made it possible for Member States to maintain sex-specific insurance premiums, notwithstanding the rule on unisex insurance and benefits as enshrined in Directive 2004/113, was not in line with the principle equal treatment between men and women, as provided for in Articles 21 and 23 of the EU Charter.¹⁰⁰

Secondly, as pointed out by Fraszky, the EU evidently has interest in the European Stability Mechanism (ESM), its monetary Union and the measures of Member States adopted in this context, in

⁹⁵ J. Fraszky, ‘EU fundamental rights and the financial crisis’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 482.

⁹⁶ CJEU Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756.

⁹⁷ *Ibid.*, par. 180.

⁹⁸ *Ibid.*, pars. 64-65; see also par. 105.

⁹⁹ See C. Barnard, (2013), ‘The Charter, the Court – and the crisis’, *Legal Studies Research Paper No 18/2013*, Section a. See also CJEU Case C-236/09 *Test-Achats* (2011).

¹⁰⁰ CJEU Case C-236/09 *Test-Achats* (2011).

ETHOS

particular since the stability of the euro also has significant consequences for the good functioning of the EU's internal market.¹⁰¹

In addition, Fraczyk argues that this ruling has created a so-called “responsibility gap” with regard to alleged and real violations of fundamental rights as laid down in the EU Charter that flow from austerity programmes of Member States.¹⁰² Moreover, the logic behind the CJEU's *Pringle* judgment was that the ESM was in accordance with EU law, in particular due to the fact that the loans granted were subject to stringent conditions.¹⁰³ It therefore becomes rather difficult for the CJEU to refuse to apply the EU Charter rights to national measures that implement these conditions and that jeopardize the fundamental rights of EU citizens.¹⁰⁴

In addition, an element that was not taken into account in the *Pringle* case is the question to which extent EU institutions are involved in the ESM – this is even more interesting as the EU Charter rights are also addressed to EU institutions (according to Article 51). Unlike the Court, the Advocate General (AG) in the *Pringle* case did address this issue and referred in the following way to the EU Charter:

“In the light of the foregoing, the conclusion and ratification of the ESM Treaty would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited. The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the *Charter of Fundamental Rights*.”¹⁰⁵

The CJEU did address the question concerning EU institutions in this context in *Ledra Advertising*, which should be read together with the *Mallis* judgment. Both cases concerned a Memorandum of Understanding (MoU) by Cyprus on Specific Economic Policy Conditionality, subsequently concluded with the ESM in March 2013.¹⁰⁶ The litigants in these cases concerned Cypriot nationals that, in the framework of the banking crisis that Cyprus faced in the period 2012-2013, and pursuant to the MoU of Cyprus, suffered significant financial losses between 480.000 EUR and 1.600.000 EUR as a result of the closure of Cyprus Popular Bank and the recapitalization of the Bank of Cyprus.¹⁰⁷ In *Ledra Advertising*, the Court argued in particular that safeguarding the banking system in Cyprus resulted in an objective of general interest that can restrict fundamental rights, within the meaning of Article 52(1) of the EU Charter, and that the national measures “did not constitute a disproportionate and intolerable interference impairing the very substance of the appellants’ right to property” as laid down in Article 17 of the Charter.¹⁰⁸

In these cases the CJEU sends a clear message to EU institutions: whether they act in the framework of EU law or at its margins, when they have entered into international agreements, the Commission and the ECB should duly respect fundamental rights as laid down in the EU Charter, and if failing to do so they should be ready to be held accountable.¹⁰⁹ In fact, these cases will thereby require the Commission and the ECB to take into account fundamental rights during the negotiating process of bailout terms that result in aggressive

¹⁰¹ J. Fraczyk, ‘EU fundamental rights and the Charter’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 482.

¹⁰² *Ibid.*

¹⁰³ CJEU Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756, pars 69; 72; 111-112, 143-143 and 156-157.

¹⁰⁴ *Ibid.*

¹⁰⁵ AG opinion in CJEU Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:675, par. 176.

¹⁰⁶ Joined Cases C-8/15 to C-10/15 *Ledra Advertising* ECLI:EU:C:2016:702.

¹⁰⁷ Joined Cases C-8/15 to C-10/15 *Ledra Advertising* ECLI:EU:C:2016:701; Joined Cases C-105/15 to C-109/15 *Mallis* ECLI:EU:C:2016:702.

¹⁰⁸ Joined Cases C-8/15 to C-10/15 *Ledra Advertising* ECLI:EU:C:2016:701, pars. 70-74.

¹⁰⁹ Joined Cases C-8/15 to C-10/15 *Ledra Advertising* ECLI:EU:C:2016:701; Joined Cases C-105/15 to C-109/15 *Mallis* ECLI:EU:C:2016:702, par. 70-74.

austerity measures. In this context, Frasczyk points out that the requirements for a successful challenge under a damage action are stricter than for an action for annulment through 263 TFEU, i.e. sufficiently serious breach rather than ‘illegality’. On the contrary, the *locus standi* for individuals is more beneficial under a damage action and the limitation period is more reasonable as opposed to a plea for annulment.¹¹⁰

2.2. The competence of the CJEU to adjudicate on austerity measures

As argued by Frasczyk, the above-discussed ruling in *Ledra Advertising* should “[...] not diminish the fact that the preclusion of the Charter pre-dated *Pringle*”, taking into account the decisions by the CJEU in respect of the European Financial Stability Mechanism (EFSM).¹¹¹ What is striking in this regard is the fact that the EFSM is part of the Union legal framework (and with that EU institutions clearly act within the scope of Union law and as such the Charter should apply).¹¹² The case study of Portugal is relevant to mention in this context.

The Troika, composed of the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission, negotiated the international bailout for Portugal in the period 2011 and 2014. Part of these negotiations consisted of the adjustment programmes, including the conditions on financial support, conclusion of loan agreements, and monitoring the implementation thereof.¹¹³ Since 2010, Portugal has witnessed a withdrawal of policies aimed at combating poverty and social precariousness, justified by the necessity to control the public deficit.¹¹⁴ The austerity measures of the Portuguese State predominantly consisted of freezing of almost all social and pension benefits in the country, resulting in a significant lowering of social rights protection of Portuguese citizens.¹¹⁵ The international bailout by the Troika included a Memorandum of Understanding (MoU) that was signed by the European Commission on behalf of the EU and the Member States.¹¹⁶ The most important elements of the MoU were incorporated into Council Decision 2011/344/EU.¹¹⁷ During this period, litigants ranging from trade unions, companies and natural persons challenged the national budgetary measures that jeopardized their social rights. In numerous cases, the CJEU declined to answer preliminary references submitted by Portuguese lower courts that questioned the compatibility with the EU Charter with national austerity measures that implemented the Memorandum of Understanding.¹¹⁸ Coutinho argues that these national courts:

“[...] either failed to properly identify the EU law acts that were the source of national austerity measures or disregarded their role as common EU law courts of ordinary jurisdiction when they bypassed the opportunity to refer a question for a preliminary ruling of the Court of Justice challenging the validity of the MoU.”¹¹⁹

¹¹⁰ J. Frasczyk, ‘EU fundamental rights and the financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 484 ; see also Case C-51/05 P - *Commission v Cantina sociale di Dolianova* [2008], ECLI:EU:C:2008:409.

¹¹¹ J. Frasczyk, ‘EU fundamental rights and the financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 484.

¹¹² *Ibid.*

¹¹³ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 510.

¹¹⁴ A. Ivanković Tamamović, ‘The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015’, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 137.

¹¹⁵ F. Coutinho, ‘Austerity on the loose in Portugal: European Judicial restraint in times of crisis’, *Perspectives on Federalism*, Vol. 8, issue 3, 2016, p. 106.

¹¹⁶ Portugal Memorandum of Understanding on Specific Economic Policy Conditionality (17 May 2011).

¹¹⁷ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 510.

¹¹⁸ F. Coutinho, ‘Austerity on the loose in Portugal: European Judicial restraint in times of crisis’, *Perspectives on Federalism*, Vol. 8, issue 3, 2016, p. 106.

¹¹⁹ F. Coutinho, ‘Austerity on the loose in Portugal: European Judicial restraint in times of crisis’, *Perspectives on Federalism*, Vol. 8, issue 3, 2016, p. 106.

The inability of these national courts to challenge austerity measures on the basis of the EU Charter can be illustrated by several cases. In the Portuguese case *Fidelidade Mundial* and *Via Directa*, a Portuguese trade union, i.e. the *Sindicato Nacional dos Profissionais de Seguros e Afins* (i.e. National Union of Insurance Professionals) was seeking a restitution of the collectively agreed holiday and Christmas allowances that were suspended by the State Budget Act for 2012 in State owned insurance enterprises. The referring Portuguese labour courts from Lisbon and Oporto sent preliminary references to the CJEU, questioning whether the latter measures complied with the fundamental rights as laid down in the EU Charter, in particular the right to equality and non-discrimination as laid down in Article 20 and 21, and the right to fair and just working conditions as laid down in Article 31(1) of the EU Charter.¹²⁰ In October 2014, the CJEU declared the preliminary reference by the Portuguese courts inadmissible, due to the fact that it argued to not have a jurisdiction to review Portuguese law vis-à-vis the EU Charter.¹²¹ It argued in particular that the austerity measures that were taken by the Portuguese government and included in the State Budget for 2012 did not trigger EU law and therefore fell outside its jurisdiction.¹²² The CJEU referred to an earlier decision dating from 7 March 2013 in which it had already dismissed on the same grounds a preliminary reference by a Portuguese court challenging a similar austerity measure included in the State Budget Act for 2011.¹²³

In the case *Sindicato dos Bancários do Norte*, the CJEU held that in line with its established case law, the EU Charter and its requirements are only binding upon Member States when ‘they are implementing EU law’ as stipulated in Article 51 Charter. It continued that under Article 6(1) TFEU, the Charter is binding and has the same value as primary EU law, but it does not create new EU competences nor modify existing ones.¹²⁴ Again, the Portuguese referring court did not provide for any arguments advocating that the Charter rights are applicable since the contested national provision at issue was implementing Union law, the CJEU once again declared itself inadmissible to rule on the issue at hand.¹²⁵ In the *Fidelidade Mundial* case, the CJEU argued that the facts at hand had the same nature as in the *Sindicato dos Bancários do Norte* case and as such the referring questions were analogous to the latter case.¹²⁶ Therefore, the Court concluded that neither the 2011 nor 2012 Budget Acts were implementing Union law and that therefore the EU Charter rights were not applicable.¹²⁷

A further complication that could be linked to the CJEU’s careful approach in applying the EU Charter in this area is that national austerity measures could equally be in breach with other international documents that promote social rights, such as the European Social Charter, ILO, UN and IMF.¹²⁸ These international systems have their own reporting mechanisms and one could argue that the availability of these mechanisms provides litigants with alternative remedies in cases in which the EU Charter does not apply.¹²⁹ In section 2.4 we will take a closer look at the role of the European Committee of Social Rights as a form of redress in the austerity context.

¹²⁰ Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327.

¹²¹ See CJEU Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, par. 22, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, par. 16. See also F. Courinho, ‘Austerity on the loose in Portugal: European Judicial restraint in times of crisis’, *Perspectives on Federalism*, Vol. 8, issue 3, 2016, p. 108.

¹²² CJEU Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, par. 22, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, par. 16.

¹²³ CJEU Case Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149, par. 7.

¹²⁴ CJEU Case Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149, paras. 10-14.

¹²⁵ *Ibid.*

¹²⁶ Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, par. 20.

¹²⁷ Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, par. 12. See also Case C-665/13, *Via Directa*, EU:C:2014:2327, par. 13.

¹²⁸ J. Fraszky, ‘EU fundamental rights and the financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 485.

¹²⁹ *Ibid.*, p. 486.

ETHOS

At the same time, the above-mentioned line of case law illustrates that it is complicated to apply the EU Charter in areas related to national austerity measures since the CJEU often lacks jurisdiction in these matters. Here, the limitation of the scope of the Charter within the meaning of Article 51 clearly restricts litigants from enforcing the social rights that they enjoy under Union law.

2.3. An alternative in challenging austerity measures through Article 19(1) TEU

Despite the *Pringle* ruling and other subsequent case law that disregarded the EU Charter, the latter instrument will most likely be applied in the austerity context when national measures fall ‘within the scope of Union law’.¹³⁰ In the latest *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* case for example, the CJEU established a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals. The case concerned a legal challenge of the Portuguese association of judges against austerity measures temporarily reducing the salaries of public sector workers.¹³¹ The CJEU relied exclusively on Article 19(1) TEU (i.e. ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’) to protect judicial independence at national level. On the basis of this provision, the CJEU argued that:

“the second subparagraph of Article 19(1) TEU does not preclude general salary-reduction measures, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas.”¹³²

In particular, the Court found that the salary-reduction measures do not violate the EU principle of judicial independence because they were a limited and temporary reduction of remuneration to assist in lowering ‘the Portuguese State’s excessive budget deficit’ and applied to various categories of public sector employees.¹³³ Important to stress however is that the CJEU reaffirms that the principle of effective judicial protection is a general principle of EU law and it thereby makes reference to the EU Charter, in particular Article 47 (i.e. right to an effective remedy and fair trial).¹³⁴ With regard to this provision, the trade union at issue argued that the salary-reduction measures infringed ‘the principle of judicial independence’ enshrined not only in the Portuguese Constitution, but also Article 47 of the EU Charter.¹³⁵ In responding to this, the Court argued that the second subparagraph of Article 19(1) TEU relates to ‘the fields covered by Union law’, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.¹³⁶ The Court thereby suggests that the scope of application of Article 19(1) TEU, which refers ‘the fields covered by Union law’ is broader than the scope of ‘implementing Union law’ within the meaning of Article 51(1) Charter. Even though the CJEU does not further elaborate on this finding, it could be regarded as far-reaching. Contrary to the opinion of AG Saugmandsgaard Øe, the CJEU incorporates Article 19(1) TEU and the principle of effective judicial protection as laid down therein with the principle of judicial independence, thereby drawing inspiration from Article 47 of the EU Charter and its case law related to

¹³⁰ J. Fraszky, ‘EU fundamental rights and the financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 486.

¹³¹ CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

¹³² *Ibid.*, par. 52.

¹³³ *Ibid.*, par. 46.

¹³⁴ *Ibid.*, par. 52.

¹³⁵ CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018], par. 13.

¹³⁶ *Ibid.*, par. 29.

ETHOS

Article 267 TFEU.¹³⁷ In this case, the CJEU did not rely on article 47 of the Charter as a legal source, in particular due to its narrower scope of application within the meaning of Article 51 Charter.¹³⁸

The latter CJEU case illustrates that a route on the basis of Article 19 TEU is possible for litigants that want to challenge austerity measures adopted by a EU Member State - in this case measures that temporarily reduced the salaries of public sector workers. It also shows that in situations in which EU law is triggered, the EU Charter could be applied in the austerity context, and this also touches upon the area of judicial protection.¹³⁹ More importantly, in this case the Court is not only concerned with Portuguese Courts, but it sends a clear message to other Member States such as Poland and Hungary that they could be held accountable when they undermine the rule of law.¹⁴⁰ In this context, Ovádek argues that when judicial independence and the effective protection of EU law are endangered in times of crisis, the EU cannot restrict itself to the 'traditional limitations' set by the material scope, which defines the areas in which EU and national law can be applied respectively.¹⁴¹ As such, this case could pave the way for the EU Commission to rely on Article 19(1) TEU in its infringement actions against Member States such as Poland for their rule of law 'backsliding'.

2.4. The impact of the ECSR on the protection of social rights in times of crisis

The European Committee of Social Rights (ECSR) has in numerous cases emphasized on the importance and obligations of State parties to adhere to the reforms adopted as a result of the austerity measures taken at national level to respond to the crisis. These have resulted in numerous case law regarding non-compliance of the European Social Charter that – in case State parties did not amend their national rules that were in breach with the Social Charter – have given rise to judicial complaint by means of self-executing recognition of the social right for the individual concerned.¹⁴² Especially with regard to Greece and Spain, the ECSR has proven to be active in responding to social rights violations as a result of austerity measures taken during the crisis.¹⁴³

In its general introduction of the Conclusion XIX-2 (2009), which concerns the implementation of the European Social Charter in the context of the global economic crisis, the ECSR has stipulated that State parties to this document have agreed to take all the necessary steps to ensure that the rights as laid down in this document can be effectively guaranteed "at the time when the need for protection is most felt."¹⁴⁴ With regard to Greece, the ECSR has argued that the legislative reforms that were taken in the wake of the Troika measures did not comply with the European Social Charter and should therefore be annulled. This concerned in particular measures regarding tackling of youth unemployment, where Greece limited the social security

¹³⁷ CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, par. 29.

¹³⁸ M. Ovádek, 'Has the CJEU Just Reconfigured the EU Constitutional Order?', May 2018, Reconnect, available at <https://reconnect-europe.eu/blog/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> [accessed on 26 October 2018].

¹³⁹ J. Fraszky, 'EU fundamental rights and the financial crisis' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 488.

¹⁴⁰ M. Ovádek, 'Has the CJEU Just Reconfigured the EU Constitutional Order?', May 2018, Reconnect, available at <https://reconnect-europe.eu/blog/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> [accessed on 26 October 2018]. Recently for example, Hungary stepped to the Court after the European Parliament adopted a report on the worrisome rule of law in Hungary: Report of 4 July 2018 on a proposal calling the European Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

¹⁴¹ M. Ovádek, 'Has the CJEU Just Reconfigured the EU Constitutional Order?', May 2018, Reconnect, available at <https://reconnect-europe.eu/blog/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> [accessed on 26 October 2018].

¹⁴² Di Carmen Salcedo Belyran, 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', DS n. 4 (2016), p. 10.

¹⁴³ Di Carmen Salcedo Belyran, 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', DS n. 4 (2016), p. 10.

¹⁴⁴ See to this extent European Committee of Social Rights Conclusions XIX-2 (2009) (GREECE) https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-ECSR_EuropeanCommitteeonSocialRights-eng.pdf.

ETHOS

coverage for youngsters (12.3), such as a salary below the poverty level¹⁴⁵, and the modifications on the pension system which have resulted in lower living standards for the pensioners (Article 12.3 Social Charter).¹⁴⁶ Greece moreover did not comply with Article 3.1 of the Social Charter on the ground that self-employed persons are not sufficiently covered by occupational safety and health regulations.¹⁴⁷

The binding conclusions of the ECSR are also of significant importance for the adequate protection of social rights in times of crisis. In fact, the ECSR has condemned various State parties in recent years for not providing free health care services to undocumented immigrants, but also other violations of the right of refugees' establishment of working conditions below the minimum acquired and prohibiting the right to strike, to name but a few examples.¹⁴⁸ In particular, the ECSR held that setting a minimum wage below the poverty level for all workers under the age of 25 in Greece infringed their right to a remuneration that guarantees a decent standard of living and their right to enjoy social rights without discrimination.¹⁴⁹ With regard to Spain, the ECSR has argued that job placement through public employment services was inadequate and that not permitting women time to breastfeed was not in accordance with Article 8(3) of the Social Charter, which guarantees the rights of employed women to protection.¹⁵⁰ It moreover argued in its conclusions that Spain was violating Article 19(1) of the Social Charter (i.e. the right of migrant workers and their families to protection and assistance) by not providing equal treatment for both migrants and nationals in self-employment.¹⁵¹ Spain also violated Article 2(1) of the Social Charter (i.e. the right to just conditions of work) by allowing working hours in excess of 60 hours in a week.¹⁵²

The case law and conclusions of the ECSR have become fundamental in the protection of social rights of various vulnerable groups in Europe in times of crisis. National courts have a key role in ensuring the effective protection of the rights as laid down in the Social Charter through the implementation of the so-called 'conventionality control', meaning the non-application of the national provision which infringes the higher international Treaty.¹⁵³ A State party may not apply its domestic provisions as a justification for its failure to act in accordance with an International treaty such as the European Social Charter.¹⁵⁴

As stressed before, many of the social rights as laid down in the EU Charter are based on or correspond to the provisions of the European Social Charter. In this context, Hepple argues that by analogy to the inspiration drawn from the European Court of Human Rights, the interpretations as given by the

¹⁴⁵ See Complaint 66/2011 ADEDY v Greece (23 May 2012), par. 65.

¹⁴⁶ Complaint 76/2012 IKA/ETAM v Greece 7 December 2012, par. 83.

¹⁴⁷ See to this extent European Committee of Social Rights Conclusions XIX-2 (2009) (GREECE) https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-ECSR_EuropeanCommitteeonSocialRights-eng.pdf; see also Di Carmen Salcedo Belyran, 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', DS n. 4 (2016), p. 11.

¹⁴⁸ ECSR, The General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and on federation of Greek civil Servants' Trade Unions (ADEDY) v. Greece, complaint no. 66/2011, decision on the merits of 23 May 2012, available at: http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC66Merits_en.pdf.

¹⁴⁹ Ibid.

¹⁵⁰ ECSR, Conclusions XIX-4-Spain–Article, XIX-4/def/ESP/, 2011.

¹⁵¹ Ibid., see also A. Ivanković Tamamović,, The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 160.

¹⁵² ECSR, Conclusions XIX-3-Spain–Article, XIX-3/def/ESP/, 2010; A. Ivanković Tamamović,, The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 160.

¹⁵³ Di Carmen Salcedo Belyran, 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', DS n. 4 (2016), p. 13.

¹⁵⁴ See in this regard also article 26 and 27 of the Vienna Convention on the Law of Treaties.

European Committee of Social Rights should at least be equally given the same value in the EU legal order.¹⁵⁵ At the moment, the EU Charter requires the case law of the ECtHR to be taken into account¹⁵⁶, while no analogous obligation exists to refer to the ECSR materials.¹⁵⁷ Nonetheless, judgments and conclusions of the ECSR are important legal sources that give meaning to the provisions laid down in the Social Charter.¹⁵⁸ The fact that the legal status of CoE Social Charter has not been aligned with the European Convention of Human Rights poses a limitation to social rights protection in the EU legal order.

3.1. Application of social rights instruments at national level in crisis context: the EU Charter

When the EU Charter is referred to in the legislative process or by the national judiciary, its use often remains superficial. In fact, research from the Fundamental Rights Agency shows that national courts that have invoked the Charter provisions did so without articulating a reasoned argument regarding why the Charter was applied in the specific circumstances of the case at hand.¹⁵⁹ In Portugal for example, numerous cases have been decided in which private legal entities made an appeal to the EU Charter in order to defend the fundamental rights of individual persons inside the legal entity during the financial crisis.¹⁶⁰ In all these cases, however, the Charter was not held to be applicable since the disputed acts fell outside the scope of EU law within the meaning of Article 51 of the EU Charter. Survey results as conducted within the context of the ‘CFR Project’¹⁶¹ illustrate that for Portugal for example, only 31,2% of judges, 17,3% of prosecutors and 28,8% of the lawyers stated they had faced the application of the Charter. Among the judicial actors who applied the EU Charter or questioned its applicability (32,8%), the main difficulties identified were when and how to make the rights guaranteed by the Charter effective as opposed to national law or legal practice and how to guarantee the achievement of the rights provided for in the EU Charter in practice.¹⁶² In the Netherlands too, data collected within the CFR Project finds that in the past three years, relatively little reference has been made to the EU Charter in the area of social security, and only in three cases with a link to employment law.¹⁶³

The latter analysis is in line with the European Union Agency for Fundamental Rights (FRA) report of 2018, which concludes that in most EU Member States, judiciaries make rather limited use of the EU Charter

¹⁵⁵ B. Hepple, ‘The EU Charter of Fundamental Rights’ (2001) See also D. Ashiagbor, ‘Economic and social rights in the European Charter of fundamental rights’, *European Human Rights Law Review* 1 (2004), p. 65; see also S.A. de Vries, (2013). ‘Balancing fundamental rights with economic freedoms according to the European court of Justice’, *Utrecht Law Review* 1.

¹⁵⁶ Note that the preamble of the EU Charter refers to both the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. See also Article 52(3) of the Charter stipulates the following: in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

¹⁵⁷ S. Peers et al., *The EU Charter of Fundamental Rights: a commentary*, Bloomsbury 2014, p. 893.

¹⁵⁸ S. Peers et al., *The EU Charter of Fundamental Rights: a commentary*, Bloomsbury 2014, p. 893.

¹⁵⁹ FRA, Fundamental Rights Report 2018, available at <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018> [accessed on 1 October 2018], p. 46.

¹⁶⁰ See the cases Acórdão no. 591/2016, Acórdão no. 86/2017 and Acórdão no. 266/2017 of the Portuguese Constitutional Court.

¹⁶¹ CFR Project) (JUST/2015/JTRA/AG/EJTR/8707, funded by Directorate-General for Justice of the European Commission, and coordinated by the Centre for Social Studies of the University of Coimbra (Portugal).

¹⁶² Some of the results presented in this section are discussed in detail in the article “Personal Scope of Fundamental Rights in Europe” to be published still in 2018 by the *Utrecht Law Review*, whose authors are Manon Julicher, Marina Henriques, Aina Amat Blai & Pasquale Policastro.

¹⁶³ Some of the results presented in this section are discussed in detail in the article “Personal Scope of Fundamental Rights in Europe” to be published still in 2018 by the *Utrecht Law Review*, whose authors are Manon Julicher, Marina Henriques, Aina Amat Blai & Pasquale Policastro.

ETHOS

at national level.¹⁶⁴ Moreover, just as in previous crisis years, many decisions by national courts that used the Charter lacked a reasoned argument about why this instrument was applied in the specific circumstances of the case. More awareness – e.g. through workshops for judges, campaigns – could contribute to increased awareness and more consistent application of the EU Charter at national level.¹⁶⁵

3.2. Application of the European Social Charter at national level

The European Committee of Social Rights examines the non-accepted provisions of the Social Charter by State parties every five years. Within the ETHOS context, Portugal and the Netherlands are the only State parties that have accepted (almost) all provisions of the revised Social Charter in their national legal framework. Unlike Portugal, which has accepted all the provisions, the Netherlands refrained from accepting Article 19.12, which obliges the parties to undertake the promotion and facilitation, as far as practicable, of the teaching of the migrant worker's mother tongue to the children of the migrant worker.¹⁶⁶ Despite the ratification of the Social Charter by 43 States, 15 States that are party to this document have not ratified the Additional Protocol that provides for a system of collective complaints by the ECSR including, for ETHOS relevance Hungary, the United Kingdom, Austria and Turkey. Portugal and the Netherlands did ratify this Protocol.¹⁶⁷ Since the Protocol is one of the measures that aims to improve the effective enforcement of the social rights contained in the Social Charter, it is unfortunate that so many States have not ratified it. In its conclusions of 2013, the ECSR has found that 180 violations of the European Social Charter took place as a result of austerity measures taken during the crisis. The increase in violations of the Social Charter provisions is linked to inadequate levels of social benefits that disproportionately target the poor, the unemployed, the elderly and the sick and to unequal treatment of migrants. The latter has been justified to combat so-called "benefit tourism".¹⁶⁸ Several countries have denied access to social welfare to migrant workers during the economic crisis. In some countries, an appeal against such a decision before an independent body was not possible. Greece stands out in this respect by providing insufficient worker's safety protection, social benefits, and care support for the poor.¹⁶⁹

The Social Charter has also been effective in guaranteeing the rights of people living in poverty in France. In January 2006, the NGO ATD Fourth World filed a complaint against France for not providing access to social housing for families living in poverty, or only granting it after a longer period of time. After numerous reviews and hearings of the ECSR, it finally concluded – through a collective complaint procedure – that France was acting in breach of Article 13 of the Social Charter respecting the right to housing, and Article 30 on the protection against poverty. The collective complaint procedure led to the adoption of the 2007 law on the enforceable right to housing in France.¹⁷⁰

As things stand, numerous social rights violations still take place in states that are party to the European Social Charter. Most recently, trade unions in Turkey referred to the Social Charter to criticize the violation of the workers' right to organize, especially during the instalment of the state of emergency by the

¹⁶⁴ FRA, Fundamental Rights Report 2018, available at <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018> [accessed on 1 October 2018], p. 4.

¹⁶⁵ D. Ashiagbor, 'Economic and social rights in the European Charter of fundamental rights', *European Human Rights Law Review* 1 (2004), p. 72.

¹⁶⁶ See for the full text of the revised Charter: <https://rm.coe.int/168007cf93>.

¹⁶⁷ See for a full overview of this: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=F3KSQtYr.

¹⁶⁸ The Economic Crisis Undermines Social Rights, available at <https://bim.lbg.ac.at/en/story/news/economic-crisis-undermines-social-rights>.

¹⁶⁹ The Economic Crisis Undermines Social Rights, available at <https://bim.lbg.ac.at/en/story/news/economic-crisis-undermines-social-rights>.

¹⁷⁰ No. 33/2006 International Movement ATD Fourth World v. France.

ETHOS

Turkish Government.¹⁷¹ In this context, the UN High Commissioner for Human Rights, Michelle Bachelet, has argued:

“The numbers are just staggering: nearly 160,000 people arrested during an 18-month state of emergency; 152,000 civil servants dismissed, many totally arbitrarily; teachers, judges and lawyers dismissed or prosecuted; journalists arrested, media outlets shut down and websites blocked – clearly the successive states of emergency declared in Turkey have been used to severely and arbitrarily curtail the human rights of a very large number of people.”¹⁷²

Despite the fact that the Turkish government has lifted the state of emergency in July 2018, the country is still facing economic and political trouble.¹⁷³ The latest factsheet on Turkey’s progress on the implementation of the European Social Charter indicates that the country does not effectively implement its provisions, in particular concerning labour rights and anti-discrimination on the labour market.¹⁷⁴ As things stand, dismissed workers do not enjoy a right to appeal and are blacklisted from other jobs. In 2017 alone, Turkey prohibited five strikes under the state of emergency.¹⁷⁵

4. Future challenges for social rights protection in times of crisis

The above-mentioned sections have illustrated that the economic crisis in Europe and the national austerity measures taken in response to it have negatively affected respect for fundamental rights, in particular for citizens’ social and economic rights. Particularly vulnerable groups such as the elderly, youth, poor, persons with disabilities, citizens with a refugee status have been undermined in effectively enjoying their fundamental rights. In this context, the Secretary General of the CoE, Thorbjørn Jagland, has urged Europe to effectively monitor these rights “with particular attention to avoiding dangerous repercussions on the social cohesion and democratic security of our societies.”¹⁷⁶ As was illustrated, the EU Charter applies when ‘a situation falls within the scope of EU law’. An important question is how this instrument could be utilized in future crises scenarios when social rights might be jeopardized. The following sections will focus on the latter issue, first of all by providing an overview of the EU Charter’s application in the EU legal order in circumstances in which social rights need to be balanced with economic freedoms. Thereafter, by pinpointing the limits of the EU Charter when it comes to effectuating the social rights enshrined therein in future crises times. Another important question in this context is the EU’s potential accession to the European Social Charter.

¹⁷¹ See to this extent: <https://www.etuc.org/en/document/eu-turkey-summit-etuc-ituc-joint-letter-presidents-borissov-tusk-and-juncker>. In order to encourage States parties to progressively accept all the Charter’s provisions, Article 22 of the 1961 Social Charter stipulates that States concerned shall send to the Secretary General of the Council of Europe, at appropriate intervals and as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they did not accept at the time of their ratification or approval or in a subsequent notification.

¹⁷² See to this extent: <https://www.etuc.org/en/document/eu-turkey-summit-etuc-ituc-joint-letter-presidents-borissov-tusk-and-juncker>.

¹⁷³ H. Elyatt, ‘Turkey lifts state of emergency, but nothing much has changed, analysts warn’, available at <https://www.cnn.com/2018/07/19/turkey-lifts-state-of-emergency-but-nothing-much-has-changed-analysts.html> [accessed on 15 October 2018].

¹⁷⁴ See to this extent: <https://www.etuc.org/en/document/eu-turkey-summit-etuc-ituc-joint-letter-presidents-borissov-tusk-and-juncker>.

¹⁷⁵ Ibid.

¹⁷⁶ CoE, ‘Legal protection and effective enforcement of social rights in the Council of Europe member States’, 2018, available at https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcPOwda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false [accessed on 24 October 2018].

4.1. The tension between economic freedoms and fundamental social rights in the EU legal order

An important area in which the EU Charter will likely be of significant value in the context of (future) financial crises, is the area in which a balance needs to be struck between economic freedoms and social rights.¹⁷⁷ In these cases, the exercise of a social right can constitute an interference with the freedoms guaranteed under EU primary law. In such circumstances, proportionality of the national measure becomes key to assessing the legality of such an action. Such an assessment is often conducted by the CJEU and in some cases by national courts. In principle, such a proportionality tests consist of three elements: 1) there should be a legitimate aim and the national measure at hand should be suitable to attain that objective; 2) no less restrictive measures to achieve that aim should be available; 3) *stricto sensu* application of proportionality, which entails a balancing act between the national interests on the one hand and the European ones on the other hand.¹⁷⁸ The following sections will shed a light on how the CJEU has dealt with cases in which fundamental social rights needed to be balanced with economic freedoms and what this means in a crisis context.

In earlier cases, in particular *Schmidberger* and *Omega*, the Court was willing to equally treat fundamental rights (in particular civil rights and human dignity) with economic freedoms (the freedom of goods and the freedom of services).¹⁷⁹ In the subsequent cases *Viking* and *Laval*, which both dealt with the right to strike and a clash of this right with a fundamental freedom, the weakness of social rights protection in the EU legal order became more visible.¹⁸⁰ *Viking* concerned a dispute between an International Transport Workers' Federation and the Viking ferry company. The latter attempted to de-flag from Finland and to establish a flag of convenience in Estonia, with the aim of paying lower wages. As a consequence of this action, the Workers' Federation sent a circular that requested other unions in Member States not to enter into business with the Viking Company.¹⁸¹ Additionally, the Finnish Seamen's Union announced a planned strike.¹⁸² *Viking* sent a preliminary reference question to the British courts claiming that the collective action was violating the fundamental freedom of the company, in particular the freedom of establishment as laid down in Article 49 TFEU.¹⁸³ In this case again, a social right (the right to strike) had to be balanced against a fundamental freedom as enshrined in the Treaty.

In its assessment, the CJEU first of all referred to a wide range of international instruments such as the European Social Charter, ILO Convention No. 87 concerning freedom of association and protection of the right to organize and the EU Charter to emphasize that the right to strike was a fundamental right.¹⁸⁴ Against this background, the Court argued that the right to strike and to take collective action constitutes a fundamental right, which forms an integral part of the general principles of Community law. At the same time it also argued that the exercise of that right can be subject to certain restrictions.¹⁸⁵ The Court specifically referred to Article 28 of the Charter, which reaffirms that fundamental rights are to be protected

¹⁷⁷ J. Fraszky, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 488.

¹⁷⁸ S.A. de Vries, (2013). 'Balancing fundamental rights with economic freedoms according to the European court of Justice', *Utrecht Law Review* 1, pp. 173-173.

¹⁷⁹ CJEU Case C-112/00 *Schmidberger Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004], ECLI:EU:C:2004:614.

¹⁸⁰ R. O'Gormann, (2011). "The Weakness of Social Rights Protection", *German Law Journal*, p. 1839.

¹⁸¹ Case 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, pars. 11-13 & 17.

¹⁸² *Ibid.*, pars. 17 & 19.

¹⁸³ Case 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, par. 17 & 19.

¹⁸⁴ *Ibid.*, par. 43.

¹⁸⁵ *Ibid.*, par. 44.

ETHOS

in accordance with Community law, national law and practices.¹⁸⁶ One could draw from the foregoing that fundamental rights can be restricted on the basis of Community law and national laws and practices.¹⁸⁷ The court referred to the cases *Schmidberger* and *Omega*, in which it clarified that the protection of fundamental rights is a legitimate interest, which could justify a restriction of the obligations imposed by Union law, even under a fundamental freedom such as the free movement of goods.¹⁸⁸ This exercise must however be “reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality”.¹⁸⁹

The *Viking* judgment demonstrates that the Court applies a nuanced case-by-case analysis when a fair balancing act needs to be conducted between a fundamental right and a fundamental freedom within the EU legal order. The conclusion can be drawn that the type of fundamental right at stake seems to be of particular importance in that analysis. As argued by O’Gorman, both cases clearly illustrate that social rights do not enjoy the same degree of protection as civil and political rights, which leads to difficulties in practice.¹⁹⁰ In fact, at the time *Viking* was judged upon, EU law did not expressly mention social rights within the treaties themselves, nor did it include a definitive provision that allowed the use of general principles as a source within documents in which social rights could be found.¹⁹¹ The consequence of this can be illustrated by the *Laval* judgment. This case concerned a dispute between Swedish trade unions and a Latvian company. The Swedish trade union wanted to force Laval to enter into negotiations on the pay of construction site workers and to sign a collective agreement covering these workers. However, Laval refused and the trade union called upon the solidarity of other Swedish sectoral trade unions and a blockade of the construction site ensued. As a result, Laval gave up the contract. In addressing on the one hand the right to strike and take collective action and on the other hand the fundamental freedom to provide services as protected under Article 49 TFEU, the Court once again repeated – as it did in *Viking* – that fundamental rights form an integral part of general principles of Union law, but are also subject to restriction.¹⁹² A difference between the two cases is the Court’s approach to the proportionality test: in *Viking*, the CJEU left it to the national court to apply the proportionality test, whereas in *Laval* the Court itself conducted the test. The CJEU argued in particular:

“Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital *must be balanced* against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.”¹⁹³

The Court carried out a proportionality test to assess whether the right to strike of the trade unions impaired the company’s right to provide services. In this case, the outcome was unfavourable to the trade unions. The

¹⁸⁶ Case 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, par. 44.

¹⁸⁷ R. O’Gorman, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1840.

¹⁸⁸ Case 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, par. 45.

¹⁸⁹ Case 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, par. 46.

¹⁹⁰ R. O’Gorman, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1841.

¹⁹¹ *Ibid.*, p. 1942.

¹⁹² Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809,

¹⁹³ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, par. 105.

ETHOS

collective action in the form of a blockade could not be “justified in the light of the public interest” and was a disproportionate measure to protect workers.¹⁹⁴ Despite the fact that the CJEU referred to various international documents, like it did in *Schmidberger*, such as the CoE Social Charter, Convention No. 87 and the Community Charter of the Fundamental Social Rights of Workers, these instruments were not taken into account when the proportionality test was conducted.¹⁹⁵ Instead, the CJEU relied on values that are laid down in the Treaties or linked to the Treaties on the basis of Article 6(2) TEU, resulting in pitfalls for the adequate protection of social rights.¹⁹⁶

4.1.1. Reactions after *Viking* and *Laval*

In its efforts to deal with the issues that arose after *Viking* and *Laval*, the European Commission drafted a proposal under the heading Monti II Regulation ‘on the exercise of the right to take collective action within the context of the economic freedom of establishment and the freedom to provide services’ (Article 56 TFEU).¹⁹⁷ The aim of the proposal was to ensure equal protection and respect for fundamental economic freedoms on the one hand and social rights on the other hand.¹⁹⁸ Nevertheless, the proposal was still being criticized for not providing adequate protection for social rights as opposed to economic freedoms, and violating the principle of subsidiarity under EU law.¹⁹⁹ The Commission therefore had to withdraw the proposal in September 2012, after 12 Member States gave reasoned opinions criticizing the draft Regulation for breaching the subsidiarity principle as laid down in EU primary law (Article 5(3) TFEU).²⁰⁰

Another important case to mention in this context is the *Rüffert* case of 2008, which concerned legislation from Lower Saxony that applied to public contracts, with the objective to prevent distortions of competition potentially resulting from the use of cheap labour, by limiting the right to contract to those undertakings prepared to pay the wages laid down in the relevant sectoral collective agreement. The CJEU argued in this context that such an action would be in breach with the freedom to provide cross-border services as interpreted in the light of Article 56 TFEU. The fact that private sector workers could not benefit from the Lower Saxony law meant that it undermined the objective, i.e. the protection of workers or guaranteeing the protection of independence in the organisation of working life by trade unions.²⁰¹

Soon after the *Rüffert* judgment, the Court was again confronted with a similar case concerning policy measures to counter unfair competition in *Commission v Luxembourg*.²⁰² It argued in particular that a Member State could not define which national public policy provisions were so important that they should apply to national and foreign service providers equally, to combat such competition.²⁰³ This ruling, together

¹⁹⁴ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, par. 110.

¹⁹⁵ *Ibid.*, par. 90.

¹⁹⁶ R. O’Gormann, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1840.

¹⁹⁷ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services /* COM/2012/0130 final - 2012/0064 (APP) */.

¹⁹⁸ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 508.

¹⁹⁹ Article 5(3) TEU stipulates that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

²⁰⁰ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 509.

²⁰¹ CJEU Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR O 1989. See also S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 509.

²⁰² CJEU Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

²⁰³ CJEU Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

ETHOS

with *Viking*, *Laval*, and *Rüffert*, represents a significant development in relation to the exercise of conflicting rights. In this context Douglas-Scott and Hatzis argue that these cases all have the potential to weaken the rights of trade unions and workers in the European Union.²⁰⁴

As already stressed before, the EU Charter – the EU’s own human rights *acquis* since 7 December 2000 – has been given the same legal status as primary EU law through the Lisbon Treaty (Article 6(1) TEU). Its solidarity chapter contains a list of social and worker’s rights. The question arises whether the EU Charter can protect citizens in effectuating their social rights when these are being infringed as a result of austerity measures in times of crisis.²⁰⁵ As Frascyk notes, several cases have already indicated that the EU Charter could be applied to remedy errors that arise out of a balancing act between competing economic freedoms and social rights.²⁰⁶ In the opinion for the *Occupational Pensions* judgment, Advocate General Trstenjak argued:

“The approach adopted in *Viking Line* and *Laval un Partneri*, according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.”²⁰⁷

A more recent ruling, which is relevant to mention in the austerity context and in which the Court adopted a more thorough examination towards social rights protection as compared to *Viking* is the *AGET* case.²⁰⁸ This case concerned a measure of the Greek government on an authorization procedure to protect the Greek labour force from significant austerity effects. The company in question, AGET Iraklis, argued that the national rule was in breach of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies and Articles 49 (freedom of establishment) and 63 (free movement of capital) of the TFEU. Such a national measure moreover triggered Article 16 of the EU Charter, which provides for the right to conduct a business.²⁰⁹ The Court argued that the Greek measure was not compatible with Union law. The Court started with stipulating that in principle such measures could be lawful under Union law in so far as they pursue the Union’s social objectives, including promoting employment. Nevertheless, it argued that the specific characteristics of the national measure “were formulated in very general and imprecise terms”.²¹⁰ It continued that:

“[I]n the absence of details of the particular circumstances in which the power in question [might] be exercised, the employers concerned [did] not know in what specific objective circumstances that power [might] be applied, as the situations allowing its exercise [were] potentially numerous, undetermined and indeterminable and [left] the authority concerned a broad discretion that [was] difficult to review. Such criteria which [were] not precise and [were] not therefore founded on objective, verifiable conditions [went] beyond what [was] necessary in order to attain the objectives stated and [could not] therefore satisfy the requirements of the principle of proportionality.”²¹¹

²⁰⁴ S. Douglas-Scott and N. Hatzis, ‘EU law and social rights’, in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 509.

²⁰⁵ J. Frascyk, ‘EU fundamental rights and the financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 488.

²⁰⁶ *Ibid.*

²⁰⁷ Opinion of AG Trstenjak in Case C-271/08 *Commission v Germany (Occupational Pensions)* [2010] ECR I-07091, par. 183.

²⁰⁸ CJEU Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

²⁰⁹ CJEU Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

²¹⁰ *Ibid.*, par. 99.

²¹¹ *Ibid.*, par. 100.

What is clear and to be welcomed from a social rights perspective is the fact that the Court adopted a more thorough examination in *AGET* than it did in *Viking and Laval* and thereby handed down a very measured judgment.²¹² However, the CJEU is not in a position to negotiate on behalf of Greece and the EU institutions in this context since its task is solely to interpret and rule on the validity of Union law. The initiative do so is in the hands of Greece and the EU institutions, the latter being responsible for striking a fair balance between the funding for the Greek economy while also guaranteeing respect for the rights and interests of workers.²¹³

As argued by Barnard, both *Viking* and *Laval* are striking in the sense that the CJEU has conducted a balancing act between economic freedoms and social rights through justifications and a strict proportionality test.²¹⁴ Barnard argues in this context that this constitutes a balancing act in name, but not in substance. It is clear that when the right to collective action constitutes a restriction and thereby infringes upon EU law, social interests are deadlocked. In the context of the crisis, the Court's approach is especially interesting in circumstances in which it will test national measures that implement austerity in future crises times – e.g. in an annulment context – and which have a link to the European Stability Mechanism (ESM) that trigger the EU Charter application.²¹⁵ Two roads are open in this respect according to Barnard. First of all, the CJEU could balance the conflicting interests (i.e. social rights versus economic freedoms) in a substantive way.²¹⁶ For example, in the case *Palacios de la Villa* the CJEU found that a national measure, which removed older workers from the labour market, was compatible with Union law as it had a legitimate aim, i.e. to facilitate the entry of younger workers within the context of intergenerational fairness.²¹⁷ It argued in particular that in adhering to legitimate policy aims, Member States enjoy a broad discretion as to the balance of different interests and the measures adopted, provided that the measures are not "inappropriate and unnecessary".²¹⁸ Secondly, Barnard argues that the Court could conduct a more procedural approach.²¹⁹ An example of this can be found in the *Volker und Schecke* case, which concerned a conflict between the transparency of public spending on the one hand and the right to privacy and protection of personal data (as protected in Article 7 and 8 of the EU Charter) of natural persons who receive money from Union's agricultural funds on the other hand.²²⁰ Through a threefold examination of violation, justifications and proportionality, the Court ruled in favour of the privacy of the litigants.²²¹ When applying this case to the crisis context and the national austerity measures, Barnard argues that the Court would then assess whether the parties concerned (in the crisis context the Member States that engaged in a Memorandum of Understanding) had entered into discourse with the ones that have been affected by these austerity measures and whether less restrictive alternatives were available in the case at hand.²²² This would amount

²¹² J. Fraszzyk, 'EU fundamental rights and the financial crisis' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 489.

²¹³ M. Markakis, 'Case C-201/15 AGET Iraklis: Can governments control mass layoffs by employers? Economic freedoms vs labour rights', 2017, available at <http://eulawanalysis.blogspot.com/2017/01/case-c-20115-aget-iraklis-can.html> [accessed on 12 November 2018].

²¹⁴ C. Barnard, 'The protection of fundamental rights in Europe after Lisbon: a question of conflict of interests' in S. De Vries, U. Bernitz and S. Weatherhill (eds) *The protection of fundamental rights in the EU after Lisbon* (Oxford: Hart Publishing 2013), p. 51.

²¹⁵ *Ibid.*

²¹⁶ C. Barnard, (2013), "The Charter, the Court – and the crisis", *Legal Studies Research Paper* No 18/2013, section 4.

²¹⁷ CJEU Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531.

²¹⁸ CJEU Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, par. 77.

²¹⁹ C. Barnard, (2013), "The Charter, the Court – and the crisis", *Legal Studies Research Paper* No 18/2013, section 4. See also J. Fraszzyk, 'EU fundamental rights and the financial crisis' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 490.

²²⁰ Joined Cases C-92/09 and C-93/09 *Volker und Schecke GbR* ECLI:EU:C:2010:662.

²²¹ *Ibid.*

²²² C. Barnard, (2013), "The Charter, the Court – and the crisis", *Legal Studies Research Paper* No 18/2013, section 4.

to a so-called *ex ante* control of fundamental rights protection, which would also be in line with the principle of good administration as laid down in Article 41 of the EU Charter.²²³

4.2. Social rights protection and recent EU citizenship case law: *Dano* and *Chavez-Vilchez*

When it comes to the application of the EU Charter in the social domain, the Court had the opportunity in recent cases related to EU citizenship to refer to this document. The conditions under which EU nationals can claim non-contributory social benefits have for example always been a controversial issue in the EU. One primary example of a case in which the Court had to say something about social benefits is the *Dano* judgment. In this particular case, the Court had to answer whether economically inactive EU-citizens, residing in a Member State of which they are not a national, were entitled to social assistance, which is granted to nationals of that host Member State.²²⁴ Under the EU Citizenship Directive 2004/38 this obligation does not exist. However, the question that rose was whether Article 18 TFEU, which is a strongly formulated right granting protection against non-discrimination based on nationality, together with the EU Charter, could provide for such an obligation. With regard to the application of the EU Charter, the Court argued that it did not cover the situation of Ms Dano. The CJEU argued in particular that when the Member States lay down the conditions for the granting of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law. As a result, the EU Charter rights are not applicable in this domain.²²⁵

The outcome of this case has been criticized by various legal academics, arguing that the CJEU has wrongly denied the application of the EU Charter in this domain. Vonk for example questions how it can be maintained that the issue of granting social benefits to EU nationals is not a matter of applying EU law and subsequently the EU Charter. Once you have a social benefit scheme²²⁶, the question of under what conditions rights arising from such schemes must be provided for EU citizens cannot be considered as fully a national issue.²²⁷ What can be concluded from the *Dano* judgment is that the application of the EU Charter in the area of social security law is not easy and individuals will likely face obstacles in effectively enjoying their social rights under EU law. In fact, this case illustrates that when EU nationals become stranded in one Member State, the EU Charter will not offer any remedy for the claiming of any social assistance. Interestingly, the *Dano* judgment was handed down in the same week that the ESCR decided two cases concerning collective complaints procedures issued by NGOs against the Netherlands. These cases concerned the refusal of the Netherlands to grant shelter and emergency assistance to non-nationals without residence status²²⁸ and the practice of Dutch local councils that required a so-called local connection test before giving shelter to homeless persons.²²⁹ In this case, the ESCR clearly argued that the Netherlands violated several articles of the European Social Charter. Despite the fact that these latter cases show willingness of the ESCR to effectuate social rights of EU citizens, it also clarifies that EU citizens will have to rely on NGOs using the complaint procedure adopted by the CoE under the European Social Charter, instead of directly claiming their rights under EU law - in particular the EU Charter, which has its own solidarity chapter aiming to

²²³ J. Fraszky, 'EU fundamental rights and the financial crisis' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 490.

²²⁴ Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

²²⁵ Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

²²⁶ Note that already in 1958 the first social security regulation at EU level entered into force.

²²⁷ G. Vonk, 'EU freedom of movement: no protection for the stranded poor' (2014), available at <http://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/> [accessed on 22 October 2018].

²²⁸ Council of European Churches v. the Netherlands; No. 90/2013.

²²⁹ FEANTSA v. the Netherlands; No. 86/2013.

ETHOS

reinforce social rights of EU citizens.²³⁰

One could argue that the application of the EU Charter in cases related to fundamental social rights encompasses certain problems in which it is difficult to pinpoint why the Charter applies in one case and in another case this instrument is completely disregarded. This trend has also been visible in the most recent case concerning EU citizenship in relation to child allowance, *Chavez Vilchez*, which concerned the question of under which circumstances a minor, dependent EU citizen is forced to leave the territory of the EU if his/her third-country national parent is refused the right to reside in a Member State.²³¹ It is relevant that in all the cases, the third country nationals had applied for social assistance and/or child allowances, which were not granted to them by the Netherlands since they did not enjoy a legal residence permit - which is a precondition to enjoy certain social benefits in the Netherlands.²³² Different from its approach in other EU citizenship related cases, the CJEU explicitly included the right to family life and the best interests of the child – as laid down in the Charter under Article 24 – in its legal assessment of Article 20 TFEU (guaranteeing EU citizenship). Nevertheless, the Court did not clarify why the EU Charter applied to the circumstances at hand nor did it elaborate on why the assessment falls within the scope of Union law.²³³ It is therefore not always clear in which circumstances the CJEU is willing to apply the EU Charter in cases related to social rights, leading to legal uncertainty for citizens that want to effectuate them before court.²³⁴ A number of other limitations can be listed with regard to the (future) application of the EU Charter. The next sections will focus on these limitations, which can provide for certain obstacles to fully realize social justice in times of crisis.

4.3. Limitations in the application of the EU Charter

Despite the fact that the EU Charter became binding with the Lisbon Treaty, there are still important limitations when it comes to invoking the (social) rights laid down therein. These limitations have proven to be troublesome when citizens wanted to enforce their social rights that were jeopardized or seriously under threat, as a result of the austerity measures adopted during the crisis. First of all, as already explained above, Article 51(1) of the Charter stipulates, the rights of the Charter apply only to the Member States when they are implementing Union law. Moreover, Article 51(2) Charter stipulates that this instrument ‘does not extend the field of application of Union law.’ The CJEU played a pivotal role in broadening the scope of the EU Charter. Secondly, its Article 52 determines the scope of guaranteed rights. The latter sections will discuss the limitations of the EU Charter in two ways: first of all by examining the rights versus principles dichotomy that can lead to problems for litigants when invoking the rights enshrined therein before courts. Secondly, by looking at the possibilities of (horizontal) direct effect of the rights contained in the Charter, more in particular by focusing on the social and worker’s rights in the EU Charter’s solidarity chapter.

²³⁰ G. Vonk, ‘EU freedom of movement: no protection for the stranded poor’ (2014), available at <http://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/> [accessed on 22 October 2018].

²³¹ CJEU C-133/15 *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* (C-133/15) EU:C:2017:354; [2017].

²³² CJEU C-133/15 *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* (C-133/15) EU:C:2017:354; [2017].

²³³ H. van Eijken and P. Phoa, ‘The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?’ *European Law Review* [forthcoming]; see also H. Kroeze, H. (2017). *Chavez-Vilchez e.a. t. SVB Nederland – Belang van het kind staat centraal in de toepassing van Ruiz Zambrano*. SEW no. 11, p. 482-486.

²³⁴ In the latest case concerning EU citizenship and the EU Charter, the Court applied the same assessment as it did in *Chavez Vilchez*, thereby not answering why the Charter applied the circumstances at hand: CJEU Case 82/16 *K.A. and Others v Belgische Staat* ECLI:EU:C:2018:308.

4.3.1. Justiciability of social rights in the EU: rights vs. principles dichotomy within the EU Charter

The EU Charter includes a complicated distinction between so-called ‘rights’ and ‘principles’ as laid down therein. More specific, Article 52(5) of the Charter stipulates the following:

“[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”²³⁵

In other words, this refers to the idea that rights, which contain so called ‘principles’ within the context of Article 52(5) of the Charter cannot create directly enforceable rights for individuals that want to invoke them before Courts. Even more so is the fact that this provision does not explicitly refer to which rights can be regarded as ‘principles’ and which provisions can be seen so-called ‘principles’. An example can be found in Article 34 of the Charter, which stipulates the following:

“[t]he Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.”²³⁶

In such circumstances, it is important to assess whether there is EU law or policy in this field, since the principle shall then ‘be judicially cognisable only in the interpretation of such acts in the ruling on their legality’. The CJEU could play an important role in interpreting these principles. However, until now the Court has not taken the opportunity to answer whether Article 27 for example (i.e. workers’ right to information and consultation within the undertaking) is a right or a principle and to thereby give content to Article 52(5) of the Charter.²³⁷ In the *AMS* case the AG, unlike the Court, addressed the content of Article 27 of the Charter. The AG thereby held that in the Charter as well as in national constitutions, claims of the nature of social rights are typically designated as ‘social rights’ to indicate that no individual subjective rights can be derived from them, but they only function via the implementation or enforcement through the State. They can then be regarded as ‘rights’ in terms of their content and nature, but ‘principles’ in terms of their enforcement.²³⁸

Article 27 provides for a typical social right for workers, which is also laid down in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. This is the first provision listed in the so-called Solidarity title of the EU Charter. Before the Charter was adopted, this social right was already incorporated in EU secondary legislation such as Directive 2002/14.²³⁹ The AG argued that Article 27 should be given the status of a principle, primarily because the provision seemed to contain in its structure a mandate for the public powers to enforce the right.²⁴⁰ According to the AG, the scope of the right granted under Article 27 is rather limited, as information and consultation of workers is to be granted ‘in good times in the cases and under the conditions provided for by Union law and national laws and

²³⁵ EU Charter of Fundamental Rights, available at <http://fra.europa.eu/en/charterpedia/title/vii-general-provisions> [accessed on 30 July 2018].

²³⁶ EU Charter of Fundamental Rights, available at <http://fra.europa.eu/en/charterpedia/title/vii-general-provisions> [accessed on 30 July 2018].

²³⁷ See CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2.

²³⁸ Advocate General Opinion in CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, par. 45.

²³⁹ *Ibid.*, par. 52.

²⁴⁰ *Ibid.*, par. 53.

ETHOS

practices'.²⁴¹ Without further concretizing the modalities, this provision asks for further implementation and a mandate of public actors and merely sets out the goals to be achieved.²⁴² In addition, the AG argued that the rights under the title Solidarity also contain mainly rights typically seen as 'social rights', which supports reading Article 27 as a principle.²⁴³ Mr. Laboubi and the trade union could hence not derive a subjective right from the principle enshrined in Article 27 of the EU Charter to be invoked in Court.

From the foregoing it can be concluded that most of the social provisions established in the EU Charter's Solidarity Title are treated as embodying 'principles' and not self-standing 'rights' meaning it is questionable whether they can be invoked before courts. The CJEU appears to define the requirements under which they can be justiciable quite restrictively in its case law, which could lead to problems in combating (future) national austerity measures that infringe upon social rights.²⁴⁴

4.3.2. The question of horizontal direct effect of the Charter provisions in the social area

Another important point to make regarding the scope of the EU Charter is the issue of the horizontal application of the rights laid down in this instrument. To what extent do the rights contained in the Charter apply in horizontal relationships – i.e. between private parties? Within the context of the Eurozone crisis, this question is of particular importance within labour disputes. This horizontal/vertical distinction can have important effects in the litigation process.²⁴⁵ Full horizontal direct effect of Charter rights can have significant consequences. Take for example the right to property in a private contractual dispute between enterprises. The EU Charter does have provisions that trigger the application of horizontal direct effect. A good example of this is Article 23, which lays down the principle of equality between men and women 'in all areas'.²⁴⁶ However, not all provisions in the Charter enjoy horizontal effect.

It is often the CJEU that decides which provisions within EU primary law, including the EU Charter, can enjoy full horizontal direct effect. In the *Association de Médiation Sociale (AMS)* case for example, which concerned the question of potential horizontal effect of the workers' right to information and consultation enshrined in Article 27 of the EU Charter, the CJEU argued that this provision does not have horizontal direct effect, meaning that it cannot be invoked in labour-related proceedings between private parties. It argued in particular that it is "clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law".²⁴⁷ However, the Court, unlike the Advocate General, did not take the opportunity to answer whether Article 27 is a right or a principle and to thereby give content to Article 52(5) of the Charter.²⁴⁸ In any case, it can be argued that the argument that the Charter *never* applies to private parties since Article 51 of the Charter clearly stipulates that the rights in this document only apply to EU institutions and other EU bodies, and Member States when they are 'implementing Union law' (and thus not to private parties), has been rejected by the Court.²⁴⁹ As

²⁴¹ Advocate General Opinion in CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, par. 53.

²⁴² *Ibid.*, par. 54.

²⁴³ CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, par. 55.

²⁴⁴ O. de Schutter 2016, 'The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights', Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 March 2018], p. 17.

²⁴⁵ J. Fraszzyk, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 480.

²⁴⁶ J. Fraszzyk, 'EU fundamental rights and the Charter' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 480.

²⁴⁷ CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, par. 45.

²⁴⁸ *Ibid.*

²⁴⁹ S. Peers, 'When does the EU Charter of Rights apply to private parties', 2014, available at <http://eulawanalysis.blogspot.com/2014/01/when-does-eu-charter-of-rights-apply-to.html> [accessed on 31 October 2018].

ETHOS

argued by Peers, this can be regarded as an improvement compared to the earlier *Dominguez* judgment, in which the Court refrained itself from addressing any of these issues at all.²⁵⁰

Unlike the *AMS case*, in *Küçükdeveci* the Court took a different road in assessing the horizontal direct effect of the EU Charter, building on its prior judgment in *Mangold*.²⁵¹ In *Küçükdeveci* the CJEU held that non-discrimination on the basis of age, as a general principle of EU law can enjoy horizontal direct effect, also in situations in which EU secondary legislation such as directives are incapable of having such an effect. In this case, the CJEU provided strong hints that Charter principles that embody the general principle of non-discrimination on age can have horizontal direct effect.²⁵² The Court argued that, unlike Article 27 of the Charter, the principle of non-discrimination on grounds of age laid down in the Charter under Article 21 “is sufficient in itself to confer on individuals an individual right which they may invoke as such.”²⁵³ This finding thereby differentiates the *Küçükdeveci* judgment from the *AMS case*.²⁵⁴

In its most recent case *Bauer et al.*, the CJEU took a new stance on horizontal direct effect of the EU Charter in the field of social rights.²⁵⁵ This case concerned a private dispute between Mrs Maria Elisabeth Bauer and Mrs Martina Broßonn and their deceased husbands who were employed by the city of Wuppertal (Germany) and Mr Volker Willmeroth. The question of concern was whether all workers are entitled to at least four weeks' paid annual leave, which may be replaced by an allowance in lieu only in the event of the employee's death. Since the city of Wuppertal and Mr Willmeroth had refused to pay that allowance, Mrs Bauer and Mrs Broßonn applied to the German labour courts, that sent preliminary reference questions to the CJEU. The CJEU argued in favour of the plaintiffs, thereby confirming that under EU law, a worker's right to paid annual leave does not lapse upon his death. What is particularly interesting is the CJEU's approach to the application of the EU Charter in a private dispute like the case at hand. The Court argued that Article 31(2) of the Charter could be applied in disputes between individuals. The interaction between Directive 2003/88 ‘concerning certain aspects of the organisation of working time’ and Article 31(2) of the EU Charter produces that result.²⁵⁶ The Court thus allowed setting aside domestic norms like those at issue that were contrary to Article 31(2) of the EU Charter in proceedings between private parties.²⁵⁷ The Court argued in particular regarding the scope of the EU Charter the following:

“With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where

²⁵⁰ Ibid. See also C-282/10 *Dominguez* ECLI:EU:C:2012:33

²⁵¹ CJEU Case C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709 . In the *Mangold* case, the CJEU held that discrimination on the basis of age concerned a general principle of Union law. Since the deadline for the implementation of the Directive (2000/78) did not expire yet, the Directive could not be invoked to bring the case in the scope of Union law. To solve this, the court relied on the fact that the national legislation at issue was implementing another directive to bring the matter in the scope of Union law.

²⁵² CJEU Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21.

²⁵³ See CJEU Case C-176/12 *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, par. 47.

²⁵⁴ Note that the CJEU has also found that EU law provisions laid down in primary law are capable of having full horizontal direct. For example, in *Angonese*, which concerned the free movement of workers, the Court argued that the economic fundamental right to free movement as laid down in article 45 TFEU has full horizontal direct effect in discrimination cases. See CJEU Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECLI:EU:C:2000:296, par. 32.

²⁵⁵ CJEU Case C- 569/16 en C- 570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871.

²⁵⁶ D. Sarmiento, ‘Sharpening the teeth of EU Social fundamental rights,’ 8 November 2018 available at <https://despiteourdifferencesblog.wordpress.com> [accessed on 15 November 2018].

²⁵⁷ CJEU Case C- 569/16 en C- 570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871, par. 43.

appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.”²⁵⁸

The latter ruling thus confirms that as regards the social right to paid annual leave, the EU Charter may be relied upon in a dispute between two private persons. This is quite an achievement, given the background and fragile position of social rights in the EU legal order. In fact, *Bauer* suggest a broader receptiveness of the CJEU to readdress earlier case law since the Court seems to reverse its restrictive approach in *AMS* regarding the application of social rights in private disputes and thereby reiterates the importance that European law places on a worker’s right to paid annual leave. This ruling should therefore be applauded as it takes EU social rights protection to a new and higher level and could provide for solutions in future crises scenarios that place social rights in jeopardy.

Having said that, it becomes more difficult when we look at social rights that are formulated as principles in the EU Charter, which - as already stressed above - cannot create self-standing rights for individuals. Since the Solidarity Chapter contains many principles, it becomes highly difficult for individuals to effectuate their social rights under the EU Charter before courts, with the above-discussed *AMS* ruling proving this finding.

4.4. EU accession to the European Social Charter

Another important future challenge for the EU in the social domain is its possible accession to the CoE Social Charter. The legal basis for such an accession is laid down in Article 216 (1) TFEU.²⁵⁹ The European Parliament has already argued in 2015 that “the EU’s accession to the European Charter is needed to resolve the conflicts stemming from the many incompatibilities between Community law and the international social rights obligations set out in the Social Charter to which all Member States are signed up individually.”²⁶⁰ The Parliament has requested the European Commission to prioritize accession of the EU to the European Social Charter on a number of occasions.²⁶¹ In response, the Commission argued that the European Social Charter would need to contain an accession clause before this process could be made possible.²⁶² Unlike the European Social Charter, the EU treaty did incorporate a legal basis for the EU’s accession to the ECHR, which is in fact formulated as an obligation under Article 6(2) TEU.²⁶³ However, such an accession to an international treaty is a task of legal complexity as can be illustrated by Opinion 2/13 of 18 December 2014. In the latter, the CJEU had already held that the draft Agreement for accession is incompatible with Union law.²⁶⁴ As argued by de Schutter, the concerns raised in opinion 2/13 would not apply to the European Social Charter due to the differences between the control mechanism of the ECHR and the collective complaints mechanism of the ECSR, or could be met by explicitly inserting suitable clauses in the agreement that provide for the accession of the EU to the European Social Charter.²⁶⁵ On the other hand, some scholars such as

²⁵⁸ CJEU Case C- 569/16 en C- 570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871, par. 87.

²⁵⁹ See to this extent: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E216>.

²⁶⁰ Parliamentary questions 23 September 2015, available at http://www.europarl.europa.eu/doceo/document//E-8-2015-013032_EN.html [accessed on 25 September 2018].

²⁶¹ *Ibid.*

²⁶² I Parliamentary questions 23 September 2015, available at http://www.europarl.europa.eu/doceo/document//E-8-2015-013032_EN.html [accessed on 25 September 2018].

²⁶³ J. Jacques, “The accession of the European Union to the European Convention of Human Rights and fundamental freedoms”, *Common market Law Review* 48: 9 (2011), p.1005.

²⁶⁴ J. Jacques, “The accession of the European Union to the European Convention of Human Rights and fundamental freedoms”, *Common market Law Review* 48: 9 (2011), p.1005.

²⁶⁵ O. de Schutter 2016, ‘The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights’, Directorate General for Internal Policies European Parliament, available at

ETHOS

Khaliq have argued that it is not likely that the EU will accede to the European Social Charter for several reasons. One argument is that the accession would expose the EU's protection of social rights to external scrutiny in a domain where its approach has not always been desirable.²⁶⁶ It was already illustrated through the cases *Viking*, *Laval*, *Rüffert* and *Luxembourg v Commission* that when the CJEU has to strike a balance between fundamental social rights and economic freedoms, it is the latter that often prevail.²⁶⁷ Secondly, the rulings of the CJEU would be subject to the views of the ECSR, which raises doubts to the principle of supremacy under EU primary law. Thirdly, some EU Member States such as the United Kingdom²⁶⁸, Poland and Germany have always been sceptical about social and economic rights, and would almost certainly argue against such an accession.²⁶⁹ Poland and the United Kingdom have for example strongly stressed the different nature of civil and political rights as opposed to social and economic rights. As things stand, these Member States are not likely to give consent to these accession talks, while any such initiative would need their consent.²⁷⁰ For the UK this will – presumably – not be relevant any longer after March 2019, when Brexit will most likely be finalised.

In addition, the director of the EU's Fundamental Rights Agency (FRA), Michael O'Flaherty, has recently invited the EU to consider accession to the European Social Charter.²⁷¹ He specifically argued that the Agency pays very close attention to the CoE legal standards and to the conclusions and decisions of the ECSR.²⁷² In that context, the FRA will continue to urge the EU for accession to the European Social Charter and the collective complaints procedure.²⁷³ The EU's accession to the Social Charter could moreover reinforce the implementation by Member States of the European Pillar of Social Rights as adopted in November 2017. The Agency will moreover continue to support the Turin process, which aims at strengthening and reconciling the Treaty system of the European Social Charter within the CoE and its relationship with EU law.²⁷⁴ One recommendation that O'Flaherty proposed in this regard is to make the data and reports of the Agency more accessible to the CoE, in order to have a better exchange of information and cooperation between these two institutions.²⁷⁵ Moreover, he argues that the implementation of the UN

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 March 2018], p. 6.

²⁶⁶ U. Khaliq, *The EU and the European Social Charter: never the twain shall meet?* Cambridge Yearbook of European Legal Studies 196 (2014) p. 182.

²⁶⁷ See in particular CJEU Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR O 1989; CJEU Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

²⁶⁸ Note that at the time of writing, it is expected that the UK will leave the EU on 29 March 2019. See for the text of the finalised draft agreement: https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en.

²⁶⁹ U. Khaliq, *The EU and the European Social Charter: never the twain shall meet?* Cambridge Yearbook of European Legal Studies 196 (2014) p. 182.

²⁷⁰ *Ibid.*

²⁷¹ See to this extent: https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcP0wda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false.

²⁷² Note that in the context of the euro crisis, some scholars have argued that the Agency has not been able to successfully continue its role to protect the fundamental rights of citizens. Hinarejos argues in this respect that the FRA has been 'sidelined' during the outbreak of the Eurozone crisis, while this is unfortunate, mainly due to "the magnitude of the political debate in this area and the valuable role that the Agency might have played or could still play in informing it." See A. Hinarejos, (2016). "A missed opportunity: the Fundamental Rights Agency and the Euro area Crisis", *European Law Journal* 1, p. 61.

²⁷³ See to this extent: https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcP0wda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false.

²⁷⁴ CoE, *The Turin Process of the European Social Charter*, 2017, available at <https://www.coe.int/en/web/turin-european-social-charter/turin-process> [accessed on 22 September 2018].

²⁷⁵ See to this extent: https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcP0wda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false.

Sustainable Development Goals could enhance fundamental social rights of European citizens.²⁷⁶ In any case, such an accession would show that the EU is equally committed to the well functioning of the internal market, *and* towards working on its social dimension, including the idea that civil, political, economic and social rights have the same equal status.

The next sections will give some recommendations on how to foster adequate protection of fundamental social rights for European citizens, including a brief discussion on the current public debate regarding the European principle of solidarity.

5.1. Evaluation and recommendations

The role of the European Court of Justice will be an important one in the protection of social rights at EU level. As illustrated, the CJEU has taken a very cautious approach to the application of the EU Charter in numerous national cases in which social rights were at stake as a result of austerity measures taken in the wake of the economic crisis.²⁷⁷ In its latest case concerning salary reduction measures taken by Portugal, the Court chose the path of relying on Article 19(1) TEU to assess the austerity measures at hand.²⁷⁸ In this case however, the Court concluded that the salary-reduction measures at issue could not be considered to impair the independence of the members of the Court of Auditors.²⁷⁹ Unfortunately the CJEU did not take the opportunity to rule on the scope of the EU Charter, in particular Article 47. When assessing social rights and their possible conflict with fundamental freedoms, the CJEU could also acknowledge more explicitly the role of the European Social Charter in the development of fundamental rights in the EU legal order. The question that arises here is whether it can be assured that the CJEU will engage with social rights, more than it did in the past.²⁸⁰ In light of this, O’Gorman argues that if the Court is serious about creating a EU citizenship that corresponds with the traditional form of citizenship, it should pay equal attention to political, civil and social rights, the latter rights thus forming an integral part of it.²⁸¹ As a guardian of the legality of acts as adopted by EU institutions and measures by Member States that appear to violate EU law, the Court can play an important role in its effort to reconcile the two levels of social rights protection at European level, i.e. the EU legal environment (in particular the EU Charter and the Treaties) and the international social rights obligations (in particular the CoE Social Charter, but also e.g. ILO Convention No. 87²⁸² and the Community Charter of the Fundamental Social Rights of Workers).²⁸³

In addition, the CoE Secretary General Thorbjørn Jagland has recommended that the provisions as laid down in the European Social Charter should be incorporated into the recently launched European Pillar of Social Rights, thereby serving as a common ‘benchmark’ for States in respecting these rights.²⁸⁴ This pillar should moreover recognize the importance of the collective complaints procedure of the ECSR for its contribution to the effective realization of social rights as contained in the Social Charter.²⁸⁵

²⁷⁶ Ibid. See also: <https://sustainabledevelopment.un.org/?menu=1300>.

²⁷⁷ CJEU Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756; see also CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

²⁷⁸ CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

²⁷⁹ CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, par. 51.

²⁸⁰ R. O’Gorman, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1861.

²⁸¹ R. O’Gorman, (2011). “The Weakness of Social Rights Protection”, *German Law Journal*, p. 1861.

²⁸² ILO Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 July 1950).

²⁸³ A. Ivanković Tamamović, The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 182.

²⁸⁴ Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights: <http://www.coe.int/en/web/portal/-/secretary-general-s-opinion-on-the-european-pillar-of-social-rights>.

²⁸⁵ Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights: <http://www.coe.int/en/web/portal/-/secretary-general-s-opinion-on-the-european-pillar-of-social-rights>.

ETHOS

When it comes to the role of civil society organizations, they should be empowered to monitor the application of fundamental rights at national level – in accordance with EU primary law and the International Covenants, and report back to the Commission’s Vice-President for Fundamental Rights and the European Parliament. There are already positive examples of organizations that use the EU Charter and Social Charter in their activities related to strategic litigation, legislation and policymaking process to realize (social) justice for vulnerable groups.²⁸⁶

Lastly, since many of the social rights as laid down in the EU Charter constitute so-called principles, their normative content depends upon legislation at the national or Community level.²⁸⁷ This makes it difficult, if not impossible for individuals to enforce their social rights before courts. One way to remedy this gap would be for the EU legislator to elevate principles into real enforceable rights. However, according to Article 5 TFEU, the EU only has a coordinating role to set guidelines in the area of social policy and employment, which could make it difficult to receive support from Member States in this matter. Nevertheless, the EU legislator should be encouraged to involve the European Social Charter in legislative proposals as initiated by the European Commission.²⁸⁸ This would also adhere to the obligation as stipulated in EU primary law, which commits the EU to “[...] take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health” in defining and implementing its social policies and activities within the meaning of Article 9 TFEU.²⁸⁹ It remains to be seen whether the Member States will give their political support to such developments, given that the competence to adopt social legislation lies primarily within the hands of Member States themselves. Re-thinking the division of powers, and particularly whether it is desirable to extend Europe’s competences when it comes to the social pillars, are important questions for today’s social justice experience of European citizens.²⁹⁰

5.2. The principle of solidarity in the EU’s current public debate

It was proven that austerity measures taken in the wake of the Eurozone crisis have been ineffective and failed in terms of achieving their aims, thereby further jeopardizing the fundamental social rights of vulnerable groups and raising opposition of the so-called European project, with the Brexit now being one of the most prominent examples thereof.²⁹¹ The principle of solidarity, which has traditionally been regarded as one of the values upon which the Union is found, is being contested in EU public and political affairs.²⁹² One example in which solidarity has proven to be problematic in terms of cognitive recognition by some

²⁸⁶ L. Bojarski et al., ‘The Charter of fundamental rights as a living instrument’, available at http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_guidelines.pdf, accessed on 24 September 2018, p. 25.

²⁸⁷ *Ibid.*, p. 26.

²⁸⁸ *Ibid.*

²⁸⁹ TFEU, available at https://eur-lex.europa.eu/resource.html?uri=cellar:41f89a28-1fc6-4c92-b1c8-03327d1b1ecc.0007.02/DOC_1&format=PDF.

²⁹⁰ C. Lambregtse, (2018). ‘Op weg naar een diepere en eerlijkere interne markt’, Interview with Sybe de Vries in SER Magazine, available at <https://www.ser.nl/nl/~media/files/internet/publicaties/sermagazine/2018/november2018.ashx> [accessed on 10 November 2018].

²⁹¹ Di Carmen Salcedo Belyran, ‘European Social Charter and Austerity Measures: the Effective Respect of Human Rights’, DS n. 4 (2016), p.3.

²⁹² Solidarity is for example enshrined in Article 80 TFEU, which stipulates the following: “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.” See also Article 67(2) TFEU, which stipulates “it shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.”

ETHOS

Member States, is in the asylum context.²⁹³ In fact, the migration ‘crisis’ has exposed the limits of EU cooperation, shared responsibility, and especially solidarity between the Member States.²⁹⁴ The refugee ‘crisis’ is characterized by the lack of support for solidarity, as it has clearly showed that Member States were unable to reach consensus on how to deal with the refugee influx.²⁹⁵ The latest development, which illustrates that solidarity is eroding, is the rejection by some States of the UN Global Compact on Migration.²⁹⁶ The latter intergovernmentally negotiated agreement was signed on 19 December 2018 in Marrakesh, and is aimed to make migration safer and orderly, based on non-binding agreements between States. The US government, which has withdrawn itself from the agreement, argued that the agreement is inconsistent with US immigration policy and has formulated it as a means by the UN to strengthen global governance at the expense of ‘the sovereign right of states’.²⁹⁷ The Austrian government, which also did not sign the agreement, expressed its concerns regarding national sovereignty and that the pact could potentially result in more legitimacy to illegal migration.²⁹⁸

Nonetheless, in its recent case law regarding the EU relocation decisions, in particular in the case *Slovakia and Hungary v. the Council*, the Court clarified that also within asylum matters Member States are obliged to respect EU fundamental rights as laid down in the EU Charter.²⁹⁹ The question remains whether Member States will adhere to their legal obligations, including securing the fundamental rights of asylum seekers and refugees, in a politically sensitive area such as asylum. Up until now, the claim for solidarity in some States has mainly been constructed to justify tougher security measures, including strict border surveillance, which place fundamental rights of migrants in jeopardy.³⁰⁰

In addition, important economic discussions are currently taking place in Brussels with respect to discussing proposals to give the Eurozone more powerful tools to prevent future financial crises. On 4 December this year, the Euro group members took decisions in order to strengthen the European Monetary Union and the ESM. The background thereof was the Euro Summit, which took place in June 2018 and which gave the mandate for the Eurozone finance ministers to strengthen further the Economic and Monetary Union (EMU).³⁰¹ This mandate included the introduction of the so-called common backstop for the Single Resolution Fund, which is a fund established by the EU in the context of the Banking Union for resolving failing banks that is to be granted by the ESM, together with further actions to be taken regarding the financial assistance instruments and the role of the ESM. With its decisions of 4 December 2018, the Euro group agreed upon this mandate.³⁰² Important to note in this regard is that the draft macroeconomic adjustment programme fully needs to comply with Article 152 TFEU (right of social partners)³⁰³ and Article 28

²⁹³ See to this extent: H. van Eijken, H., L.A.J. Senden, & B. Safradin, The “Refugee crisis”: a crisis of law, will or values?. In Dina Siegel & Veronika Nagy (Eds.), *The Migration Crisis? Criminalization, Security and Survival* (pp. 27-60) (34 p.). The Hague: Eleven Publishing (2018).

²⁹⁴ H. van Eijken, H., L.A.J. Senden, & B. Safradin, The “Refugee crisis”: a crisis of law, will or values?. In Dina Siegel & Veronika Nagy (Eds.), *The Migration Crisis? Criminalization, Security and Survival* (pp. 27-60) (34 p.). The Hague: Eleven Publishing (2018).

²⁹⁵ *Ibid.*

²⁹⁶ Note that in this respect, the US, Australia, Austria, the Czech Republic, Dominican Republic, Hungary, Latvia, Poland and Slovakia have withdrawn from the process of signing the agreement.

²⁹⁷ R. Marghesson, ‘The Global Impact on Migration and US Policy’, October 16, 2018, available at <https://fas.org/sgp/crs/row/IF11003.pdf> [accessed on 17 December 2018].

²⁹⁸ M. Macq, ‘Austria to back out from the global compact for safe, orderly and regular migration’, available at <https://www.esjnews.com/austria-global-compact> [accessed on 17 December 2018].

²⁹⁹ CJEU Judgment in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631, par. 305.

³⁰⁰ CJEU Judgment in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631, par. 305.

³⁰¹ European Stability Mechanism, ‘Explainer on ESM reform’ 10 December 2018, available at <https://www.esm.europa.eu/explainer-esm-reform> [accessed on 13 December 2018].

³⁰² European Stability Mechanism, ‘Explainer on ESM reform’ 10 December 2018, available at <https://www.esm.europa.eu/explainer-esm-reform> [accessed on 13 December 2018].

³⁰³ On social dialogue and its effectiveness as an instrument to promote labour justice see: S. Araujo, ‘The effectiveness of social dialogue as an instrument to promote labour and social justice’ - Comparative Report, forthcoming on <https://www.ethos-europe.eu>.

ETHOS

of the EU Charter (the right of collective bargaining and collective action).³⁰⁴ Moreover, in (future) crises times, the European Commission will only sign a Memorandum of Understanding with Member States that enter an ESM programme if it believes that these Member States fully adhere to the rights and principles laid down in the EU Charter.³⁰⁵

In any case, events such as Brexit³⁰⁶, and the rise of extreme right-wing parties in certain Member States, which have implemented exclusionist and protectionist measures, have put the political cohesion of the Union to a risk. These developments should activate the EU to reconsider its geopolitical role, and specifically the principle of solidarity, which is one of the cornerstones of the Union.

6. Conclusion

Fundamental rights had already been recognized by the CJEU as general principles of Community law as long ago as the 1960s, with *Stauder* and *Internationale Handelsgesellschaft* forming the landmark cases. Many years later, the Lisbon Treaty brought the expansion of the protection of fundamental social rights in the EU legal order to a higher level.³⁰⁷ EU law as it stands today has taken an essential step in the development of social rights protection, in particular through its now binding EU Charter and the adoption of the EU Social Policy Agenda. The EU Charter is a modern catalogue that lays down social and economic rights alongside civil and political rights, which are indivisible. Nevertheless, the potential of social rights in the EU Charter is limited due to their characterization as principles rather than self-standing rights and their lack of horizontal direct effect. It has been illustrated that when social rights have been jeopardized as a result of austerity measures taken during the crisis, the CJEU took a cautious approach in answering preliminary reference questions of national courts. The fact that the EU Charter is only applicable when national measures ‘fall within the scope of Union’ law may therefore be seen as a limitation to the effective enforcement of the right contained therein. Progress can moreover still be made with regard to raising awareness on the use of the EU Charter at the national level.

On the other hand there is the CoE Social Charter, which provides for an extensive social protection and includes a more complete list of social rights than the EU Charter does. Despite the fact that the EU Charter is largely inspired by the provisions of the Social Charter, the latter instrument has to a large extent been disregarded in the more recent developments concerning the protection of fundamental social rights in the EU legal order. Nonetheless, the role of the European Committee of Social Rights, which monitors the compliance of State parties to the Social Charter, should be applauded at times when various austerity measures infringed social rights of European citizens.

As argued by Fraczyk “it is in moments of crisis that fundamental rights can assume their greatest importance by providing a check against qualitatively defective decision making which is procedurally inadequate and/or (grossly) disproportionate”.³⁰⁸ The CJEU’s role in this matter will thereby be crucial to guide national courts in referring to the EU Charter and the European Social Charter, particularly in areas in which fundamental social rights need to be balanced with fundamental freedoms. This would not least be beneficial for the uniformity in the EU’s internal market. Nonetheless, the CJEU has limited the scope for

³⁰⁴ A. Zoppe and A. Gasparotti, *European Stability Mechanism (ESM), main features, instruments and accountability* (2018), p. 5, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON_NT\(2014\)497755_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON_NT(2014)497755_EN.pdf) [accessed on 12 December 2018].

³⁰⁵ *Ibid.*

³⁰⁶ Note that once the Brexit becomes a reality, presumably after March 2019, the EU Charter will no longer form an integral part of UK domestic law. The case law of the CJEU will also not be binding on UK courts in their application of EU derived law, which could lead to a real risk to employment rights that have been introduced as a result of EU membership.

³⁰⁷ S.A.de Vries, ‘EU and ECHR: Conflict or Harmony?’, *Utrecht Law Review* 9 (2013).

³⁰⁸ J. Fraczyk, ‘EU fundamental rights and the Financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, pp. 490-491.

ETHOS

such guidance in the financial crisis context, as was illustrated through *Pringle* and other subsequent rulings.³⁰⁹ This being said, in the latest *Bauer* ruling the Court expanded the force of social rights protection in private disputes, which proves a glimpse of solidarity in the making at EU level.

While one could criticize the fact that some of the social rights have the status of principles and are not that strongly formulated as opposed to civil and political rights in the EU Charter, the significance of integrating them in the same instrument should not be undervalued.³¹⁰ In fact, the explicit inclusion of social and economic rights in the EU Charter – together with other important social developments at EU level such as the EU Social Agenda and its efforts to reconcile economic and social objectives – has the potential to integrate social rights and values into the Union’s predominantly focused internal market rationale.³¹¹

At the same time, if the EU would emphasize in stronger wording that *all* its citizens could benefit from social protection in Europe, this would prevent certain groups of citizens from experiencing social injustice. In this context, the accession of the EU to the European Social Charter should be seen as a priority of its own: it would not only lead to a significant improvement for the protection of fundamental social rights in Europe, but would also be of considerable symbolic value since the EU can prove that it relates to international instruments in the field of social rights protection, in accordance with the degree of social market integration it has already achieved.³¹² A clear example that should be applauded for in this context is the European Pillar of Social Rights of 2017.³¹³

³⁰⁹ J. Fraszky, ‘EU fundamental rights and the Financial crisis’ in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*, p. 491.

³¹⁰ L. Bojarski et al., ‘The Charter of fundamental rights as a living instrument’, available at http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_guidelines.pdf, accessed on 24 September 2018, p. 18.

³¹¹ *Ibid.*

³¹² O. de Schutter 2016, ‘The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights’, Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 March 2018], p. 50.

³¹³ *Ibid.*

7. Bibliography

Books

Blyth, M. (2015). *Austerity: The history of a dangerous idea*. Oxford: OUP.

Craig P., and de Burca, G. (2011). *EU law: text, cases and materials*, Oxford University Press New York.

Douglas-Scott S. and Hatzis N., (2017) *Research Handbook on EU law and Human Rights*, Elgar.

Harris, D.J. (2009). 'Collective complaints under the European Social Charter' In: K.H. Kaikobad & M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*.

Peers S. et al., *The EU Charter of Fundamental Rights: a commentary*, Bloomsbury 2014.

Articles

Ashiagbor, D., (2004). 'Economic and social rights in the European Charter of fundamental rights', *European Human Rights Law Review* 1.

Armstrong, K. (2013). The New Governance of EU Fiscal Discipline. *European Law Review* 38 (5), pp. 601–617.

Bailey, D., M. Clua-Losada, and N. Huke, et al. (2016). Challenging the age of austerity: Disruptive agency and the global economic crisis. *Comparative European Politics*.

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

Barnard, C. and Deakin, S. (1999) 'A Year of Living Dangerously? EC Social Rights Employment Policy, and EMU', *Industrial Relations Journal*, 30(4), 355–372.

Barnard, C., (2013), "The Charter, the Court – and the crisis", *Legal Studies Research Paper* No 18/2013.

Bekker, S. (2015). 'European socioeconomic governance in action: coordinating social Policies in the third European Semester', *European Social Observatory Research Paper No. 19*. Brussels: European Social Observatory.

Bellamy, R. (2012), 'The liberty of the moderns: Market freedom and democracy within the EU'. *Global Constitutionalism* 1 (1): 141–172.

Besselink, L.M.F. (2014). 'The parameters of Constitutional Conflict after Melloni', *European Law Review* 3.

Bojarski et al., 'The Charter of fundamental rights as a living instrument', available at http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_guidelines.pdf, accessed on 24 September 2018.

ETHOS

Commissioner for Human Rights. (2013). Safeguarding human rights in times of economic crisis. *Issue Paper, Council of Europe*. Available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2664103&SecMode=1&DocId=2215366&Usage=2>. Accessed July 2018.

Copeland, P., and S. James. 2014. Policy windows, ambiguity and Commission entrepreneurship: explaining the relaunch of the European Union's economic reform agenda. *Journal of European Public Policy*. 21 (1): 1–19.

Coutinho, F., (2016). 'Austerity on the loose in Portugal: European Judicial restraint in times of crisis', *Perspectives on Federalism*, Vol. 8, issue 3.

Di Carmen Salcedo Belyran, (2016). 'European Social Charter and Austerity Measures: the Effective Respect of Human Rights', DS n. 4.

Douglas-Scott S. and Hatzis, N. 'EU law and social rights', in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*.

Eijken van H., and Phoa, P., (2018). 'The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?' *European Law Review* [forthcoming].

Eijken, H. van, Senden, L.A.J. & Safradin, B., The "Refugee crisis": a crisis of law, will or values?. In Dina Siegel & Veronika Nagy (Eds.), *The Migration Crisis? Criminalization, Security and Survival* (pp. 27-60) (34 p.). The Hague: Eleven Publishing (2018).

Fraszyk, J. (2017). 'EU fundamental rights and the financial crisis' in S. Douglas-Scott and N. Hatzis, *Research Handbook on EU law and Human Rights*.

Hinarejos, A., (2016). "A missed opportunity: the Fundamental Rights Agency and the Euro area Crisis", *European Law Journal* 1.

Hos, N., 'The principle of proportionality in the Viking and Laval cases: an appropriate standard of judicial review', *EUI Working papers* 8 (2009).

Ivanković Tamamović A., 'The impact of the crisis on fundamental rights across Member States of the EU – Comparative analysis, Study for the LIBE Committee' 2015, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf).

Jacques, J., (2011). "The accession of the European Union to the European Convention of Human Rights and fundamental freedoms", *Common market Law Review* 48: 9.

Khaliq, U., (2014). The EU and the European Social Charter: never the twain shall meet?' *Cambridge Yearbook of European Legal Studies* 196.

ETHOS

Kroeze, H. (2017). Chavez-Vilchez e.a. t. SVB Nederland – Belang van het kind staat centraal in de toepassing van Ruiz Zambrano. SEW no. 11, p. 482-486.

O’Gormann, G., (2011). “The Weakness of Social Rights Protection”, *German Law Journal*,

Schutter O. de, (2016), ‘The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights’, Directorate General for Internal Policies European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) [accessed on 28 September 2018],

Vervaele, J., (2013) ‘The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU’, *Review of European Administrative Law* 2 .

Vries, S.A.de., (2013)., ‘EU and ECHR: Conflict or Harmony?’, *Utrecht Law Review* 9.

Vries, S.A. de (2013). ‘Balancing fundamental rights with economic freedoms according to the European court of Justice’, *Utrecht Law Review* 1.

Websites

ATD Fourth World, ‘Using the European Social Charter to defend social rights’, 20 March 2018, available at <http://www.atd-fourthworld.org/using-european-social-charter-defend-social-rights/> [accessed on 14 October 2018].

CoE, ‘Legal protection and effective enforcement of social rights in the Council of Europe member States’, 2018, available at https://www.coe.int/en/web/turin-european-social-charter/developments-and-perspectives-regarding-the-charter-in-the-council-of-europe-member-states/-/asset_publisher/6evOUmcP0wda/content/fra-director-michael-o-flaherty-invites-eu-to-consider-accession-to-the-european-social-charter?inheritRedirect=false [accessed on 24 October 2018].

CoE, ‘The Turin process of the European Social Charter’, 2017, available at <https://www.coe.int/en/web/turin-european-social-charter/turin-process> [accessed on 22 September 2018].

European Committee of Social Rights, ‘Second Report of the Non-accepted provisions of the European Social Charter Turkey, September 2018, available at <https://rm.coe.int/turkey-2nd-na-report-en/16808e3d3e>.

Elyatt, H., ‘Turkey lifts state of emergency, but nothing much has changed, analysts warn, available at <https://www.cnn.com/2018/07/19/turkey-lifts-state-of-emergency-but-nothing-much-has-changed-analysts.html> [accessed on 15 October 2018].

Lambregtse, C., (2018). ‘Op weg naar een diepere en eerlijkere interne markt’, Interview with Sybe de Vries in SER Magazine, available at <https://www.ser.nl/nl/~media/files/internet/publicaties/sermagazine/2018/november2018.ashx> [accessed on 10 November 2018].

ETHOS

Markakis, M., 'Case C-201/15 AGET Iraklis: Can governments control mass layoffs by employers? Economic freedoms vs labour rights', 2017, available at <http://eulawanalysis.blogspot.com/2017/01/case-c-20115-aget-iraklis-can.html> [accessed on 12 November 2018].

R. Marghesson, 'The Global Impact on Migration and US Policy', October 16, 2018, available at <https://fas.org/sgp/crs/row/IF11003.pdf> [accessed on 17 December 2018].

Ovadék, M., 'Has the CJEU Just Reconfigured the EU Constitutional Order?', May 2018, Reconnect, available at <https://reconnect-europe.eu/blog/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> [accessed on 26 October 2018].

Peers, S. 'When does the EU Charter of Rights apply to private parties', 2014, available at <http://eulawanalysis.blogspot.com/2014/01/when-does-eu-charter-of-rights-apply-to.html> [accessed on 31 October 2018].

Sarmiento, D. 'Sharpening the teeth of EU Social fundamental rights', 8 November 2018 available at <https://despitedifferencesblog.wordpress.com> [accessed on 15 November 2018].

Vonk, G. 'EU freedom of movement: no protection for the stranded poor' (2014), available at <http://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/> [accessed on 22 October 2018].

Zoppe A. and Gasparotti A., European Stability Mechanism (ESM), main features, instruments and accountability (2018), p. 5, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON_NT\(2014\)497755_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON_NT(2014)497755_EN.pdf) [accessed on 12 December 2018].

8. Table of cases and legislation

CJEU case law

CJEU Case C-26/69 *Erich Stauder v City of Ulm – Sozialamt* ECLI:EU:C:1969:57.

CJEU Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114

CJEU Case C-43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 (*Defrenne II*).

CJEU Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Others v Dimotiki Etairia Pliroforissis (ERT)* [1991] ECLI:EU:C:1991:254

CJEU Case C/409-95 *Hellmut Marschall v Land Nordrhein-Westfalen* ECLI:EU:C:1997:533.

ETHOS

CJEU Case C/158-97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* ECLI:EU:C:2000:163.

CJEU Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* ECLI:EU:C:2000:367.

CJEU Case C-112/00 *Schmidberger Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333.

CJEU Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004], ECLI:EU:C:2004:614.

CJEU Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809,

CJEU Case C-51/05 *P - Commission v Cantina sociale di Dolianova* [2008], ECLI:EU:C:2008:409.

CJEU Case 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.

CJEU Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

CJEU Joined Cases C-92/09 and C-93/09 *Volker und Schecke GbR* ECLI:EU:C:2010:662.

CJEU Case C/617-10 *Akerberg Fransson* ECLI:EU:C:2013:105.

CJEU Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

CJEU Case C-665/13, *Via Directa*, EU:C:2014:2327.

CJEU Case C-133/15 *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* (C-133/15) ECLI:EU:C:2017:354; [2017].

Joined Cases C-8/15 to C-10/15 *Ledra Advertising* ECLI:EU:C:2016:702.

CJEU Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

CJEU Case in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631,

CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117,

CJEU Case 82/16 *K.A. and Others v Belgische Staat* ECLI:EU:C:2018:308.

CJEU Case C- 569/16 en C- 570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871.

ETHOS

AG opinions

AG opinion in CJEU Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:675.

AG opinion in Case C-271/08 *Commission v Germany (Occupational Pensions)* [2010] ECR I-07091.

ESCR case law and conclusions

No. 33/2006 *International Movement ATD Fourth World v. France*.

FEANTSA v. the Netherlands: No. 86/2013.

European Committee of Social Rights Conclusions XIX-2 (2009) (GREECE)

[https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-](https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-ECSR_EuropeanCommitteeonSocialRights-eng.pdf)

[ECSR_EuropeanCommitteeonSocialRights-eng.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session11/GR/CoE-ECSR_EuropeanCommitteeonSocialRights-eng.pdf).

Council of European Churches v. the Netherlands; No. 90/2013.

ECSR, Conclusions XIX-4-Spain–Article, XIX-4/def/ESP/, 2011.

ECSR 66/2011 *ADEDY v Greece* (23 May 2012).

ECSR 76/2012 *IKA/ETAM v Greece* 7 December 2012.

Legislation

EU Charter of Fundamental Rights (2000), available at

http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

Revised European Social Charter, 1961 available at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cf93>

TEU, available at <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-1-common-provisions/4-article-3.html>.

European Pillar of Social Rights (2017), available at https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

9. Appendix

Figure 1. Level of convergence between the EU Charter and CoE Social Charter for the key provisions

EU Charter	CoE Social Charter
<p>Article 12: freedom of assembly and association</p> <ol style="list-style-type: none"> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union. 	<p>Article 5: The right to organize</p> <p>With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, not shall it be applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.</p>
<p>Article 14 Right to Education</p> <ol style="list-style-type: none"> 1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right. 	<p>Article 10: the right to vocational training</p> <p>With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:</p> <ol style="list-style-type: none"> 1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude; 2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments; 3. to provide or promote, as necessary: <ol style="list-style-type: none"> (a) adequate and readily available training facilities for adult workers; (b) special facilities for the re-training of adult workers needed as a result of technological development or new trends in employment; 4. to encourage the full utilisation of the facilities provided by appropriate measures such as: <ol style="list-style-type: none"> (a) reducing or abolishing any fees or charges; (b) granting financial assistance in appropriate cases; (c) including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; (d) ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young

	workers, and the adequate protection of young workers generally.
<p>Article 15 Freedom to choose an occupation and right to engage in work</p> <ol style="list-style-type: none"> 1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. 2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. 3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. 	<p>Article 1 The right to work With a view to ensuring the effective exercise of the right to work, the Parties undertake:</p> <ol style="list-style-type: none"> 1 to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable level of employment as possible, with a view to the attainment of full employment; 2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon; 3 to establish or maintain free employment services for all workers; 4 to provide or promote appropriate vocational guidance, training and rehabilitation. <p>Article 18 The right to engage in a gainful occupation in the territory of other Parties with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:</p> <ol style="list-style-type: none"> 1 to apply existing regulations in a spirit of liberality; 2 to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers; 3 to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise: 4 the right of their nationals to leave the country to engage in a 5. gainful occupation in the territories of the other Parties.
<p>Article 21 Non-discrimination</p> <ol style="list-style-type: none"> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited 	<p>European Social Charter Part V</p> <p>Article E Non-discrimination The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.</p>
<p>Article 23 Equality between men and women</p> <p>Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in</p>	<p>Article 20 The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the</p>

<p>favour of the under-represented sex.</p>	<p>grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:</p> <p>a access to employment, protection against dismissal and occupational reintegration; b vocational guidance, training, retraining and rehabilitation;</p> <p>c terms of employment and working conditions, including remuneration;</p> <p>d career development, including promotion.</p>
<p>Article 24 The rights of the child</p> <ol style="list-style-type: none"> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests. 	<p>Article 17 The right of mothers and children to social and economic protection</p> <p>With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public or private organisations, to take all appropriate and necessary measures designed:</p> <p>1 to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular the establishment or maintenance of institutions and services sufficient and adequate for this purpose;</p> <p>to protect children and young persons against negligence, violence or exploitation;</p> <p>to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;</p> <p>4 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.</p>
<p>Article 25 The rights of the elderly</p> <p>The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.</p>	<p>Article 23 The right of elderly persons to social protection</p> <p>With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:</p> <p>- to enable elderly persons to remain full members of society for as long as possible, by means of:</p> <ol style="list-style-type: none"> 1. a adequate resources enabling them to lead a decent life and <ul style="list-style-type: none"> play an active part in public, social and cultural life; 2. b provision of information about services and facilities available for elderly persons and their opportunities to make use of them; <p>- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:</p> <ul style="list-style-type: none"> a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; b the health care and the services necessitated by their state;

	to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.
Solidarity Chapter IV EU Charter	
<p>Article 27 - Workers' right to information and consultation within the undertaking Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.</p>	<p>Article 21 The right to information and consultation With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:</p> <ol style="list-style-type: none"> 1. to be informed regularly or at appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and 2. to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.
<p>Article 28 – rights to collective bargaining and action</p> <p>Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.</p>	<p>Article 6 The right to bargain collectively With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:</p> <ol style="list-style-type: none"> 1. to promote joint consultation between workers and employers; 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered to. <p>Article 28: The right of workers' representatives to protection in the undertaking and facilities to be accorded to them With a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking:</p> <ol style="list-style-type: none"> 1. a they enjoy effective protection against acts prejudicial to them, including dismissal, based on their

	<p>status or activities as workers’ representatives within the undertaking;</p> <p>2. b they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.</p> <p>Article 29: The right to information and consultation in collective redundancy procedures</p> <p>With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers’ representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.</p>
<p>Article 29. Right of access to placement services</p> <p>Everyone has the right of access to a free placement service.</p>	<p>Article 9 The right to vocational guidance</p> <p>With a view to ensuring the effective exercise of the right to vocational guidance, the Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual’s characteristics and their relation to occupational opportunity; this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults.</p>
<p>Article 30. Protection in the event of unjustified dismissal</p> <p>Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.</p>	<p>Article 24 The right to protection in cases of termination of employment</p> <p>With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:</p> <p>1. a the right of all workers not to have their employment terminated</p> <p>without valid reasons for such termination connected with their capacity or conduct, or based on the operational requirements of the undertaking, establishment or service;</p> <p>2. b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.</p> <p>To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.</p> <p>Article 25 The right of workers to the protection of their claims in the event of the insolvency of their employer</p> <p>With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers’ claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.</p>

<p>Article 31. Fair and just working conditions</p> <ol style="list-style-type: none"> 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. 	<p>Article 2: The right to just conditions of work With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:</p> <ol style="list-style-type: none"> 1 to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit; 2 to provide for public holidays with pay; 3 to provide for a minimum of four weeks' annual holiday with pay; 4 to eliminate risks in inherently dangerous or unhealthy occupations and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either reduction of the working hours or additional paid holidays for workers engaged in such occupations; 5 to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest; 6 to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship; 7 to ensure that workers performing night work benefit from measures which take account of the special nature of the work. <p>Article 3 The right to safe and healthy working conditions With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:</p> <ol style="list-style-type: none"> 1 to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimizing the causes of hazards inherent in the working environment; 2 to issue safety and health regulations; 3 to provide for the enforcement of such regulations by measures of supervision; 4 to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.
<p>Article 32. Prohibition of child labour and protection of young people at work</p> <p>The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be</p>	<p>Article 7 – The right of children and young persons to protection</p> <p>With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:</p> <ol style="list-style-type: none"> 1 to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in

<p>protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.</p>	<p>prescribed light work without harm to their health, morals or education;</p> <p>2 to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy;</p> <p>3 to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;</p> <p>4 to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;</p> <p>5 to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;</p> <p>6 to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;</p> <p>7 to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay;</p> <p>8 to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;</p> <p>9 to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;</p> <p>10 to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.</p>
<p>Article 33. Family and professional life</p> <ol style="list-style-type: none"> The family shall enjoy legal, economic and social protection. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child. 	<p>Article 8 The right of employed women to protection of maternity With a view of ensuring then effective exercise of the right of employed women to protection of maternity, the Contracting Parties undertake:</p> <ol style="list-style-type: none"> to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks; to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such time that the notice would expire during such a period; to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;

	<p>4 to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;</p> <p>- to prohibit the employment of pregnant women, women who have recently given birth and women nursing their infants in underground mining, and, as appropriate, on all other work which is unsuitable for them by reasons of its dangerous, unhealthy, or arduous nature and to take appropriate measures to protect the employment rights of these women.</p> <p>Article 27 The right of workers with family responsibilities to equal opportunities and equal treatment With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:</p> <p>1 to take appropriate measures:</p> <p>a to enable workers with family responsibilities to enter and remain in employment, as well as to reenter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;</p> <p>b to take account of their needs in terms of conditions of employment and social security;</p> <p>c to develop or promote services, public or private, in particular child day care services and other children arrangements;</p> <p>2 to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;</p> <p>3 to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.</p>
<p>Article 34. Social Security and Social assistance</p> <p>1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.</p> <p>2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.</p> <p>3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.</p>	<p>Article 12 The right to social security With a view to ensuring the effective exercise of the right to social security, the Parties undertake:</p> <p>1. to establish or maintain a system of social security;</p> <p>2 to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;</p> <p>3 to endeavour to raise progressively the system of social security to a higher level;</p> <p>4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake</p>

between the territories of the Parties;

b the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 – The right to social and medical assistance With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. 1 to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. 2 to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. 3 to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. 4 to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953

Article 14 – The right to benefit from social welfare services

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:

- 1 to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
- 2 to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.