The European pillar of social rights: critical legal analysis and proposals

Klaus Lörcher and Isabelle Schömann

Report 139

etui.

The European pillar of social rights: critical legal analysis and proposals

Klaus Lörcher and Isabelle Schömann

Report 139
european trade union institute

Brussels, 2016

Print: ETUI printshop, Brussels

D/2016/10.574/29
ISBN: 978-2-87452-422-6 (print version)
ISBN: 978-2-87452-423-3 (electronic version)

The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.

Contents

Abstract

The aim of the present paper is to provide a basis for an in-depth discussion of the European Commission's initiative for a 'European Pillar of Social Rights' by briefly examining its context. The main foci are the content of Communication (2016) 127 published on 8 March 2016 (Communication)[1] (Part One) and – in more detail – an analysis (Part Two) of the rights listed in the Annex of the Communication.[2]

This paper is based mainly on the Communication and its Annex. It takes account of the two Staff Working Documents (SWD) 50 and 51 only as far as indicated, taking into account that these latter documents are more 'technical' in nature and for information purposes only.[3]

Explanations

References to other parts of the text as well as the headings in the 'Contents' and 'Detailed table of contents' can be used as hyperlinks. The same applies to references to sources outside the text (for example, to EU Directives or to ILO Conventions).

1 COM(2016) 127 final: http://eur-lex.europa.eu/resource.html?uri=cellar:bc4bab37-e5f2-11e5-8a50-01aa75ed71a1.0004.02/DOC_2&format=PDF

2 COM(2016) 127 final ANNEX 1: http://ec.europa.eu/social/BlobServlet?docId=15274&langId=en

3 SWD are not political documents in contrast to Communications.
SWD (20016) 50 on 'The EU social *acquis*' and SWD (2016) 51 on 'Key economic, employment and social trends behind a European Pillar of Social Rights', have not yet been integrated in the present analysis, for two main reasons: they do not coincide with the structure of the Communication 'Launching a consultation on a European Pillar of Social Rights' COM(2016) 127 final and the Annex: A European Pillar of Social Rights – First preliminary outline (which are the only documents that have been adopted politically), and also they are too detailed and need much more reflection.

Summary

A. Background

The current Commission's initiative on a European Pillar of Social Rights is intended to ensure a fair and truly pan-European labour market, as part of a deeper and fairer monetary union. In this respect, the public consultation launched within the framework of this initiative and its outcomes are intended to provide input to the Commission White Paper on the future of the European and Monetary Union, announced for publication in spring 2017.

On 8 March 2016, the Commission issued a series of documents: a Communication 'Launching a consultation on a European Pillar of Social Rights' and an Annex 1 as a first preliminary outline of the pillar structure and content. The Annex proposes a list of 20 domains covering the entire EU social (legal) *acquis*. Two staff working documents deal with 'The EU social *acquis*' and with 'Key economic, employment and social trends behind a European Pillar of Social Rights'. According to the Communication, these staff working documents should serve as the basis for a large consultation despite the fact that they have no legal standing with regard to the Communication of the Commission.

The main objective of the EU Pillar of Social Rights appears to be to serve the completion of the EMU and the internal market, for which social policy and welfare systems should also be conceived as productive factors, to boost productivity and international competitiveness and to increase living standards. In a nutshell, the Pillar of Social Rights is deemed a 'self-standing reference document, of a legal nature, setting out key principles and values shared at EU level' with the view to pave the way towards a more inclusive growth model, first in the Eurozone with the aim of further integration and consolidation in the other Member States, interested in joining the initiative.

B. Analysis

In short, the paper analyses in a first part the background and genesis of the initiative of the European Pillar of Social Rights until its first concretisation with the publication of the European Commission's communication on 8 March. Furthermore, a focused scrutiny of the content of the Communication allows a more detailed insight into the purpose of the initiative, namely, besides a stock-taking exercise taking in the entire EU social *acquis*, the willingness to review and adapt it to the 'changing realities of the world of work', with a view to revamping the flexicurity concept, closely linked to the Better Regulation agenda.

In a second part, there is a critical legal analysis of each of the 20 domains listed in the Annex of the Communication of 8 March 2016. The legal analysis, for each of the 20 domains:

- examines the content of the domain as defined by the Commission;
- considers the EU *acquis* referred to by the Commission and complements it when necessary;
- checks the legal basis proposed by the Commission and complements it when necessary;
- evaluates the content and legislative proposal;
- proposes a more balanced, accurate and substantial formulation of each of the 20 domains;
- proposes additional social and labour rights, missing from the Annex of the Communication.

In a nutshell, the first part of the analysis raises specific concerns about the following four main aspects:

(1) Is there any social dimension to the EU Pillar of Social Rights?
From the outset it will be noted that the European Pillar of Social Rights is embedded in a deep and overarching economic rhetoric in which economic growth appears to be the main goal. Its aim is to make labour markets more responsive in order to increase the sensitivity of employment to the economic cycle. The social dimension of the EMU is seen as a technicality much more than as a founding value and principle of the European Union, in particular when it comes to achieving social progress, full employment and a high level of protection. The Commission's words are clear: the Pillar is an economic necessity (and not a political or social imperative!)

(2) Does the Pillar help to operate a change of paradigm in the conception and function of social and labour law towards the monetarisation of labour and social protection, in supporting a shift from social and labour law to labour market law; that is, a move from the guidance and protection to the taxation of the labour relationship?

(3) The re-emergence of the concept of flexicurity as the model to be adapted to meet the challenges of a new world of work is more than surprising and indeed ill-placed, in particular when the Commission intends to apply to it to achieve 'fair and effective distribution of rights, duties and incomes', given that the basic conditions for the functioning of flexicurity – namely a long tradition of collective bargaining systems which provides for extensive protection of workers – are no longer met in the Member States of the European Union, in particular due to the structural reforms of industrial relations systems and the decentralisation of collective bargaining.

(4) The presentation of the social *acquis*, to be found in the various documents as the basis on which to build public consultation, leads to much confusion, in particular because it is far from being exhaustive. It is incoherent especially in relation to specific fields of social or labour law and not well-structured. References to the common values and principles shared at the EU, national and international

levels are presented as sources of inspiration, whereas they should be the *foundations* on which the Pillar rests. Additionally, legal international treaties as sources of legal obligations for Member States and in some cases for the European Union are ill-treated and misleadingly presented. Shouldn't the Pillar's goal be the ambitious one of making a difference in terms of better protection of social and labour rights, in particular in the aftermath of the crisis, paying attention to the international and recurrent messages sent out by, among others, the ILO and the Council of Europe to respect and promote international labour standards?

(5) The unequivocal link between the Better Regulation Agenda and the Pillar, which will create an 'occasion (…) to revisit the EU social *acquis*', 'to review its relevance in the light of new trends' and 'to drive reforms' also gives rise to much concern, in particular because of the deregulatory nature of the Agenda and its lack of added value in the social REFIT exercises carried out so far. Is this in compliance with the intention of President Juncker when he stated that the Pillar 'should complement what we have already jointly achieved when it comes to the protection of workers in the EU'? Nothing is less certain.

(6) The current Communication and in particular the Annex does not propose much of substance outside the 'normal' EU policy and EU social *acquis*. There are several general problems for which no substantively new or far-reaching approach is offered:

- The *concept* of 'pillar of rights': there is no rights-based approach but the whole exercise, in the end, will boil down to a benchmarking exercise.
- The *legal framework*: the place in the existing hierarchy of norms is at least unclear. In any event, it seems that no legally binding instrument is envisaged. Even the references to potential legal bases for secondary legislation in the Annex are mere descriptions without any indication to act accordingly. Therefore, there is nothing to suggest that it will go beyond the existing *acquis*.
- The *legal basis*: it would be a novelty to see how a legal instrument in the social field could apply (only) to the Eurozone; however, there is probably no respective legal basis.
- The *form* of the act: currently a Recommendation is envisaged. It is therefore difficult to see any real added value of such a Pillar.

(7) Concerning the list of 20 'policy domains' the following (non-exhaustive list of) issues should be taken into account:

- The 'policy domains' lack a general framework of rights which would ensure a high level of protection and effective exercise.
- The 20 'policy domains' only
  - contain in their respective titles descriptions of the 'policy domain' concerned, which are vague;
  - contain 'principles' which lack direct legal effect;
  - are aimed 'to screen the employment and social performance of participating Member States' and therefore lack substance.

However, the title of the initiative explicitly refers to 'social rights'. Our proposition is to replace the description of 'policy domains' by giving them content and formulating them as 'rights'.

- The contents of the 'policy domains' often do not sufficiently reflect the social objectives of the EU, in particular 'full employment' and 'social progress' (Article 3(3) TEU, improvement of living and working conditions as well as harmonisation upwards (Article 151(1) TFEU). Our proposition is to define the content of the rights so that improvement in relation to the existing framework can be ensured.
- In several respects the 'policy domains' (in particular in Chapter II) do not sufficiently reflect the need for better protection of workers. Our proposition is to include additional rights.
- Several of the 'policy domains' do not appear to be placed in the appropriate order. In particular several points mentioned now in Chapter I should be considered for placement in the next Chapter. Our proposition is, in particular if indicated by an '*', to reconsider the order (the place in which it is situated at the moment) and move it the Chapter on fair working conditions or be placed differently within the given Chapter.

8) Accordingly, it is proposed:

- to reformulate the 20 policy domains so as to reintegrate the reference to rights, improve their content and add new rights (right to effective enforcement, right to most favourable conditions, right to non-regression, right to the protection of personal data, right to whistleblowing, right to work);
- to propose a more accurate structure for the Pillar with a focus on a more elaborated structure for working conditions.
- This new structure and the improved new content could include the:

  - Right to effective enforcement
  - Right to most favourable conditions
  - Right to non-regression
  - Right to work
  - Right to dignity at work
  - Right to reasonable working time
  - Right to the protection of personal data in the employment relationship
  - Right to freedom of expression including the right to whistleblowing
  - Right to protection of specific groups

C. Proposals

The 'EU Pillar of Social Rights' should have at least the content which is described in detail in Section VI (see below):

Chapter I: General provisions and access to the labour market

a) Section 1: Effective exercise of rights

- *Right to an **effective enforcement** of all rights, including the effective supervision by, for example, the labour inspectorate, the right to an effective remedy and to a fair trial, as well as measures to ensure awareness of all rights in an easily understandable way*
- *Right to **most favourable conditions***
- *Right to **non-regression***

b) Section 2: General provisions

- *Right to **equal treatment**, in particular in employment and occupation*
- *Right to equal treatment between **men and women**, in particular to equal pay*
- *Right to the **protection of personal data** in the employment relationship*

c) Section 3: Access to the labour market

- ***Right to work***
- *Right to free and quality **placement services***
- *Right to protection **against precarious work***
- *Right to **youth employment** including that all people under the age of 25 years shall receive a good-quality offer within a period of four months of becoming unemployed or leaving formal education:*
  a. *of employment according to the principle of non-discrimination at the work place (or right to equal treatment for equal work),*
  b. *of continued education,*
  c. *of a decently paid apprenticeship or a decently paid traineeship.*

Chapter II: Employment rights

a) Section 1: Collective rights

- *Right to form and join **trade unions**, right to collective bargaining and collective action, including the right to strike*
- *Right to **social dialogue**, information and consultation, as well as participation*

b) Section 2: Individual rights

- *Right to dignity at work*
- *Right to a written* ***contract of employment***
- *Right to protection in case of a* ***probation period***
- *Right to minimum pay guaranteeing at least a* ***fair remuneration***
- *Right to a* ***working time*** *compatible with workers' health and safety and their personal needs*
- *Right to high level* ***healthy and safe working conditions*** *and to participate in prevention policy*
- *Right to* ***maternity protection*** *and* ***reconciliation of family and professional life***
- *Right to quality lifelong* ***learning*** *and vocational (re-)training*
- *Right to paid* ***educational leave*** *(ensuring portability of entitlements)*
- *Right to* ***whistleblowing***
- *Right to protection against unfair* ***dismissal*** *(with obligation to reinstatement)*
- *Right to quality* ***supplementary pensions*** *(ensuring portability of entitlements)*

Chapter III: Social protection rights

- *Right to effective* ***integration*** *of all social benefits and services ensuring a decent standard of living for the persons concerned.*

a) Section 1: Social protection

- *Right to good quality* ***social protection benefits****, in particular to those based on all branches of social security, including in case of disability and social assistance systems including minimum income*
- *Right to good quality* ***rehabilitation***
- *Right to effective measures against* ***child poverty***
- *Right to active inclusion*

b) Section 2: Social services

- *Right to provision of good quality, availability, affordability and accessibility of* ***social services*** *adequately financed and provided by specifically qualified professionals, including in case of long-term care and childcare*
- *Right to good quality preventive and curative* ***health care***
- *Right to quality, safe and affordable social* ***housing*** *for those persons in need*

D. Possible ways forward

In the view of the public consultation, at least two main avenues can be explored. The first is to perceive the Commission's initiative on European Pillar of Social Rights as a questionable endeavour and rather a risk to workers' protection. The relevant line of argumentation would follow, for example, the direct link with the

Better Regulation Agenda, in which the modernisation of EU law goes hand in hand with a deregulatory objective, or the confusion about the (lack of mandatory) reference to international labour standards, EU values and principles as binding sources to build the pillar, or the risks run in adopting a two-speed social EU between the Member States of the Eurozone and the other Member States. This would leave room for mainstreaming opt-outs in social labour protection, but also increase, among other things, inequalities and social dumping.

The other alternative is to consider the momentum of the Commission's initiative on the European Pillar of Social Rights as a possible avenue, possibly giving it the benefit of the doubt, for strengthening the social dimension of the new EU (economic) governance and shape the social part of the EMU. In this case, the following aspects should be clarified:

- *In relation to the 'European Pillar of Social Rights'*
  - defining its scope by (not only) applying it to the Eurozone;
  - defining a new approach to social rights which strengthens their role, their content and their impact;
  - defining a list of substantive and procedural rights (as described above) which has to be better structured and further developed as to its content, by, among other things, responding to the following necessities for each right addressed:
    - defining the legal basis on which an EU legally binding act could be adopted, in any case completing the list given;
    - defining the content ensuring a level of protection beyond the existing framework;
    - securing effective enforcement;
  - integrating general clauses as to the relationship to national law (including collective agreements) and international agreements (most favourable clause) and as to non-regression;
  - integrating a quality structure for effective enforcement;
  - integrating a clear concept and strategy for effective implementation.

- *In relation to more general preconditions for a well-functioning 'European Pillar of Social Rights', the following aspects should be considered:*
  - the involvement of Social Partners, in particular in the EU's new economic governance (European Semester);
  - the recognition, promotion and enforcement of the rights of the CFREU by the European institutions when issuing any act and by the Member States when implementing EU law that might not be directly related to social issues;
  - the correct and timely implementation of the social directives, in particular to get rid of the gaps in workers' protection;
  - to recognise that social protection (in a wide sense) is key to competitiveness in the EU rather than a burden;
  - if EU social legislation has to be adapted, such adaptation should enhance existing labour and social standards;
  - recognition of the need for and the necessary political steps to achieve a Social Progress Protocol or clauses;
  - the effective protection and promotion of fundamental social rights.

Part one
Background and general evaluation

I. Political context

In his speech on the State of the Union, the European Commission's President Jean-Claude Juncker launched the 'European Pillar of Social Rights' initiative to ensure a fair and truly pan-European labour market (Juncker, 9 September 2015), as part of the Commission's efforts towards a deeper and fairer Economic and Monetary Union. The European Pillar of Social Rights seems to have appeared out of the blue, but it started to emerge as early as 2012 with a range of initiatives taken at the highest political level of the European Union.

A. Genesis of the initiative

The first proposition of what could be called the (tentative) roots of a European Pillar of Social Rights is to be found in the Four Presidents' report[4] of 2012, as well as in the European Commission's 'Blueprint for a Deep and Genuine EMU',[5] issued in response to the European Council's June and October 2012 demand for a 'specific and time bound roadmap for the achievement of a genuine Economic and Monetary Union'. While the aim is to ensure integrated fiscal and budgetary sustainability in the EU with the creation of a large set of governance tools incorporated or anchored in the Treaty, the European Commission regards as necessary an integrated economic policy framework to support structural reforms of national labour market systems and social welfare. The idea is that this would result in 'strong and sustainable economic growth to produce higher levels of growth and employment'.[6] This is presented as a way in which the EU could remain a highly attractive social market economy and preserve the European social model. An integrated economic policy framework should be put in place within the framework of the European Semester (and the macroeconomic imbalances procedure) and will integrate 'arrangements of a contractual nature' between the Member States and the EU institutions in reforms aimed at promoting competitiveness, growth and jobs. This would be mandatory for the euro-area countries and voluntary for the other Member States. These arrangements are corrective action plans and can lead to sanctions in case of non-compliance.

4. http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf
5. European Commission (2012a).
6. Four Presidents' report of 2012: 13.

It is evident that the 'social' dimension of the Economic and Monetary Union (EMU) is regarded as going hand in hand with a need for deeper policy coordination of taxation and employment, in combination with reinforcement of the coordination and surveillance of employment and social policies. This should occur, in principle, by merging the economic policy guidelines with the employment guidelines.

With reference to the basic legal principles to be applied, the European Commission intends to pave the way for EMU (supposedly including its 'social' dimension) in the existing institutional and legal framework and legal basis (such as Article 136 TFEU) laid down by the Treaty, with a preference for qualified majority voting instead of what it describes as 'burdensome unanimity'.[7] According to the Commission, intergovernmental treaties can be used on an exceptional and transitional basis until Treaty changes are adopted. Furthermore, it states that, while recourse to existing sets of EU instruments – including secondary legislation – should be favoured, adoption of measures specific to the euro zone is possible but will remain of a temporary nature. All Member States but two – namely Denmark and the United Kingdom – are intended to become full members of EMU according to the Treaties. These assumptions raise serious doubts as far as social rights are concerned and one wonders about the legal basis on which they are founded.

B. Paving the way for a more concrete initiative

This approach has been further developed by an analytical note 'Preparing for the next steps on better economic governance in the euro area' of February 2015, in the view of the Five Presidents report 'Completing Europe's Economic and Monetary Union'[8] of June 2015. In these documents, a closer coordination of economic policies is at the heart of the new convergence process to strengthen EMU, a process that should take place on four fronts: a genuine economic union, a financial union, a fiscal union and a political union. One of the main objectives explained is to create a renewed economic union of convergence, growth and jobs, on the basis of EU law (rather than pacts), which should be supported by four pillars: (i) the creation of a euro-area system of competitiveness authorities, (ii) reinforced implementation of the macroeconomic imbalances procedure, (iii) more focus on employment and social performance and (iv) stronger coordination of economic policies within a revamped European semester. The creation of the four pillars should happen between July 2015 and July 2017.

Undoubtedly, the third pillar is the link to the (still not mentioned as such) initiative on the European Pillar of Social Rights under the expressed ambition that the European Union should earn a 'social triple A'.[9] Next to a set of other initiatives in the social field, it should aim at greater convergence and at improving employment

7. European Commission (2012a: 13).
8. https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_en.pdf
9. 'I want Europe to be dedicated to being triple-A on social issues, as much as it is to being triple-A in the financial and economic sense', Jean-Claude Juncker, October 2014 speech to the European Parliament.

and social provisions. However, no more details have been given on what form the 'social triple A' should take. This lack of follow-up on the latter proposition was pointed out by the European Parliament in an oral question to the European Commission on 25 February 2016,[10] in which further concrete requests were expressed with regard to its concept, components and underlying objectives, but also how with regard to the Commission will ensure that a 'social triple A' rating is achieved for the EU as a whole and not only for EMU. Additionally, in December 2015 the Employment, Social Policy, Health and Consumer Affairs Council outlined, in its conclusions, parts of the 'vision for a "social triple A" rating for Europe in stressing the need to identify and address key common social and employment challenges and trends in order to set common objectives, including the Europe 2020 targets'.

With this focus in mind, the Five Presidents' Report sets the scene: the 'social triple A' for Europe is an economic necessity.[11]

C. September 2015: the pillar of social rights

In the 2015 State of Europe Speech, President Juncker, addressing the European Parliament with a view to launching a dialogue with both the European Parliament and the Council on the Commission's future work programme, presented the most pressing challenges facing the European Union. Under the heading 'time for honesty, unity and solidarity', and building on the Five Presidents' Report, he developed, as the fifth priority, the pressing need for 'a fair and truly pan-European labour market'. In clear and unequivocal terms, he stated that:

> Fairness in this context means promoting and safeguarding the free movement of citizens as a fundamental right of our Union, while avoiding cases of abuses and risks of social dumping. Labour mobility is welcome and needed to make the euro area and the single market prosper. But labour mobility should be based on clear rules and principles. The key principle should be that we ensure the same pay for the same job at the same place. As part of these efforts, I will want to develop a European pillar of social rights.[12]

For the first time, the initiative was given a name: the 'European pillar of social rights', together with some information on what it should be. It is presented as a tool, a 'compass' to pave the way towards a 'renewed convergence' within the euro area. Moreover, it should 'complement what we have already jointly achieved when it comes to the protection of workers in the EU' with the clear request to social partners 'to play a central role in this process'. The concretisation of the idea is left to the European Commission.

10. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000034+0+DOC+XML+V0//EN
11. Five Presidents' Report, 2015: 8.
12. http://ec.europa.eu/priorities/sites/beta-political/files/state_of_the_union_2015_en.pdf. See p. 18

In an orientation debate on the economic and social dimension of the Single Market held on 6 October 2015, the College of Commissioners, building on the unexpected announcement by Commission President Juncker of a European Pillar of Social Rights, started, for the first time, to discuss and frame the initiative. The first outcomes of the meeting were twofold[13]: on one hand, the pillar should be a 'self-standing reference document, of a legal nature' with the aim of establishing key principles and values shared at EU level. It 'could [also] serve as a framework to screen employment and social performance in the light of changing work patterns and societies' and furthermore, it could lead to the updating or complementing the EU legal *acquis*. On the other hand, a non-exhaustive list of 15 rights and provisions has been compiled to identify 'social rights', 'essentially linked to the employment contract, working conditions or access to welfare'. The first part of the list comprises the right to minimum pay, minimum rights to representation, the minimum rights during probation periods, minimum protection against unfair dismissal, minimum measures to ensure awareness of rights and access to justice, the right to equal treatment regardless of the type of employment contract, minimum health and safety rights and minimum working time protection rights. The second part of the list comprises access to provisions related to maternity/paternity, lifelong learning and (re-)training, childcare and benefits, unemployment, active inclusion, pensions and basic social services, including health care.

Thus the European Pillar of Social Rights was born and henceforth the Commissioners started to acquire ownership of it. Despite the enthusiasm that such an initiative has created, in particular at a time when the social dimension of the EU is so badly neglected, concerns have been expressed about at least two sets of issues. On one hand – and in more general terms – such concerns range from the lack of reference to 'harmonisation upwards' that would apply to a social initiative according to Article 151(1) TFEU; the concept's lack of content; the unclear legal framework on which it would be built; the choice of the wording of the 'pillar', although already abandoned in 2009; the problematic restriction of social issues, at least in legal terms, to the euro zone; and the vague reference to the existing (legal) framework 'achieved when it comes to the protection of workers'. On the other hand, and in more specific terms, the list of social rights and provisions tabled raises questions concerning the sources of the rights invoked, the character of 'minimum' rights and 'access' to 'basic' provisions, the nature of the rights, being individual and collective, but also the content of the rights and provisions, as the list essentially covers rights linked to the employment relationship, but not only that.

It was not clear, either, how the proposed list would respond to the new challenges in the world of work, such as digitalisation and the ageing work force, nor why the indicative list does not include a reference to 'the same pay for the same job at the same place', as mentioned in the speech by President Juncker on the state of Europe and still to be found in the Communication. Furthermore, questions arose concerning why the pillar does not cover, from the outset, transversal issues identified as being insufficiently dealt with, such as the protection of personal data in

13. http://europa.eu/rapid/press-release_MEMO-16-64_de.htm

the employment relationship, the effective exercise of the right to non-regression and the right to enforcement, to name but a few.

With the benefit of the hindsight, however, one could say that at least the list contained an explicit reference to 'rights'. Enigmatically, this list was abandoned in favour of a longer but vaguer list, from which all references to 'rights' and 'provisions' have disappeared. This sudden and puzzling change occurred in the Commission's Communication on the EU Pillar of Social Rights of 8 March 2016, along with the abandonment of a reference to a 'social triple A'.

D. March 2016: the Commission's Communication on the European pillar of social rights

On 8 March 2016, the European Commission issued a series of documents, including a Communication 'Launching a consultation on a European Pillar of Social Rights',[14] Annex 1 of which is a preliminary outline of the pillar structure and content. Furthermore, two staff working documents deal, first, with 'The EU social *acquis*'[15] and, second, with 'Key economic, employment and social trends behind a European Pillar of Social Rights'.[16] These documents are intended to serve as the basis for a large consultation by the end of 2016 in support of a White paper on the future of EMU, to be elaborated and published in spring 2017.

In a nutshell, the Commission has embarked on a complete metamorphosis of the new EU Pillar of Social Rights, as developed below.

14. COM(2016) 127 final. http://eur-lex.europa.eu/resource.html?uri=cellar:bc4bab37-e5f2-11e5-8a50-01aa75ed71a1.0004.02/DOC_2&format=PDF

15. SWD(2016) 50 final. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0050&from=EN

16. SWD(2016) 51 final: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0051&from=EN . Additionally, a series of documents aimed at providing a brief overview of the 20 policy domains has been made available on the Commission website: http://ec.europa.eu/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights_en

II. Evaluation of the content of the Communication

A. General considerations

Before going into a more detailed evaluation of the approach and content of the European Pillar of Social Rights itself (see below Part Two) the underlying concept needs to be evaluated. From the outset it will be noted that the European Pillar of Social Rights is embedded in a deep economic rhetoric in which economic growth appears to be the main goal. Labour markets are to be made more responsive in order to increase the sensitivity of employment to the economic cycle. The social dimension of EMU is seen as technical in nature, much more than as founded on the values and principles of the Treaties: the well-being of European citizens in particular with the aim of achieving social progress, full employment and a high level of protection.

The role of the initiative on the European Pillar of Social Rights is to support the deepening of the single market and EMU. It should apply first of all to the members of the euro zone and welcome other Member States later on. The main reason is that it would facilitate the strengthening of the process of further integration and consolidation towards greater convergence. In this respect, the pillar is supposed to set ambitious goals first of all for the euro-zone Member States, such as establishing a framework for upward convergence to achieve better and higher labour and social standards in the EU in order to fight against (in-work) poverty and discrimination. Second, it will be a strong driver and deliver a clear message against social dumping in order to provide workers and enterprises with legal certainty and a sustainable social and economic future. Third, the pillar will have to provide for social investment in education and lifelong learning, in transitions to and in the labour market, as well as for ambitious social welfare and social protection systems, with the participation of the social partners and civil society representatives, coupled with policies of social innovation. It would be of great importance that the Pillar should be discussed in this framework.

First and foremost, the **scope** of the Pillar will have to be clarified: is the euro zone defined as the current Member States with the euro as their currency or does it also include Member States that intend to adopt the euro in the future (all except Denmark and the United Kingdom)? In the first case, what kind of procedure and conditions will be put in place for Member States that wish to join later on? Furthermore, the Pillar might create incentives for the other European Member States to join the process. To this end, the Pillar will have to be ambitious enough to convince the euro-zone Member States first. In any case, the current proposition with restricted scope is in various ways unusual and possibly a difficult avenue when it comes to social and labour rights and protections, in particular when considering the repartition of competences between Member States and the European Union and its lack of competence in certain areas of labour and social law. Besides creating a double-speed European Union, it might exacerbate social inequalities and social dumping rather than creating incentives for Member States to join.

Furthermore, the **legal nature** of the pillar remains unclear: according to the Communication, when established, 'the pillar should become a reference framework to screen employment and social performance of Member States to drive reforms'. This wording differs from the wording of the College of Commissioners in its orientation debate, which referred to a 'self-standing reference document, of a legal nature, setting out key principles and values shared at EU level'. The lack of clarity about the legal nature of the pillar and the related consequences – in particular in terms of its 'authority' to support or initiate reforms – certainly does not create the legal certainty badly needed for further progress in the protection of social and labour rights, but also in terms of the stakeholders' ownership of the initiative.

In the same vein, the reference to social benchmarks, social indicators and the like is quite confusing, in particular because some are already in place and used by different international institutions, with uneven success and variable levels of precision.

Finally, the **public consultation** appears to be a confusing exercise in many instances: first of all, the set of 10 questions, which is divided into three categories: 1. the social situation and EU social *acquis*; 2. the future of work and the welfare system; 3. the European Pillar of Social Rights,[17] lacks coherence, with the annex listing 20 domains of relevance for the pillars. The formulation of the first question, for example, is puzzling: what is meant by the 'social situation' of the EU social *acquis*, given, in particular, the poor and non-exhaustive description of it in the staff working document[18] accompanying the Communication? Furthermore, the generality of the questions and the unclear wording (mixing, for example, the references to the pillar, not yet defined in the Communication), the domains listed, the principles, which neglect the values of the EU as well as the (social) rights at stake and the lack of reference to the word 'rights' itself in the listed domains, as well as in the questions. None of this brings much clarity to the exercise, nor will it help to obtain much clarity and increase the relevance of the outcomes of the consultation. Furthermore, the European Commission is expending lots of energy and resources in the organisation of direct public consultations of different groups of civil society at the national level, as well as strategic dialogue meetings with civil society organisations and special hearings with the European social partners based on a particular predefined scenario, which leaves the participants with little room for manoeuvre to express critical views and develop more proactive replies. Finally, no information is provided on how the European Commission will proceed to evaluate the outcomes of the public consultation, for the presentation of which, at least in an interim version, a conference is scheduled in November 2016, although the public consultation runs until the end of December 2016. Nor is there any information on how these outcomes will be integrated in or will influence the White Paper on the future of the EMU announced for spring 2017. Besides the very tight timing, concerns can be expressed about the methodology

17. European Commission (2016).

18. SWD(2016) 50 final to be found: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0050&from=EN. See also the developments in this paper in Part II, B. 4 on the legal foundation of the pillar: the scant

and transparency of the exercise, not to mention the relevance of the outcomes of the consultation.

B. Specific considerations

1. Rationale of the European Pillar of Social Rights: an economic necessity rather than a genuine, rights-based prerequisite

In a nutshell, the Communication is intended, first, to outline the rationale of the initiative; that is, to sketch the reasons why a Pillar of Social Rights would be needed. Elaborating on an economic rather than a social line of argumentation, the Commission has embarked on the unconvincing development of a 'highly competitive social market economy' (Article 3(3)(1) TEU), in which, however, employment and social rights do not appear to be as essential features of the process of economic policy coordination at EU level, but as deriving from economic development. Furthermore, the Communication tries to justify – inconsistently – EU actions in the social field, mostly driven by the principle of subsidiarity, as complementing Member States' actions, again with reference to Article 3 TEU, without further ado. Reference to the 2012 report 'Blueprint for a Deep and Genuine EMU' shows, however, that the underlining idea is to achieve a progressive pooling of sovereignty and thus responsibility, as well as of solidarity-related competences at the European level, including the social competences of Member States. The European Commission's 2012 Labour Market Developments in Europe confirms that this approach is also applied at the level of national collective bargaining, when it comes to operationalising the direction of labour market reforms, so that 'reforms potentially leading to better employment outcomes [henceforth, employment-friendly reforms] result in an overall reduction in the wage setting power of trade unions'.[19]

Moreover, the remark that 'the establishment and deepening of the European single market has gone hand-in-hand with the development of a legal *acquis* in the social field at EU level', appears to be shorthand for the hard and prolonged battles fought for a social level-playing field at EU level, up to the adoption of social directives. However, this is far from being evidence of social legislative provisions, in the past or more recently. Needless to say, a series of examples confirms these trends, starting with the apathy of the Commission since 2000 with regard to social directives or its reluctance to sustain the outcomes of the European social dialogue and to give them the support of an EU legal act (for example, the 2012 European framework agreement on the protection of occupational health and safety in the hairdressing sector[20]). The better regulation initiative[21], with a clear deregulation agenda affects social and labour regulation at EU, but also national

19. European Commission (2012b: 117)
20. http://ec.europa.eu/social/main.jsp?catId=329&langId=en&newsId=1286&moreDocuments=yes&tableName=news
21. http://ec.europa.eu/smart-regulation/index_en.htm

level, while structural reforms of labour law systems and social welfare have been forced on Member States via the European semester since 2011. Strangely, no reference is made to the different but clear indications given by, among others, the ILO[22] and the Council of Europe to the European Union that its structural reform agenda has been in violation of member states' international obligations in terms of protection of workers.[23]

Furthermore, the Commission should reconsider the interlinkage of international and European and national level legally binding sources of (fundamental) social rights, as the decision of the European Committee of Social Rights of the Council of Europe of 3 July 2013.[24] The complaint lodged by the Swedish trade union confederations LO and TCO following the adoption of the so-called 'Lex Laval' to comply with the CJEU judgment of 2007[25] (restricting the rights of trade unions in respect of posted workers on the basis of 'fundamental economic freedoms', which were considered more important than fundamental social rights, argued that the Swedish legislation was not in conformity with the right to strike and to collective bargaining as stipulated in the European Social Charter (ESC)[26]. In a decision, the European Committee of Social Rights recognised that the Swedish legislation adopted to comply with the 2007 CJEU judgment is in violation of the right to freely bargain collectively (Article 6(2) ESC), of the right to collective action, 'since it prevents trade unions taking action to improve the conditions of posted workers over and beyond the requirements of the above-mentioned conditions' (minimum conditions) as anchored in Article 6(4) ESC and in violation of the provisions on equal treatment for posted workers, in respect of remuneration and other working conditions, compared with other workers with permanent employment contracts (Article 19(4)(a) ESC), as well as in violation of the requirement to guarantee that foreign posted workers, lawfully working within the territory of Sweden, are given equal treatment in terms of their ability to enjoy the benefits of collective bargaining (Article 19(4)(b) ESC).

2. Towards a change of paradigm: from labour law protection to labour market law

In a second set of arguments, the pillar is presented as a tool to help to overcome the crisis and to find answers to already identified long-term trends, such as demographic ageing, but also trends that have been exacerbated by the crisis such as (long-term and youth) unemployment and inequalities, as well as to new challenges in terms of digitalisation, for example. According to the Communica-

22. For a response by the ILO see ILO (2016).
23. See point II.4.a) of this paper.
24. Decision on admissibility and the merits: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012.
25. Judgment (Grand Chamber) 18 December 2007, Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECR 2007 I-11767, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62005CJ0341
26. In principle, the references to the ESC refer to the wording and content of the Revised European Social Charter (RESC 1996), unless specified otherwise. For more details, see below note 59.

tion, remedies seem to include 'well-functioning and fair labour markets and welfare systems', in which income inequality plays a major disruptive role. To attain such a goal, the Communication relies on the adoption of modern social policies combining innovation, investment in human capital, prevention and protection against social risks, effective safety nets and incentives to enter the labour market.

Besides the rather general line of argumentation, the Communication remains silent on the concrete added value of the pillar and in particular on how would it help to achieve the 'ideal' situation depicted above. Moreover, no real definition or explanation is put forward to help understand what 'well-functioning and fair' labour markets and/or welfare systems mean. Is a well-functioning welfare system one in which, for example, social security offers a high level of protection or in which minimum protection is proposed, possibly coupled with conditionality, time constraints and a financial participation requirement? Is a fair labour market one in which labour law offers protection to all workers in an unbalanced working relationship with the employer, as it should be, or is it regarded as a labour market in which labour law plays insiders and outsiders against each other, lowering the protection offered by standard employment contracts while 'flexibilising' non-standard employment, as is currently the case in most structural labour law reform? Is a fair and modern social policy a social policy in which the risks are carried by the most vulnerable party in the labour relationship?

This line of argumentation is far from convincing and raises many fundamental questions, in particular on the change of paradigm and the monetarisation of labour law, concretised by the move from labour law protection to labour market law; that is, from guidance and protection to taxation of the labour relationship.

3. Flexicurity redefined

A third line of argumentation investigates methods and means of setting up the European Union and in particular the euro zone for Economic and Monetary Union. In short, if the social dimension of the EU/EMU is at stake, to be measured in terms of the efficiency of labour markets and welfare systems, it appears less urgent to reinforce existing rights and protection and move towards full employment, social progress and a high level of protection, but rather to allow for enough flexibility so as to 'absorb and adjust to shocks'.

Most unexpectedly, the concept of flexicurity re-emerges,[27] despite recurrent criticisms and well-founded evidence showing that this concept has failed to combine a balanced and fair organisation of labour relationships.[28] More worrying is the Commission's declaration that the concept should be redefined so as to allow a 'fair and effective distribution of rights, duties and incomes, also across generations', blurring its essential features, namely attempts to reconcile business's desire for a 'flexible' workforce with the workers' need for security. This concept

27. In particular also in SWD 51 (see above note 3), although this will not be analysed in this paper.
28. Keune (2007)

finds its roots in Denmark and inspired the European Council and the European Commission back in 2007.[29] However, the specific characteristics of the Danish model and the prerequisites for its success have not been matched at EU level and in other Member States: the third element of the model, namely an active labour market policy, which completes the 'Danish golden triangle of flexicurity', has been neglected. In particular, the safety net of an employment benefit system and an active employment policy rest on a long tradition of social dialogue and a collective bargaining system that provides for extensive protection of workers with regard to flexibility. This is also coupled with a high level of labour organisation. Far from being a plausible answer to the crisis or post-crisis situation,[30] the conditions are no longer met, in particular with regard to the need for well-functioning collective bargaining systems. The current and persistent requests for structural reforms of Member State collective bargaining systems are characterised by massive decentralisation, deterioration of the all-industry level and deviations from broader collective agreements. There have also been substantial changes in the structures of collective bargaining systems in respect of the representativeness of the parties, the duration of collective agreements, their after-effects and restrictions on *erga omnes* effects as a result of narrower collective agreements.[31] The damage created by structural reforms can be summed up as a de-collectivisation of labour relations in some Member States.[32] In this context, it appears incoherent to propose to revamp the concept of flexibility. It also appears illogical, if the objective is to achieve a 'fair and effective distribution of rights, duties and incomes', without any clarification of what is meant by 'fair' and 'effective'.

An additional line of argumentation looks at the performance of welfare systems in the Member States, first, in terms of their adequacy and financial sustainability with regard to addressing evolving social needs; second, in terms of their ability to support job creation; and third, in terms of their stabilisation function in case of macroeconomic shocks. All in all, it is the quality of public finance that is at stake. Whether the pillar would make it possible to address such a broad and cross-cutting issue remains a challenge, in particular on one side, due to the repartition of competences between Member States and the Commission in the field of social protection and social welfare, and on the other side given the hegemony of the European Union in the monitoring of the public debt crisis.

The social dimension of the EU with regard to crisis management has been ignored to a large extent. In particular, the drastic budgetary reduction imposed on Member States in respect of their public spending leaves less room to manoeuvre to develop 'well-defined' welfare systems, in which currently fiscal and macroeconomic analysis is driving proposed institutional solutions to the crisis. In this respect, the 2013 Portuguese Constitutional Court judgment[33] is of major interest, as this was the last resort to reject the national legislative act implementing the 2011 bailout in the form of planned cuts in public sector pay, pensions and benefits,

29. http://ec.europa.eu/social/main.jsp?catId=102
30. Tangian (2010).
31. Koukiadaki *et al.* (2016).
32. Jacobs (2014: 186).
33. For more information see Cisotta and Gallo (2014).

which flouted the constitutional requirement that public and private sector workers and pensioners should be treated equitably.

4. Legal foundations of the pillar: scant respect for international and European treaties

The second part of the argument is, perhaps, one of the most controversial, for various reasons. Quite apart from the unfortunate introductory remark by the Commission concerning an alleged 'complacency and the status quo' with regard to social affairs – whether on the part of the European Union or the Member States – the casualness or inconsistency with which the Commission handles the legal sources of the (social) *acquis* and the common values and principles shared by the member states is disconcerting.

According to President Juncker in his speech on the state of the European Union, and reiterated in the Communication, the pillar should 'complement what we have already jointly achieved when it comes to the protection of workers'. It is further mentioned that it 'should be a self-standing reference document, of a legal nature, setting out key principles and values shared at EU level'. There would therefore be valid expectations that the pillar be based on the common values and principles shared at national, EU and international levels. The Communication, however, only suggests that the pillar 'can also build' on the common values and principles. There follows a random, incomplete and even sometimes wrongly quoted enumeration of 'reference documents' and 'international instruments', despite the fact that they refer to international treaties, the European Treaties and ILO Conventions, which have been omitted from the list, in which only 'recommendations from the ILO' are mentioned.

a) International labour standards and the proposed scope of the pillar

It is striking to see how little these treaties are acknowledged by the Commission, in particular in relation to the international obligations deriving from them and binding the Member States that have ratified international treaties and ILO Conventions. Moreover, the European Social Charter is deemed to be the 'social Constitution of Europe', which should serve as reference for the European Union[34]. Needless to say, even less importance seems to be given to the case law of, for example, the European Committee of Social Rights of the Council of Europe when issuing decisions within the framework of the collective complaint procedures, judging whether a Member State is in conformity in law and practice with the provisions of the European Social Charter or adopting conclusions within the framework of the national reporting procedure. One example is the Committee's decisions on austerity measures taken in Greece in 2010 and 2011 within the framework of the international loan mechanism agreed upon with the Troika. It concluded that there had been a violation of a range of fundamental social rights of the European Social

34. http://www.coe.int/en/web/turin-european-social-charter

Charter, including the right to fair remuneration[35], the right of young persons to protection, the right to vocational training and the right to social security[36]; it also remarked on lack of attention paid to this case law by the Commission.

The same applies to violations of ILO Conventions in general and to Nos 87 and 98 in particular, concerning requests for the suspension of and derogation from collective agreements, as well as derogation *in pejus* and decentralisation of collective bargaining, respectively. These violations were found by the ILO Committee on Freedom of Association within the framework of complaints submitted by the Greek General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation and the Greek Federation of Private Employees, supported by the International Trade Union Confederation,[37] concerning austerity measures taken in Greece over the past two years within the framework of the international loan mechanism agreed with the Troika (EC, ECB and IMF). The then ILO Director-General Juan Somavia stated that 'Respect for fundamental principles and rights at work is non-negotiable: not even in times of crisis when questions of fairness abound. This is particularly important in countries having to adopt austerity measures. We cannot use the crisis as an excuse to disregard internationally agreed labour standards'.[38]

The approach described above is all the less understandable given that the real added value of an EU pillar would indeed lie in its ability to embrace a much broader context, not only in terms of regional and international treaties, but also in terms of the inheritance of historical developments that have impacted the European Union. This historical legacy constitutes the essential foundation of European labour and social law and, at the same time, is the implicit – and frequently explicit – starting point for the construction of the European Social Model, referred to the Four Presidents' Report of 2012. Also of crucial importance here is the Declaration of Philadelphia adopted by the ILO, which explicitly states that labour is not a commodity, that freedom of expression and of association are essential to sustained progress and that poverty anywhere constitutes a danger to prosperity everywhere. The pillar would certainly make a difference for the future of work in the European Union and EMU, if it created the necessary incentive for the European Union to comply with its Treaty obligation to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as stated in Art. 6(2) TEU. In the same vein, the Commission should use the opportunity of the pillar to set an example and in parallel urge Member States – in particular due to the scope of the European Social Charter – to take on the ambitious goal of at least converging with the rights anchored in the European Social Charter in its revised version, in combination with the interpretation of the rights based on the case law of the European Committee of Social Rights.

35. Decision on the merits: *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*, Collective Complaint No. 65/2011.

36. Decision on the merits: *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*, Collective Complaint No. 66/2011.

37. Report No. 365, Case No 2820 (Greece) - Complaint date: 21 October 2010.

38. Speech to the European Parliament on 14 September 2011.

b) European labour rights and the proposed scope of the pillar

It is even more alarming when it comes to the reference to the EU legal *acquis*. On one hand, the staff working document on the 'EU social *acquis*' [39] is of little help, for a number of reasons: the lack of harmonisation with the Annex of the Communication in terms of structure and content brings much confusion to the whole setting and understanding of the initiative. Furthermore, the enumeration of legislative and non-legislative acts is misleading, as it gives a partial picture of specific social domains and cannot therefore be taken seriously as a reference for elaborating the pillar, as suggested in the Communication. Moreover, the proposed list of hard and soft law is not complete, even when listing the most relevant legal *acquis*; EU primary law and secondary sources of rights are mixed and do not follow a consistent reasoning. The reference to the jurisprudence of the Court of Justice of the European Union in respect of the interpretation of EU law and in particular to social directives, is brief in the Communication; it is absent from the staff working document, giving the impression that directives are the latest level of protection of a particular right.

Similarly, the Charter of Fundamental Rights of the EU, legally binding for EU institutions and Member States when applying EU law, finds little reference in the pillar, be it in the SWD or in the Communication or only to a certain extent in the Annex. Finally, the reference to the Community Charter on the Fundamental Social Rights of Workers[40] (Community Charter) comes very late in the SWD, possibly due to its non-legally binding character in comparison with the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights or CFREU). But what is more striking is that the Community Charter is presented as a past document: 'the Charter was a political instrument and a point of reference for the CJEU', despite the fact that the Community Charter and the EU Charter of Fundamental Rights are not similar and are both sources of inspiration and, for the Charter of Fundamental Rights, a legally binding source of social rights for the EU and the Member States. These loopholes and mistakes make the SWD useless for the purpose of better understanding and explaining the concept and details of the Pillar. Finally, the statement in the Communication that 'EU law is enforceable and more detailed than international standards' is striking and partly incorrect.

In the same vein, concerns can be expressed about the Communication's declaration that 'the key issue in Europe is not necessarily the recognition of rights, but rather their actual take-up and implementation, and can be made effective through a strong legal framework ensuring fair remedies for both citizens and businesses'. While the last part of the sentence might partly reflect reality, the first does not: on the contrary, a series of labour and social rights are still missing, not to mention social rights of a transversal nature, such as a social progress clause or a right to dignity at work, as well as rights to reasonable working time, protection of personal data in the employment relationship and whistleblowing, as developed in Part Two of this paper. The lack of reference to the hierarchy of norms

39. SWD(2016) 50 final to be found: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0050&from=EN

40. http://www.eesc.europa.eu/resources/docs/community-charter--en.pdf.

between the EU treaties and EU secondary law and secondary law and soft law is misleading and very confusing for readers unacquainted with EU legal jargon. In the respect, aligning social rights with principles is problematic as it creates even more confusion.

The European Pillar of Social Rights initiative also has to be evaluated against the background of the current political initiatives currently being undertaken by the Commission, but also pending public consultations. In particular it is unclear how they are supposed to be interrelated.

Finally, the impressive but still far from comprehensive references to soft law reveals the desire of the EU Commission to affect the labour market as much as possible, in particular via, among other things, the EU Semester, which might give, when aligned with the conclusion of the SWD 51 in relation to the revival of the flexicurity concept and the trends towards structural reforms of so-called stringent employment regulations, a better view of the actual rationale of the pillar as an economic rather than a social necessity to make labour markets more responsive to the economic cycle.

5. The supremacy of the better regulation initiative is flooding the social acquis

The last line of argumentation is within the framework of the European Commission's Better Regulation Agenda with a view to revising the *acquis*. It is interesting to read that the Commission is aware of the recurrent and evidenced-based criticisms that Better Regulation aims, at least partly, at deregulating the EU legal *acquis*.[41] It is surprising to see the reference to the Better Regulation agenda coupled with the initiative of the pillar, as the words of President Juncker in his 2015 speech on the State of the Union mentioned that the pillar is intended to 'complement what we have already jointly achieved when it comes to the protection of workers in the EU', and not to review it.

Furthermore, it is all the more surprising that the recourse to the European Semester, (as a 'new' open method of coordination), would allow the avoidance of the 'burdensome unanimity requirements',[42] to quote the Commission, by neglecting the legislative procedure and parliamentary debate, and possibly consultation of the European social partners, when it comes to structural reforms of the labour market and labour systems in the member states, including reforms of industrial relations systems.

The rhetoric of Better Regulation is also to be found in what the Commission calls the 'added value' of the pillar: the possibility given 'to 'revisit', 'to assess and approximate the *acquis* for better performance of national employment and social policies'. However, Better Regulation in the fields of social and labour law has so

41. Vogel (2010), Van den Abele (2015), Schömann (2015). See also Supiot (2016).
42. European Commission, 2012, 'A blueprint for a deep and genuine EMU', COM(2012) 777 final/2.

far not brought any added value in the existing legal framework nor has it improved existing legislation or the adoption of new social legislation. For example, the regulatory fitness and performance programme of the European Commission (Refit), which aims at making EU law simpler and to reduce regulatory costs in order to contribute to a 'clear, stable and predictable regulatory framework', has not so far met the expectations described above. The refit on information and consultation, the refit on health and safety directives, as well as other initiatives have rather aroused suspicion concerning the real agenda behind the refits, to the extent that, in both cases, the European Parliament has stressed the need for strong and stable regulation insofar as both fields do not 'hamper but rather contribute to growth' and are 'two important keys for strengthening productivity and competitiveness in the European economy'.[43] More could be said about the EU directive on carcinogens and mutagens, that has been under review since 2004 with no result and for which the Commission had stopped developing exposure limits for cancer-causing chemicals due to a refit review in 2013. It is only in spring 2016 that the Commission is expected to announce a 'binding occupational exposure limit' for 13 cancer-causing substances, despite the fact that some exposure limits are still inadequate and some substances are not included.

Moreover, the deregulation path has been made more difficult by the appointment and work of the high level group on administrative burdens that was active as special advisor to the Commission between August 2007 and October 2014. In particular, a series of specific reports and recommendations have aroused much suspicion concerning the overall Better Regulation agenda, given the lack of consistency and the one-sided approach taken by the group: for example, the flagship initiative requiring exemption of SMEs and micro enterprises from legislation. Undoubtedly, such an exemption would deprive policy-making of much of its effectiveness, encourage social dumping and lead to protectionist measures on the part of member states; another flagship initiative is the 'one in, one out' key recommendation of the high level group by which an arbitrary net target is pre-set to reduce regulatory costs or to offset new burdens by removing existing ones. However, such a recommendation will not help to properly address new as well as unresolved problems, nor will it allow taking full account of the benefits of legislation in social or environmental terms, let alone the fact that replacing up to 28 national measures by a European one intends to make national markets mutually and equally accessible and therefore help to reduce administrative costs. A last flagship initiative is the demand to release draft impact assessments for public consultation before submitting a legislative proposal to the co-legislators. Needless to say, such a demand will unnecessarily delay the decision-making process and may lead to a 'paralysis by analysis', in particular because a Commission legal initiative that goes through a co-decision process will inevitably be subject to considerable public scrutiny.

The appointment of the former chair of the group by President Juncker as Special Adviser on Better Regulation is a further confirmation of the deregulatory path

43. European Parliament, 2014, EU regulatory fitness and subsidiarity and proportionality - better law-making; http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0061+0+DOC+XML+V0//EN

favoured by the Commission, despite the dissenting opinion published by four members of the HLG with a background in advocacy for workers, for public health, for the environment and for consumers, on the grounds of the 'clear deregulatory purpose' of some of the final propositions of the group and the unrelievedly negative and therefore unbalanced view of regulation.[44] Such a development raises serious concerns about the quality of good governance, transparency and objectivity in delivering better regulation.

The Communication, finally, is aimed at launching a consultation of civil society on a set of 10 questions in three domains, which do not fit within the structure of the Annex: the first set of questions aims at diagnosing the social situation and examining the extent to which the social *acquis* tackles the identified challenges; a second set deals with remedies for ensuring the sustainability of welfare systems and work in the future; and a third and last set of questions addresses the relevance of the pillar, as proposed, to support renewed convergence in the euro zone. This is complemented by further hearings and public consultation on three issues: taking stock of the social *acquis*, the future of work and welfare systems and the role of the pillar in deepening EMU.

6. What might be the real objective of the initiative?

In order to help to clarify the real objective (hidden agenda) of this initiative it might be helpful to compare it with previous initiatives, which were developed to achieve (more) acceptance of certain – probably critical – political measures by leveraging expectations of improvements in the social dimension at EU level.

Besides the Community Charter (1989), which was aimed at complementing the 'internal market' agenda of the former Commission President Delors and at the same time trying to compensate for its social deficit, three examples might be sufficient:

- the 'Solemn Declaration on Workers' Rights, Social Policy and Other Issues' (2009)[45] of the European Council, which was aimed at convincing the Irish population to vote in favour of ratification of the Lisbon Treaty during the Irish referendum;
- the promise of former Commission President Barroso for a much stronger focus on the social dimension in Europe at all levels of decision-making in crisis times and for a 'regulation' for the Posted Workers Directive (2009)[46] with the aim of being re-elected;

44. http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/annex_12_en_hlg_ab_dissenting_opinion.pdf

45. Presidency Conclusions – Brussels, 18/19 June 2009 - 11225/2/09 REV 2 - ANNEX 2: 20 – 21.

46. 'In my guidelines, I explained why the crisis calls for a much stronger focus on the social dimension in Europe at all levels of decision making. … That is why I commit to propose as soon as possible a Regulation to resolve the problems that have arisen … A Regulation has the advantage of giving much more legal certainty than the revision of the Directive itself, which would still leave too much room for diverging transposition, and take longer to produce real effects on the ground' (15 September 2009) http://europa.eu/rapid/press-release_SPEECH-09-391_en.htm.

– the call for a social roadmap[47] (2012)[48] with the aim of better acceptance of EMU.

Looking at these examples one main question arises: Were expectations met and if not, why?

For the Community Charter there is still a somewhat positive outcome although it was not made legally binding. Indeed, it was provided with a certain impact even in legal terms (see above) and, much more developed, in political terms by the 'Social Action Programme',[49] which led to a series of important social secondary legislation initiatives.

However, all three further examples have not resulted in any major positive step forward in order to achieve a more social EU.

Analysing the initiative on the European Pillar of Social Rights against this background the title raises high expectations with its (pan-)European dimension, with the core of 'social rights' built into a 'pillar'. Nevertheless, the content of the Commission's document(s) appears to go in the opposite direction:

– only a 'white paper' and no legally binding framework;
– only principles and no rights;
– only a benchmarking exercise and no secondary legislation measures;
– only a euro zone-oriented, not a pan-EU approach.

Obviously, the expectations raised with an instrument called the 'European Pillar of Social Rights' have not been met. Should this initiative therefore lead to a further political exercise involving institutions and actors at EU and national level, to an important extent fuelling many expectations, despite the fact that, from the beginning and possibly even more at the end, actual tangible improvements of the social situation in the EU are lacking and/or there is even a real danger of regression in this respect (for example, via the concept of flexicurity or the 'Better Regulation Agenda')?

47. See for possible details: Anne-Marie Grozelier, Björn Hacker, Wolfgang Kowalsky, Jan Machnig, Henning Meyer and Brigitte Unger (eds.), Roadmap to a Social Europe, 2013, https://www.socialeurope.eu/wp-content/uploads/2013/10/eBook.pdf.

48. '12. … To this end, the President of the European Council, in close cooperation with the President of the Commission, after a process of consultations with the Member States, will present June 2013 European Council possible measures and a time-bound roadmap on the following issues …
b) the social dimension of the EMU, including social dialogue; …' European Council conclusions on completing EMU adopted on 14 December 2012 'Roadmap for the completion of EMU' http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134320.pdf.

49. Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers. COM (89) 568 final, 29 November 1989 http://aei.pitt.edu/1345/1/Social_charter_COM_89_568.pdf.

Part two
Critical legal analysis and proposals

III. Preliminary explanations

A. General considerations

Part Two of this paper aims at providing the discussion on the European Pillar of Social Rights with a new dimension: a rights-based approach. This is what a pillar of social 'rights' suggests as its content and intention. However, as described above, this is not the approach the Commission takes with regard to the details of the Pillar. It only looks at the issue from an EU (not limited to the euro zone) perspective.

We shall examine each of the 20 policy domains described by the Commission separately. Starting with a description of the Commission's intentions and proposals – which are cited in detail – the paper tries to analyse them in particular in relation to their content and possible activities aiming at secondary EU legislation. These analyses form the basis of an evaluation that leads finally to concrete proposals for a specific right. Obviously, the proposals are not limited to the 20 policy domains that the Commission develops in the Annex to the Communication. They will be complemented by several additional rights that are deemed an important part of a 'European Pillar of Social Rights'.

It is evident that such a rights-based 'European Pillar of Social Rights' is not aimed at replacing the existing EU Charter of Fundamental Rights nor the Community Charter. Nor, for obvious reasons, is it aimed at restricting (in particular, better) implementation by collective agreements. Nevertheless, it will describe rights that call for further EU action, be it by secondary legislation or – in the case of absent competences – by political measures. The following analysis will deal more specifically with the possible legislative competences.

In any event, this analysis and the respective proposals have to be embedded in a wider perspective. On one hand, the dimension of necessary Treaty changes is important but excluded here. For this dimension, the ETUC has for a long time asked for a 'Social Progress Protocol'.[50] On the other hand, the dimension of the euro zone will have to be dealt with more specifically and separately. Indeed, the ongoing debate on social benchmarking in the euro zone requires an additional but different approach.

50. https://www.etuc.org/sites/www.etuc.org/files/social_progress_protocolEN_1.pdf. It might have to be updated in particular in relation to the new dangers for social rights coming, among other things, austerity policies.

B. Specific explanations

The following description will provide specific explanations as to the structure and to the content of each of the relevant policy domains.

1. As to the Commission's 20 specific 'policy domains'

Each of the Commission's 20 specific 'policy domains' (see below IV.) will be examined according to the following structure:

a) Content

As a basis for further consideration, the text of the Commission's Communication Annex is quoted here in full (in smaller letters).

b) EU acquis

(1) European Commission's view

In order to be able to assess the starting point for possible further action, here again the text of the Commission's Communication Annex is quoted in full (again in smaller letters), but limited to the substantive '*acquis*', whereas the provisions related to competence questions are quoted under 'Legal basis' (see below c)). The Commission Staff Working Document on 'The EU social *acquis*'[51] provides further information in this respect, but the (sub-)headings are not directly related to the policy areas mentioned in the Annex). In particular the 'Soft law' references are more accurately described there[52] and referred to here only in case of specific interest.

(2) Our view

As the Commission in its description refers only to EU primary law (TEU, TFEU, CFREU) the *acquis* is described more broadly. For the CFREU the relevant Explanations (see Article 6(1)(3) TEU) will have to be taken into account.

Particular emphasis will be put on describing the secondary legislation.

Finally, relevant international and other European standards and in some cases important case law will also be referred to.[53] The legal value of these references is based on the following framework:

51. SWD(2016)50, 8.3.2016, http://ec.europa.eu/social/BlobServlet?docId=15292&langId=en.
52. See SWD(2016)50 (see above, note 51) under '4. Soft law' the subsections on Policy coordination, EU funding and Recommendations (pp. 14 ff).
53. See for a more minimalistic approach the SWD(2016)50 (see above, note 51) under '5. Social rights and principles as laid down in international law' (acknowledging at least 'International standards remain an important reference, as they can express common views on minimum labour and social protection.')

- the CJEU's jurisprudence[54] according to which international human rights treaties on which Member States have collaborated are relevant for interpretation purposes;[55]
- Article 53 CFREU: international agreements that all Member States have ratified (in particular, UN Covenants, such as the International Covenant on Economic, Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR) as well as the ILO core Conventions[56] and the pertinent case-law[57]) are of particular relevance,
- Concerning specific European instruments:
  - ECHR:[58] in particular Article 6(3) TEU; Preamble, Articles 52(3) and 53 CFREU,
  - ESC/RESC[59] as well as the Community Charter (albeit not of a legally binding character in itself): references in recital 5 of the TEU and Article 151(1) TFEU, in the Preamble (para. 5) of and the Explanations to CFREU (Article 6(1)(3) TEU requiring 'due regard to the explanations referred to in the Charter, that set out the sources of these provisions' which is of specific relevance for the fundamental social rights in respect of which the Explanations refer mainly to the ESC/RESC and the Community Charter).

54. For the case-law of the CJEU see the InfoCuria data base http://curia.europa.eu/juris/recherche.jsf?language=en.

55. CJEU, Opinion 2/13, 18.12.2014, EU:C:2014:2454: 'the Court of Justice draws inspiration … from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold* v *Commission*, 4/73, EU:C:1974:51, paragraph 13).' para. 37. This source of inspiration is therefore not limited to international human rights treaties ratified by all or by a majority or even by one single Member State.

56. In numerical order: Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Equal Remuneration Convention, 1951 (No. 100), Abolition of Forced Labour Convention, 1957 (No. 105), Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182). The 'priority Convention' Labour Inspection Convention, 1947 (No. 81) has also been ratified by all EU Member States. To find out the status of ratification of the other ILO Conventions on the website http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO simply click on the relevant Convention and find the link to 'Ratifications by country' at the end.

57. See for the case law of the respective Committee concerning UN Covenants and the other Conventions related to human rights http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en; for the ILO Conventions see the case law of the respective Committees on the NORMLEX database http://www.ilo.org/dyn/normlex/en/f?p=1000:20000:0::NO.

58. For the text of the Convention which has been ratified by all EU Member States and its Protocols see the consolidated version under the European Convention on Human Rights; for the case law of the European Court of Human Rights (ECtHR) see the database http://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}. For a more comprehensive analysis of the ECHR in relation to employment see Dorssemont et al. (2013).

59. For the text of both instruments see http://www.coe.int/en/web/turin-european-social-charter/charter-texts; for the 'Signatures and ratifications' http://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications. Finally, for the case law of the European Committee of Social Rights (ECSR) which is only referred to in specific cases see in general Council of Europe (ed.), Digest of Decisions and Conclusions of the European Committee of Social Rights (1 September 2008) as well as more generally and more up-to-date the data base http://hudoc.esc.coe.int/eng/#. For a more comprehensive analysis of the ESC in relation to employment see Bruun et al. (2016).

c) Legal basis

This subsection deals with the possible legislative activity in the policy domain mentioned.

(1) European Commission's view

The final citation of the Commission's Communication Annex (again in smaller letters) relates to the legal bases.

(2) Our view

On the basis of the Commission's text this part tries to analyse in more detail the possibilities for legislative activities in the form of Directives.

In this respect, the Commission's indications are often not very clear. For the sake of a clearer picture, the different forms of competences should be distinguished:[60]

– *Shared competence* (Article 2(2) TFEU)

  – This competence is the most important as it allows for the adoption of legally binding acts. The form and procedure to be followed are defined in the respective policy area. For social policy, Article 153(2)(b) TFEU allows for the adoption of directives as minimum standards in relation to the Member States in the specific fields defined by Article 153(1) TFEU, that is,

    (a) improvement in particular of the working environment to protect workers' health and safety;
    (b) working conditions;
    (c) social security and social protection of workers;
    (d) protection of workers where their employment contract is terminated;
    (e) the information and consultation of workers;
    (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
    (g) conditions of employment for third-country nationals legally residing in Union territory;
    (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
    (i) equality between men and women with regard to labour market opportunities and treatment at work.[61]

    However, other competences might also have to be taken into account

60. For more details see Lörcher (2012).

61. For the following two fields there is no legislative competence in the form of Directives providing for minimum requirements:
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).

(e.g. on internal market according to Article 114 TFEU but with specific guarantees such as 'most favourable clauses').

Normally, the 'ordinary legislative procedure' (Article 294 TFEU) applies, but the exercise of some specific competences might be governed by special procedures.

– *Coordinate competence* (Article 2(3) TFEU)

It is provided that the 'Member States shall coordinate their economic and employment policies within arrangements as determined by the Treaty, which the Union shall have competence to provide'. If the coordination competence of Article 153(2)(a) TFEU applies to this category it, in any event, is 'excluding any harmonisation of the laws and regulations of the Member States'.

– *Supportive competence* (Article 2(5) TFEU)

In the same vein, subpara (2) excludes 'harmonisation of Member States' laws and regulations'. The Commission's cooperation under Article 156 TFEU might be an example.

– Competence for *unforeseen cases* (352 TFEU)

This possibility sets very high procedural hurdles.[62] It will therefore not be developed further here.

d) Evaluation

The evaluation is focused on the substance. The following elements are of particular interest:

(1) Content
Here, the content of the Commission's proposal is analysed in relation to its strengths, weaknesses and even dangers. The result of this analysis forms the basis for the proposal (see under e).
(2) Legislation
Based on the analysis of the legal basis and taking into account the content of the proposal it is analysed whether a Directive could be adopted.
(3) Placement
Some of the Commission's points (in particular in Chapter I) do not appear to be well placed from a systematic point of view. The same might apply to different points within one Chapter. The headings are marked '*' in order to show that their placement will be reconsidered. In the end, the proposal for the new structure will be described (see below under VI.).

62. See, for example, GC, Judgment 19/04/2016 – T-44/14 – *Costantini* – paras 51–55.

e) Proposal

The proposal described here refers only to the heading of the respective right, not (yet) to its more detailed substance. Subsequently, it will be placed in the new structure in a more coherent order (see below VI).

2. As to the additional 'policy domains'

For the additional 'policy domains' (see below V.) in principle, the structure described above also applies. However, for obvious reasons no quotations from the Commission's text can be provided. Moreover, the 'Evaluation' is replaced by a 'Motivation'.

IV. Detailed analysis and proposals concerning the Commission's 20 policy domains

A. Chapter I: Equal opportunities and access to the labour market

Chapter I deals not only with the two aspects mentioned in the title, but also with a range of elements related to working conditions (and therefore to be shifted to Chapter II, see below VI.).

1. Skills, education and lifelong learning*

a) Content (as defined by the Commission)

Basic skills in language, literacy, numeracy and ICT, which are the first building blocks for learning, remain a challenge for a significant share of the population, from children to adults. To increase quality and relevance of education outcomes, education and training systems need to become more effective, equitable and responsive to labour market and societal needs. Equal access regardless of economic means to acquiring a foundation of basic skills and key competences in initial education needs to be complemented by quality opportunities for adults to acquire basic skills and key competences throughout the life course. Population ageing, longer working lives and increased immigration of third country nationals require additional actions for up-skilling and life-long learning, to successfully adapt to technological transformations and fast-changing labour markets.

a. All persons shall have access to quality education and training throughout the life course to acquire an adequate level of basic skills and key competences for active participation in society and employment. Low skilled young people and working age adults shall be encouraged to up-grade their skills.

b) EU acquis

(1) European Commission's view

Article 14 of the Charter of Fundamental Rights (CFREU) sets out: *Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education.*

* See the explanation for the '*' at the bottom of page 35.

(2) Our view

Besides the right to education enshrined in Article 14 CFREU, quoted by the Commission in Article 9 TFEU, specifies that 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and *a high level of education, training* and protection of human health.' The EU obligation is further developed in Title XII of Part III TFEU on education, vocational training, youth and sport. In point No. 15 the Community Charter provides, in relation to vocational training:

> 15. Every worker of the European Community must be able to have access to vocational training and to receive such training throughout his working life. In the conditions governing access to such training there may be no discrimination on grounds of nationality.
>
> The competent public authorities, undertakings or the two sides of industry, each within their own sphere of competence, should set up continuing and permanent training systems enabling every person to undergo retraining, more especially through leave for training purposes, to improve his skills or to acquire new skills, particularly in the light of technical developments.

However, to date no directive or regulation has dealt with the right or access to lifelong learning and (re)training, except Gender Equality Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), as regards access to employment, *vocational training* and promotion, and working conditions. Furthermore, the European social partners have signed a 'framework of actions for the lifelong development of Competencies and qualifications' in 2002. Otherwise the EU is working on vocational training in the form of the open method of coordination.

Concerning international and European standards, the ESC provides for extensive rights concerning lifelong learning: the right to appropriate facilities for vocational guidance (Article 9 ESC); the right to appropriate facilities for vocational training (Article 10 ESC); and the right to vocational training, rehabilitation and resettlement, for disabled persons whatever the origin and nature of their disability (Article 15 ESC). At international level, the ILO Paid Educational Leave Convention, 1974 (No. 140) and Human Resources Development Convention, 1975 (No. 142) provide for a right to paid vocational training and secure a right to vocational training. Moreover, concerning the right to education Article 26 UDHR, Article 13 ICESCR and Article 2 of Protocol No. 1 to the ECHR should also be mentioned.

c) Legal basis

(1) European Commission's view

Articles 165 and 166 TFEU set out that the Union shall implement a vocational training policy and shall contribute to the development of quality education by

encouraging cooperation between the Member States, supporting and supplementing their action.

(2) Our view

For lifelong learning as part of education the EU is permitted to adopt 'incentive measures, excluding any harmonisation of the laws and regulations of the Member States' (Article 165(4) 1st indent TFEU) and Recommendations (Article 165(4) 2nd indent TFEU). Concerning vocational training a similar approach applies (Article 166(4) TFEU, speaking of 'measures' in general). Therefore, inasmuch as these legal bases would not allow for adoption of Directives on this legal basis it would still have to be examined whether other competences could be used (bearing in mind, for example, that important social directives in the early days of EU secondary legislation were based on internal market competences).

d) **Evaluation**

(1) Content

The term 'skills' does not in itself provide for a rights-based approach. Instead, lifelong learning and (re)training are better adapted for such an approach, but need qualification concerning the standard required. Therefore, the term 'quality' should be added in order to allow workers to adapt under good conditions to the changing realities of the world of work, with particular attention to digitalisation at work. (The right to paid educational leave is dealt with more specifically under 3.)

(2) Legislation

Although the issue as such is not directly open to secondary legislation an examination of internal market competences might be envisaged (see above (c)), but with the need of always (as on most previous occasions) ensuring that Member States could continue to provide for better standards.

(3) Placement

Lifelong learning and, in particular, (re)training are closely related to labour rights. It should therefore be placed in Chapter II.

(4) Proposal

The formulation should read as follows: 'Right to quality lifelong Learning and vocational (re-)training'.

2. Flexible and secure labour contracts*

a) Content (as defined by the Commission)

Flexible contracts can facilitate entry to the labour market and promote career transitions, while allowing employers to respond to shifts in demand. Digital economies are changing the work patterns and leading to new forms of work such as self-employment. This may allow more diverse entry routes in the labour market and can help to keep people active. Large differences in employment conditions persist however across different employment contracts. Moreover, there are "grey zones", such as 'dependent' and 'bogus' self-employment leading to unclear legal situations and barriers to access social protection. Such phenomena risk leading to precariousness and/or two-tier, segmented labour markets, which hamper productivity and lead to exclusion. Non-permanent employment can raise risks of precariousness through lower levels of protection against dismissal, lower pay, limited access to social protection and training. Moving towards types of contracts that have comparable guarantees and costs can allow temporary employment to become a stepping stone towards stable and secure employment, while increasing the resilience of labour markets to shocks.

a. Equal treatment for equal work and work of equal value shall be ensured, regardless of employment contract, unless different treatment is justified on objective grounds. Misuse or abuse of precarious and non-permanent employment relationships shall be prevented.

b. Flexibility in the conditions of employment can offer a gateway to the labour market and maintain employers' ability to swiftly respond to shifts in demand; however, the transition towards open-ended contracts shall be ensured.

b) EU acquis

(1) European Commission's view

-

(2) Our view

Surprisingly, the Commission does not refer to any '*acquis*' in this area. There are at least two main elements with regard to which the EU *acquis* has to be described:

Concerning *protection against precarious* work the Community Charter requires active improvement:

> 7. The completion of the internal market must lead to an *improvement in the living and working conditions of workers* in the European Community. This process must result from an approximation of these conditions while the *improvement is being maintained*, as regards in particular the duration and organisation of working time and forms of employment other than open-

> ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work. (Emphases added)

In contrast to several other areas the Commission does not refer here to (one of the) social policy objectives defined in Article 151(1) TFEU. Indeed, the 'improvement of … working conditions, so as to make possible their harmonisation, while the improvement is being maintained' should be specifically mentioned.

The secondary legislation in relation to (certain) types of employment contracts provides for (certain) protection for workers in the situation of part-time employment (Directive 97/81/EC), a fixed-term contract (Directive 99/70/EC) or temporary agency work (Directive 2008/104/EC). It should also be recalled that Directive 91/383/EEC provides for specific protection in relation to health and safety for the latter two categories (besides the general protection).

Concerning international and European standards guaranteeing the right to work, Article 6 ICESCR (together with General Comment No. 18),[63] as well as Article 1 ESC should be taken into account. With its Part-Time Work Convention, 1994 (No. 175), Home Work Convention, 1996 (No. 177) and more recently with its Domestic Workers Convention, 2011 (No. 189), as well as several other Conventions, the ILO provides an important protective framework in relation to specific groups of workers in possibly precarious situations.

In relation to *prohibition of discrimination*, again an important set of EU standards is to be referred to. Although the CFREU does not contain an explicit provision, the basic principle of 'equality before the law' (Article 20 CFREU) would cover the protection against unjustified discrimination. For precarious work in particular, the gender dimension requires in particular that Article 23 CFREU, providing for equality between men and women, be taken into account.

Moreover, in secondary legislation there is an important EU *acquis* as regards the three fundamental Directives currently in force: the Anti-Racism Directive 2000/43/EC, the Employment Equality Framework Directive 2000/78/EC and the Gender Equality Directive 2006/54/EC (mentioned above). Further directives addressing specific aspects of precarious work contain the prohibition of discrimination on other grounds, such as for workers in part-time employment (Directive 97/81/EC), a fixed-term contract (Directive 99/70/EC) or temporary agency work (Directive 2008/104/EC).

Concerning international and European standards, there is a wide range of instruments within the framework of the UN (Article 2 UDHR, Article 2(2) ICESCR as well as specific Conventions, in particular the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)), the ILO (Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111)) and in the Council of Europe (Article 14 ECHR and Protocol No. 12; Article E RESC).

63. http://www.refworld.org/docid/4415453b4.html

(c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out that the Union shall adopt minimum requirements, as well as support and complement the activities of the Member States in the field of working conditions.

(2) Our view

The Commission's description does not contain a clear indication what the form of action should be. In relation to working conditions, Article 153 (1)(b) in combination with (2)(b) TFEU would allow for the adoption of a directive. In support thereof and additionally, other measures could be envisaged (Article 153(2)(a) and Article 156 TFEU).

(d) Evaluation

(1) Content

The domain 'Flexible and secure labour contracts' appears to reflect the so-called 'flexicurity' concept. Here, it is specified by two main aspects: non-discrimination and flexibilisation.

Against the background of Article 20 CFREU the principle of *equal treatment* is nothing new. Even here, the formulation is limited as it only concerns an 'employment contract' and not the larger notion of 'employment relationship'. Moreover, all the other anti-discrimination provisions (see above (b)) are not (sufficiently) taken into account. Therefore, a general right to equal opportunities is necessary (see below 6).

The *flexibilisation* approach is dangerous. It invites employers to use all forms of 'flexible' contracts. This is contrary to the 'improvement of … working conditions' referred to in Article 151(1) TFEU and in the Community Charter (see above (b)). The only safeguard appears to be that 'the transition to open-ended contracts shall be ensured'. Even if one could understand this positively in the sense of a (legal requirement for a) transition of a fixed-term contract to a contract of indefinite duration the real question is, what would this safeguard offer in relation to all the other forms of 'grey-zone' employment? Obviously nothing. This part should be retained only insofar as it provides effective protection against precarious work.

(2) Legislation

As described above even the Commission is of the view that minimum requirements could be set by a Directive.

(3) Placement

The concept is not only related to 'access to labour market', instead it appears more closely linked to labour rights. It should therefore be placed in Chapter II.

(e) Proposal

The formulation should read as follows: 'Right to protection against precarious work'.

3. Secure professional transitions*

a) Content (as defined by the Commission)

Working lives are becoming more diverse, including multiple jobs and forms of employment, career interruptions, increased mobility and professional changes within one's lifetime. Making the most of technological change and fast-changing labour markets requires faster and improved support for job and professional transitions, as well as support for regular up-skilling throughout the working life. Up-skilling requires investment from individual workers, companies and society. Some social protection entitlements, such as occupational pensions, unemployment benefits, health insurance or training entitlements cannot always be easily transferred when changing jobs, nor can they be valorised or accrued when starting up self-employment. Conversely, some of the entitlements of jobseekers or inactive persons should not become disincentives to re-staring work or starting up own enterprises.

a. All working age persons shall have access to individualised job-search assistance and be encouraged to take up training and up-skilling in order to improve their labour market or entrepreneurial prospects and faster job and professional transitions.

b. The preservation and portability of social and training entitlements accumulated during the career shall be ensured to facilitate job and professional transitions.

b) EU acquis

(1) European Commission's view

Article 151 of TFEU sets out that the Union and the Member States shall have as an objective the promotion of employment.

(2) Our view

Besides Article 151(1) TFEU, referring to 'the promotion of employment', Article 3(3)(1) TEU defines the aim of 'full employment'. Moreover, Article 9 TFEU refers not only to the promotion of a high level of employment, but also to the guarantee of a high level of education and training. Article 29 CFREU guarantees the right of access to a free placement service. In its No. 6, the Community Charter requires

that 'Every individual must be able to have access to *public* placement services free of charge' (emphasis added).

Concerning international and European standards guaranteeing the right to work, Article 6 ICESCR (together with its General Comment No. 18) and in particular Article 1 ESC should also be taken into account. With its Employment Policy Convention, 1964 (No. 122), Paid Educational Leave Convention, 1974 (No. 140), Human Resources Development Convention, 1975 (No. 142) and Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) the ILO provides for an important framework in this respect.

For further details in relation to education and training see above 1.b).

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the combating of social exclusion, and the modernisation of social protection systems.

(2) Our view

Although it is not very clear to which elements of the proposal it is related, it is interesting to note that the Commission mentions the 'social security and social protection of workers' which, according to Article 153(1)(c) in combination with (2)(b) TFEU allows for the adoption of a directive. However, this requires unanimity (Article 153(2)(3) TFEU).

Insofar as this proposal is also related to the improvement of workers' knowledge, paid educational leave could be considered a 'working condition' and, as such, open to the adoption of a Directive (Article 153(1)(b) in combination with (2)(b) TFEU).

Moreover, the two further elements mentioned by the Commission are excluded from the adoption of Directives according to Article 153(1)(j) and (k) in combination with (2)(b) TFEU. It therefore remains at the level below legislation.

d) Evaluation

(1) *Content*

There are two main elements:

As regards *job and professional transitions*, the concept of 'individualised job-search assistance' should be considered an integral part of the free placement services guaranteed in Article 29 CFREU.

Second, the concept of employability appears to be behind the formulation 'be encouraged to take up training and up-skilling in order to improve their labour market or entrepreneurial prospects and faster job and professional transitions'. If the worker needs education and training this should be guaranteed by the right to lifelong learning and (re)training (see above 1.) and it should always remain his or her free choice.

Portability is a new idea that, in principle, would offer additional protection. However, the main problem is that there is no such 'entitlement' in EU law. Therefore it would be important to provide for such a right to '*paid educational leave*' (at least) on the basis of the ILO's Paid Educational Leave Convention, 1974 (No. 140).

(2) Legislation

For the social security aspect of placement services there are strong arguments (in particular because they are often part of unemployment insurance schemes) to find a legal basis in Article 153 TFEU for a directive (see above c)).

For paid educational leave it would appear obvious that the adoption of a directive would be possible (see above c)).

(3) Placement

At least the second part (paid educational leave) would have to be shifted into Chapter II.

e) Proposal

The formulation read as follows: Right to free and quality placement services as well as Right to paid educational leave ensuring portability of entitlements

4. Active support to employment

a) Content (as defined by the Commission)

Persistent, recurrent as well as long-term unemployment, in particular for young people and people with low skills, calls for adequate and targeted support for (re)entering work as well as measures to develop, skills, qualifications or work experience to enable entering into new occupations. Rapid and effective access to such measures can prevent labour market and social exclusion.

a. ***All people under the age of 25 years shall receive a good-quality offer of employment, continued education, an apprenticeship or a traineeship within a period of four months of becoming unemployed or leaving formal education.***

b. ***It shall be equally ensured that registered long term unemployed persons are offered in depth individual assessments and guidance and a job integration agreement comprising an individual service offer and the identification of a single point of contact at the very latest when they reach 18 months of unemployment.***

b) EU acquis

(1) European Commission's view

Article 151 of TFEU sets out that the Union and the Member States shall have as an objective the promotion of employment.

(2) Our view

Besides Article 151(1) TFEU mentioned by the Commission, there is an important 'EU *acquis*' in relation to young people and employment:

In particular, Article 14 CFREU enshrining the right to education and Article 32 CFREU on the prohibition of child labour and protection of young people at work should be mentioned. In light of the new legal environment established by the Lisbon Treaty, in 2010 the Commission developed a strategy for the implementation of the CFREU, with the objective of ensuring the effective protection and promotion of fundamental rights[64] and in particular, Article 32 CFREU. Interestingly, the CFREU Explanations refer explicitly to Article 7 ESC, so that the material scope of Article 32 CFREU should be interpreted in light of the jurisprudence of the ECSR and include in particular 'all economic sectors and all types of enterprises, including family businesses, as well as all forms of work, whether paid or not'. Identically, a range of issues that are not addressed by the CFREU have to be interpreted in light of Article 7 ESC, such as light work, limitation of working hours, rest and annual vacations, but also vocational training, prohibition of night work and regular medical checks.

Moreover, under the heading 'Protection of children and adolescents' the Community Charter provides:

> 20. Without prejudice to such rules as may be more favourable to young people, in particular those ensuring their preparation for work through vocational training, and subject to derogations limited to certain light work, the minimum employment age must not be lower than the minimum school-leaving age and, in any case, not lower than 15 years.
>
> 21. Young people who are in gainful employment must receive equitable remuneration in accordance with national practice.

64. European Commission (2010: 3).

> 22. Appropriate measures must be taken to adjust labour regulations applicable to young workers so that their specific needs regarding development, vocational training and access to employment are met.

Concerning the offer for *employment and education* (proposal under a)): as early as 1994 the EU adopted Directive 94/33/EC setting minimum standards for the protection of young people at work. Moreover, the Employment Equality Framework Directive 2000/78/EC prohibits 'age' as ground for discrimination.

Since 2013, the European Commission has developed the Youth Guarantee following a Council Recommendation of 22 April 2013, on the basis of Article 292 TFEU. It follows the guidelines for the employment policies of the Member States, adopted by the Council in its Decision 2010/707/EU, in particular guidelines 7 and 8 that call on Member States to promote the integration of young people in the labour market and to help them, in cooperation with the social partners, to find initial employment, work experience or further education and training opportunities, including apprenticeships, and to intervene rapidly when young people become unemployed.

In June 2013 the European Social Partners signed a Framework of Actions on Youth Employment.

Concerning international and European standards and besides Art. 7 ESC already mentioned, the ILO's Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77) and Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78) provide for additional (health) protection of young workers.

c) Legal basis

(1) European Commission's view

> Article 153 also sets out that the Union and shall adopt minimum requirements, as well as support and complement Member States' efforts to promote the integration of persons excluded from the labour market.

(2) Our view

The Commission refers to the 'integration of persons excluded from the labour market' (Article 153(1)(h) TFEU). In combination with Article 153(2)(3) TFEU this forms the legal basis for the adoption of minimum requirements in the form of a directive. Moreover, any 'working conditions' (Article 153(1)(b) TFEU) can be defined in the same way.

d) Evaluation

(1) Content

Concerning the first proposal, the text is identical to the existing EU legislation and Council recommendation on the youth guarantee.

However, it appears less protective in relation to Article 32 CFREU as the proposal does not refer to the need for 'working conditions appropriate to their age and [that they should] be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development', which may lead to economic abuse of young people at work. Furthermore, there should be a reference to include all sectors of activity, all economic sectors, all types of enterprises, as well as all forms of work, whether paid or not.

Both an ILO report of 2012[65] and a 2014 ETUC study 'The Youth Guarantee in Europe' (2014)[66] show the limits of such an initiative, in particular the fact that it does not adequately ensure that young people – and in particular women – are not trapped in precarious jobs. They also stress the need for careful design of regulations. In particular such an initiative relies on the availability of well-resourced public employment services. The impact of the crisis has shown that national public employment services are often understaffed – in particular due to severe cuts in public services – and are not in a position to cope with young people who might not have been part of its usual target group before. Furthermore, the social partners in the Member States have been only marginally involved at the national level in the implementation of the Youth Guarantee. A reformulation of the right to active support for employment of young people should include good-quality offer of employment according to the principle of non-discrimination at the work place (or right for equal treatment for equal work), of continued education, and of decently paid apprenticeship or of decently paid traineeship.

(2) Legislation

The competences described above provide for fairly wide legislative activities in form of a Directive.

e) Proposal

The formulation should read as follows: Right to youth employment including that all people under the age of 25 years shall receive a good-quality offer within a period of four months of becoming unemployed or leaving formal education.

5. Gender equality and work life balance*

a) Content (as defined by the Commission)

Women continue to be underrepresented in employment, overrepresented in part-time work and lower-paid sectors, and receive lower hourly wages even though

65. ILO (2012a).
66. https://www.etuc.org/sites/www.etuc.org/files/publication/files/ces-brochure_youth_guarantee_09pap.pdf

they have surpassed men in educational attainment. Supporting their labour market participation is fundamental for ensuring equality of opportunities, and becomes an economic imperative in a context of ageing workforce.

Lack of adequate leave and care arrangements for children and other dependent family members can discourage people with caring responsibilities, mainly women, from continuing their jobs or re-entering employment. Barriers to female participation in the labour market include lack of adequate work-life balance policies, fiscal disincentives for second earners or excessive taxation of labour, and stereotypes on fields of study and occupation.

Access of self-employed or workers who are not on full time and permanent contracts to paid family-related leave or insurance schemes remains uneven. Moreover, insufficient possibilities and encouragement for men to take leaves is reinforcing women's roles as primary carers, with negative effects on female employment. There is also an enhanced opportunity for flexibility in the organisation of work partly derived from digital environments and combination of several occupations in the sharing and collaborative economy. Flexible working arrangements can also help facilitate work-life balance by allowing both people in employment and firms to adapt working schedules and patterns to their needs.

a. Gender equality in the labour market and education shall be fostered, ensuring equal treatment in all areas, including pay, and addressing barriers to women's participation and preventing occupational segregation.

b. All parents and people with caring responsibilities shall have access to adequate leave arrangements for children and other dependent relatives, and access to care services.[67]An equal use of leave arrangements between sexes shall be encouraged, through measures such as the provision of remunerated leave for parents, both men and women

c. In agreement between employers and workers, flexible working arrangements including in the area of working time shall be made available and encouraged, taking into account both workers and employers' needs.

b) EU acquis

(1) European Commission's view

Article 33 of the Charter of Fundamental Rights sets out: *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.*

67. In accordance with Principles 17–18 below.

Article 24 of the Charter of Fundamental Rights moreover sets out: Equality between women and men 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 favour of the underrepresented sex.

Article 3 TEU sets out that the Union shall combat social exclusion and discrimination. Moreover, Article 8 TEU sets out that the Union shall aim to eliminate inequalities and to promote equality between women and men.

(2) Our view

The Commission quotes two CFREU Articles, Article 23 [not 24] CFREU, which provides for equality between men and women, and also Article 33(2) CFREU protecting (the reconciliation of) family and professional life, and mentions expressly the 'right to paid maternity leave and to parental leave'. It is important to refer not only to the EU's objectives (Article 3(3)(2) TEU) and to the horizontal gender mainstreaming clause (Article 8 TFEU), but above all to the EU's values encompassing also 'equality between men and women' (Article 2 TEU), as the values are above the objectives (as, according to Article 3(1) TFEU, among the Union's main aims is to promote its values).

Moreover, Article 157 TFEU contains (besides the principle of equal treatment for migrant workers) the most important starting point for the EU anti-discrimination legislation: the (directly applicable) principle of equal pay for work of equal value (paras (1) and (2): ex-Article 119 TEEC), further extended to the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation is of particular relevance (paras. (3) and (4)).

In its No. 16 the Community Charter states the matter even more clearly:

> 16. Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.
>
> To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.

Measures should also be developed enabling men and women to reconcile their occupational and family obligations.

As regards secondary legislation, the following main directives should be noted: in relation to the general equality requirement in employment matters, particularly in relation to pay but also in relation to maternity, the Gender Equality Directive 2006/54/EC and, more specifically, the Maternity Leave Directive 92/85/EEC; concerning family life: the parental leave Directive 2010/18/EU. The Directive 2004/113/EC implementing the principle of equal treatment between men and

women with regard to access to and supply of goods and services enshrines it in EU law (but not access to education, Article 3(3)). In respect of social security, Directive 79/7/EEC provides for the progressive implementation of the principle of equal treatment for men and women in matters of social security.[68]

With regard to international and European standards, particular reference should be made to both UN Covenants (Article 3 ICESCR, Article 3 ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as the ILO's two fundamental rights conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and, more specifically, the Equal Remuneration Convention, 1951 (No. 100),[69] the Workers with Family Responsibilities Convention, 1981 (No. 156) and the Maternity Protection Convention, 2000 (No. 183). Moreover, at European level the following provisions of the ESC should be mentioned: Article 4(3) on equal pay; Article 8 (the right of employed women to protection of maternity), Article 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex); Article 26(1) (the right to dignity at work, with specific relation to prevention of sexual harassment); and Article 27 (the right of workers with family responsibilities to equal opportunities and equal treatment). As a new development, the Council of Europe Convention on preventing and combating violence against women and domestic violence is to be noted in particular (see its Articles 20(1) and 50 (2)). Finally, Article 14 ECHR and Article 1 of Protocol No. 12 refer to sex as a ground for prohibited discrimination.[70]

Of course, all other instruments that include 'sex' as a ground for prohibited discrimination will also have to be taken into account (see below 6).

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out that the Union shall adopt minimum requirements, as well as support and complement the activities of the Member States in the area of working environment, working conditions, as well as equality between men and women with regard to labour market opportunities and treatment at work.

Article 19 TFEU sets out that the Union may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 153 TFEU sets out that the Union shall adopt minimum requirements, as well as support and complement the activities of the Member States with regard to the integration of persons excluded from the labour market as well as promoting equality between women and men with regard to labour market opportunities and treatment at work.

68. See for further details (also in respect of the consultation): http://ec.europa.eu/justice/newsroom/gender-equality/opinion/150901_en.htm.
69. See ILO (2012b: 271 ff).
70. See Factsheet on the ECtHR's jurisprudence on Gender equality.

(2) Our view

For legislative acts, three legal bases are available, the first two of which are mentioned by the Commission:

- General: Article 19(2) TFEU requires unanimity,
- Labour market opportunities and treatment at work: Article 153(1)(i) in combination with (2)(b) TFEU,
- Employment and occupation (Article 157(3) TFEU).

d) Evaluation

(1) Content

According to the Commission's approach three main issues are at stake:

The *gender equality principle*: although Directive 2006/54/EC might have a somewhat limited scope (in principle, limited to employment, including vocational training and occupational social security systems, but not education or social security in general) it appears obvious that the principle as such has a much wider scope, including education and social security. Moreover, its reference to 'address[ing] barriers' instead of 'deleting' [suppressing?] them appears too weak. Therefore, the principle of equal treatment should be understood in a wider manner and be complemented by additional (in particular, prevention-oriented) measures. In any event, it is of particular importance that the principle of 'equal pay for work of equal value' be effectively implemented and must therefore be mentioned expressly.

Concerning *reconciliation of professional and family life* several issues are at stake. First and foremost is paid leave important in relation to caring responsibilities. This is the working conditions aspect in relation to the (social protection) institutions dealt with below (for example, see below under 17 and 18). Most recently, the Commission carried out a first phase consultation of social partners under Article 154 TFEU on possible action to address the challenges of work/life balance faced by working parents and caregivers,[71] to replace the 2008 Commission proposal to revise the Maternity Leave Directive 92/85/EEC.[72] It appears

71. COM(2015) 7754 final: http://ec.europa.eu/social/BlobServlet?docId=14743&langId=en

72. In a nutshell, the ETUC requests the following:
- Leave facilities should offer a genuine prospect of combining work, family and/or private life; they should be paid and ensure the right combination of length and flexibility without impacting workers' capacity to come back to work after the leave period or negatively affect their career, wages and pensions rights.
- The Directive on maternity protection should be revised to ease mothers' transition into work, such as the provision of appropriate breaks and/or privacy; fostering protection against dismissal; protection from imposed night shifts and overtime or inflexibility towards breastfeeding mothers for at least six months; securing full payment of maternity leave.
- The new Paternity Directive ensuring paid paternity leave and its length should be adequate (from two weeks to one month); should be individual and non-transferable, and preferably mandatory, that is, an automatic right and not depending on request; it should ensure job

necessary to recognise a right to reconciliation of professional and family life.

Closely related is the third element on *working (time) arrangements*. It is interesting to note that it is not limited to working time but conceived in a general way. In accordance with the principle just mentioned this element would be covered.

(2) Legislation

As regards the first element, Article 19(1) TFEU mentions 'sex' as one of the eight grounds of the legal basis for the adoption of a directive (Article 19(2) TFEU). It would allow for a wide legislative approach (in particular for social security and education matters). However, it requires unanimity. The other two elements could be regulated by a directive based at least on Article 153(1)(i) in combination with (2)(b) TFEU (the other two bases could be Article 153(1)(b) and Article 157(3) TFEU).

(3) Placement

As the core of all three elements is related to working conditions and should thus be placed in Chapter II, the general principle should remain in Chapter I as it is valid also for the entire field of social protection dealt with in Chapter III.

e) Proposal

> The formulation should read as follows: 'Right to equal treatment between men and women, in particular to equal pay' and 'Right to maternity protection and reconciliation of family and professional life'.

6. Equal opportunities

a) Content (as defined by the Commission)

Discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation is illegal throughout the Union. However certain groups face difficulties in accessing the world of work. In particular, third country nationals and ethnic minorities are under-represented in employment and incur a greater

protection and job related rights, and it should not lead to losses in terms of social security or pension rights.
– Introduction of a Carers' Leave Directive, as a supplement to the provision of affordable professional care.
– Flexible working (time) patterns adapted to workers' needs (men and women) through a life-cycle approach.
https://www.etuc.org/documents/etuc-position-first-stage-consultation-eu-social-partners-new-start-work-life-balance#.Vsc8B2f2bUM

risk of poverty and social exclusion. It is important to address the obstacles to their participation, which can include language barriers or gaps in recognition of skills and qualifications. As far as discrimination on the grounds of nationality or ethnic origin is concerned, the experience on the ground shows a lack of awareness both of employers of non- discriminatory hiring practices and of people subject of discriminations of their rights.

Supporting their labour market participation is fundamental for ensuring equality of opportunities, and becomes an economic imperative in a context of ageing workforce.

a. Labour market participation of under-represented groups shall be enhanced, ensuring equal treatment in all areas, including by raising awareness and addressing discrimination.

b) EU acquis

(1) European Commission's view

Article 21 of the Charter of Fundamental Rights sets out: *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*

Article 3 TEU sets out that the Union shall combat social exclusion and discrimination. Moreover, Article 8 TEU sets out that the Union shall aim to eliminate inequalities and to promote equality between women and men.

(2) Our view

The Commission quotes Article 21 CFREU containing the non-discrimination principle. Moreover, as general principles, Article 20 CFREU guaranteeing equality before the law and Article 21 CFREU on non-discrimination, as well as rights of specific groups such as elderly persons (Article 25 CFREU) and persons with disabilities[73] (Article 26 CFREU) should also be mentioned. It is also necessary to refer not only to the EU's objectives (Article 3(3)(2) TEU) and to the horizontal anti-discrimination clause (Article 10 TFEU),[74] but above all to EU's values encompassing also 'non-discrimination' and 'equality between men and women' (Article 2 TEU) as the values are above the objectives (as, according to Article 3(1) TEU, the Union's main aims include the promotion of its values). Also importantly, Part Two of the TFEU deals, among other things, with non-discrimination (specifically Article 18 TFEU on the prohibition of discrimination on grounds of nationality within the scope of the Treaties) and Article 45 TFEU on the rights of migrant workers to non-discrimination.

73. For more details, see below I.A.16.

74. Albeit limited to the eight grounds of non-discrimination specified in the three directives mentioned below; see concerning this limited approach also Article 19 TFEU.

As regards secondary legislation three fundamental Directives are in force: the Anti-Racism Directive 2000/43/EC, the Employment Equality Framework Directive 2000/78/EC and the Gender Equality Directive 2006/54/EC (mentioned above). Many further directives contain prohibitions of discrimination on other grounds (for example, the Maternity Leave Directive 92/85/EEC and the Transfer of Undertaking Directive 2001/23/EC).

Concerning international and European standards, the non-discrimination principle is enshrined in the UN Covenants (Article 2(2) ICESCR[75] and Article 2(2) ICCPR). Moreover, a series of Conventions deal with specific aspects, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, mentioned above), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Convention on the Rights of Persons with Disabilities (CRPD to which the EU is party). As one of the eight core Conventions of the ILO, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) is of particular importance but many other Conventions prohibit certain grounds of discrimination. One more recent example is the Home Work Convention, 1996 (No. 177) which provides for equality of treatment (Article 4).

At European level, the core provision is Article 14 ECHR (non-discrimination in relation to the rights guaranteed under the ECHR) complemented by Protocol No. 12 (general non-discrimination principle).[76] Article E RESC also prohibits discrimination.

c) Legal basis

(1) European Commission's view

Article 19 TFEU sets out that the Union may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 153 TFEU sets out that the Union shall adopt minimum requirements, as well as support and complement the activities of the Member States with regard to the integration of persons excluded from the labour market as well as promoting equality between women and men with regard to labour market opportunities and treatment at work.

(2) Our view

As mentioned by the Commission, the legal basis of Article 19 TFEU is, for the adoption of a directive, limited to the eight grounds quoted above. Moreover, it requires unanimity (Article 19(2) TFEU). Article 153 TFEU would allow for the adoption of a directive prohibiting discrimination as far as working conditions

75. See General Comment No. 20 on non-discrimination in economic, social and cultural rights.
76. See, for example, European Union Agency for Fundamental Rights and European Court of Human Rights (2011). See also Bruun (2013: 367).

are concerned (Article 153(1)(b) in combination with (2)(b) TFEU). For equal treatment between women and men (see above 5.c)), as well as for the integration of persons excluded from the labour market the Commission also refers to Article 153(1)(h) and (i) in combination with (2)(3) TFEU as a basis for the adoption of minimum requirements. In conclusion, although there is no legal basis covering all aspects of equal treatment there are several elements that allow for the adoption of a Directive (in particular insofar as they are related to working conditions).

d) Evaluation

(1) Content

The key term 'labour market participation' represents less a legal than an economic approach. Moreover, the concept of 'underrepresented groups' should not be the starting point as it is not clear in relation to which other group it is underrepresented. It might also come into conflict with the more usual concept of 'ground for discrimination'. One might consider the element 'ensuring equal treatment in all areas' as – at first glance – positive. However, it is obvious that Articles 20 and 21 CFREU (the latter being mentioned by the Commission) merely cover all areas. 'Raising awareness' might be considered interesting, but it is not clear in respect of whom and by whom this should take place. If it were the obligation of the state to raise the awareness of employers this could be a very first step. However, more importantly, discrimination should not only be 'addressed' but eliminated.

(2) Legislation

As described above (see (2)), although there is no legal basis covering all aspects of equal treatment there are several elements that allow for the adoption of a Directive (in particular as far as they are related to working conditions).

e) Proposal

> The formulation should read as follows: 'Right to equal treatment in particular in employment and occupation'.

B. Chapter II: Fair working conditions

In principle, Chapter II covers the whole area of individual and collective labour law. Compared with its relevance in general, the content of the Community Charter and the number of rights contained in Chapter III in particular the actual content is particularly unsatisfactory. As indicated above, a number of elements provided for in Chapter I will also have to be included here (for the proposed new structure see below, VI.).

7. Conditions of employment

a) Content (as defined by the Commission)

New forms of flexible employment require additional care to specifying the nature, volume or duration of work, to identify the employers as well as the associated level of social protection and to avoid abuses in periods of probation. Decentralised, self-organised forms of work can increase worker autonomy and boost business development, while leading to lower awareness of rights and unclear information requirements for employers. Existing EU legal provisions to inform employees on the conditions of employment do not apply from the start of employment and become more difficult to apply in increasingly transnational, mobile, digital and de-localised business organisation models. Complex, costly and uncertain regulation governing the termination of open ended contracts makes firms reluctant to hire and also lead to uneven enforcement of the rules in place.

a. Every worker shall be informed in written form prior to the start of employment on the rights and obligations derived from the employment relationship.

b. If there is a probation period, the probation period shall be of a reasonable duration; prior to its start, workers shall receive information on its conditions.

c. Dismissal of a worker is to be motivated, preceded by a reasonable period of notice, and there shall be an adequate compensation attached to it as well as access to rapid and effective appeal to an impartial dispute resolution system.

b) EU acquis

(1) European Commission's view

Article 30 of the Charter of Fundamental Rights sets out: *Every worker has the right to protection against unjustified dismissal, in accordance to Union law and national laws and practice.*

(2) Our view

Whereas the Commission here refers only to Article 30 CFREU, the content of its proposal has much wider scope.

Concerning the '*written information*' it is important to take account of No. 9 of the Community Charter requiring at least a contract of employment:

> The conditions of employment of every worker of the European Community shall be stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country.

Directive 91/533/EEC establishes the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.[77] Article 2(6) ESC has taken up this obligation, requiring that this should be done 'as soon as possible' (at the latest within two months).

Normally, there are no specific references in EU legislation to *probation periods*. But as probation periods might be stipulated in the form of fixed-term contracts the relevant legislation (Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) would apply, in particular the non-discrimination principle.

As regards *dismissals*, the Commissions mentions Article 30 CFREU. However, several other rights are related thereto (for example, Article 33(2) CFREU in case of maternity). In secondary legislation, there is Directive 98/59/EC on the approximation of the laws of the Member States related to collective redundancies, whereas a general Directive in case of individual dismissal is still missing. However, all anti-discrimination Directives (2000/43/EC, 2000/78/EC and 2006/54/EC), as well as other Directives (for example, the Maternity Leave Directive 92/85/EEC and the Transfer of Undertaking Directive 2001/23/EC), contain prohibitions on dismissals on those specific grounds. Concerning international standards, as well as the case law of the relevant bodies Article 24 RESC, ILO Termination of Employment Convention, 1982 (No. 158) and – increasingly important – Article 8 ECHR[78] are of specific interest.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out that the Union shall adopt directives setting out minimum requirements, as well as support and complement the activities of the Member States in the field of working conditions and for the protection of workers where their employment contract is terminated.

(2) Our view

For the first two elements, Article 153 (1)(a) and (b) TFEU would cover rights related to contracts of employment (and, all the more, any related written statements), as well as rights during minimum probation periods. The legal basis would therefore be Article 153 (2)(b) TFEU and allow for full legislative competence. The same applies, in principle, to legislation concerning dismissals because legislation concerning the 'protection of workers where their employment

77. In January 2016, the European Commission published a Roadmap on the evaluation of Council Directive 91/533/EEC of 14 October 1991 related to an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.
78. See, for example, Judgment, 9 January 2013 – No. 21722/11 - *Oleksandr Volkov v Ukraine*, http://hudoc.echr.coe.int/eng?i=001-115871, paras. 165 ff; for further jurisprudence of the ECtHR see the Factsheet on 'Work-related rights'.

contract is terminated' is also covered (Article 153(1)(d) TFEU). However, the adoption would require unanimity (Article 153(2)(3) TFEU).

d) Evaluation

(1) Content

The heading 'Conditions of employment' covers a very wide range of issues. However, the Commission's proposal deals with only three elements (two of which are also interrelated). Therefore, several further important elements will be addressed later (see under B.).

The right to *written information* is already enshrined in Directive 91/533/EEC. However, there are several weaknesses, such as its general approach (it is only a statement and not a substantive right to a contract). In relation to two weaknesses the proposal contains improvements ('prior to the start' and not up to two months after the start; 'rights' is not limited to 'essential working conditions').

The Commission's proposal concerning *probation periods* has a positive element inasmuch as it limits it to a 'reasonable' period. However, it does not define the relationship to fixed-term contracts nor to dismissals. Assuming that it is supposed to cover both forms, fixed-term contracts and contracts of indefinite duration, the crucial question would still be what happens when the probation period comes to an end. In the former case, there would be no protection if the end coincides with the end of the fixed-term contract; in the latter case the protection against unfair dismissal would apply. Therefore, it is important to provide that probation periods should, at least in principle, be foreseen only in contracts of indefinite duration. The information aspect would already (have to) be covered by the previous element (see above 'rights' instead of only 'written information').

As regards *dismissals*, there are certain positive elements (motivation, period of notice, effective appeal). It is unclear to what 'adequate compensation' is 'attached'. Reading it negatively it could be understood as only compensating the period of notice. Two crucial elements are, however, not addressed at all, without which there is no real protection: first, valid reasons must be proved by the employer if the dismissal is considered to be justified and, second, if there is no valid reason reinstatement (ensuring the continuation of all entitlements) and not (only) adequate compensation is urgently required. Otherwise, protection against unjustified dismissals boils down to a calculation exercise for 'compensation'. This is particularly unacceptable in cases of, for example, discrimination (also including for trade union activities).

(2) Legislation

As described above (see (2)) directives would be possible in relation to all three elements, whereas only the first two could be adopted under the 'ordinary legislative procedure' and the (third) element concerning protection against dismissal would require unanimity.

e) Proposal

The formulations should read as follows: 'Right to a written contract of employment', Right to protection in case of a probation period' and 'Right to protection against unfair dismissal (with obligation to reinstatement)'

8. Wages

a) Content (as defined by the Commission)

Minimum wages with an adequate level ensure a decent standard of leaving for workers and their families and contribute to tackle the incidence of in-work poverty. A wide coverage avoids distortions leading to a two-tier labour market. A predictable evolution of wages is important for a stable business environment. Minimum wages need to be set at a level maintaining employment prospects for the low skilled and make work pay for the unemployed and inactive. Maintaining an evolution of wages in line with productivity has proven crucial for competitiveness, particularly within the euro zone.

a. All employment shall be fairly remunerated, enabling a decent standard of living. Minimum wages shall be set through a transparent and predictable mechanism in a way that safeguards access to employment and the motivation to seek work . Wages shall evolve in line with productivity developments.

b) EU acquis

(1) European Commission's view

-

(2) Our view

It is interesting to note that the Commission does not refer to any EU *acquis*. This is probably related to the fact that the CFREU does not contain an explicit right to decent remuneration nor to minimum pay (one might, however, argue that Article 31 CFREU could include such a right in relation to the 'decency' concept enshrined therein) and the lack of legislative competence (Article 153(5) TFEU). The EU's activities in this field are more related to setting benchmarks on national minimum wage legislation.

As regards *fair and decent remuneration*, it should, however, be noted that No. 5 of the Community Charter requires that 'All employment shall be fairly remunerated'. Concerning international and European instruments, Article 23(3) UDHR refers to the 'right to just and favourable remuneration ensuring for himself and

his family an existence worthy of human dignity' and Article 7 ICESCR provides for 'fair wages and equal remuneration for work of equal value'. At European level Article 4(1) ESC provides for a 'right of workers to a remuneration such as will give them and their families a decent standard of living'.

In terms of how to define the best reference and target for setting and implementing *minimum wages*,[79] different standards are at stake. These include the standard of the Council of Europe, just mentioned, the UK concept of a Living Wage and the OECD's low wage thresholds. Concerning the procedures for setting minimum wages the ILO Minimum Wage Fixing Convention, 1970 (No. 131) defines a framework.[80]

Further elements have to be mentioned in relation to the *protection of wages*. In particular, ILO Convention Protection of Wages Convention, 1949 (No. 95) and Article 4(5) ESC aim at protecting wages from deductions. Moreover, and closely related to social security the protection of wages in cases of insolvency is guaranteed by ILO's Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) and Article 25 RESC.

c) Legal basis

(1) European Commission's view

-

(2) Our view

Pay' is expressly excluded from the EU's legislative competences (Article 153(5) TFEU). However, the Union's lack of competence is not absolute. The Commission can issue non-binding acts that cover pay on the basis of its competence for encouraging cooperation and facilitating coordination between Member States. The formulation of Article 156 TFEU appears broad enough to cover pay (under the heading of 'labour law and of working conditions').

Moreover, the Union can, on the basis of the prohibition of discrimination in matters of pay (as anchored Article 157 TFEU), allow for legally binding acts. Concretely, 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'. Accordingly, the Gender Equality Directive (2006/54/EC), as well as the two other anti-discrimination Directives (2000/43/EC and 2000/78/EC) prohibit discrimination also in relation to remuneration.

79. Discussion Note on Minimum Wages in Europe for the 2014 Warsaw Conference of the ETUC Collective Bargaining Committee. https://collective.etuc.org/sites/default/files/141119%20Minimum%20wage%20-%20Final%20Discussion%20Document_EN.pdf

80. See, in particular, ILO (2014).

Finally, the European social partners have competence for developing contractual relations and, if they so desire, to reach agreements (Article 155(1) TFEU), also in the field of pay, which would have the status of 'autonomous' agreements (because implementation in the form of a Directive would not be possible (Article 155(2) 1st alternative in combination with Article 153(5) TFEU).

d) Evaluation

(1) Content

Generally speaking, with regard to its motivation, the Commission follows more an economic than a social approach. The proposals refer to two elements.

The proposal for *fair and decent remuneration* appears, in principle, to be positive as it refers in its wording to the most important elements of internationally guaranteed level of remuneration (ICESR, ESC). However, there is no relationship to a decent standard of living for the family (as in Article 4(1) ESC) or at least dependent persons. But there is a danger that after long debates the Commission will reject any legislative activities.

Concerning *minimum pay*, the whole (ongoing) debate should be taken into account. In this respect, it should be noted that, at European level, the idea of a European minimum wage has gained ground, in particular in the European S&D Group Alliance, which used the idea of European support for minimum wages as one of the prime conditions for their approval of the president-designate of the Commission Jean Claude Juncker. In response, Juncker, speaking to the European Parliament, referred to the idea of Europe making sure that a minimum wage exists in each Member State.

The aim should be to ensure that statutory minimum wage systems, where they exist, fully cover all workers in a country, regardless of the legal status of their employment contract or of their working conditions and their age. It could be combined with *erga omnes* mechanisms, where trade unions consider them necessary.

However, wage-setting institutions should be maintained in correlation with social partners' autonomy in setting wages.

The ETUC position so far has been that 'minimum wages, where they exist, have to ensure at least minimum living standards. Furthermore, they should not be differentiated and no exceptions to their coverage should be allowed'; the statutory minimum wage, in those countries where trade unions consider it necessary, should be increased substantially. In any event, all wage floors should respect Council of Europe standards on fair wages. However, the ETUC has faced internal requests coming from some affiliates (notably, but not exclusively, from the Central and Eastern European countries (CEE),) concerning the fact that, according to very difficult national situations, discussions should start on a possible European approach to the minimum wage. Such an approach needs to be discussed in combination with the question of how to strengthen national/sectoral collective bargaining systems in order to prevent a downward slide of wage formation over-

all. Despite all the problems at least discussions on a possible European minimum wage approach should start, given the sometimes very difficult national situations.

In any event, minimum pay should not be considered to be the lowest level of remuneration, equal to or only a little above the poverty threshold. In keeping with human dignity (see Article 23(3) UDHR) it is important to qualify the level of the minimum wage by referring to either 'fair' or 'decent' remuneration.

Generally speaking, the protection of fair wages must include the effective implementation of the principle of 'equal for work of equal value' between men and women (see above 5.d)).

(2) Legislation

In principle, there no substantive legislative competence; however, in relation to other fields (such as the principle of equal pay, particularly in relation to men and women, but also for other grounds) the related competences can be considered as including pay (see above c)).

e) Proposal

The formulation should read as follows: 'Right to minimum pay guaranteeing at least a fair remuneration'.

9. Health and safety at work

a) Content (as defined by the Commission)

New challenges for health and safety at work have emerged in light of less stable employment relationships, new working patterns and an ageing workforce. Ensuring protection against occupational injuries and ill-health to all workers, irrespective of the form of employment and addressing "grey zones", such as 'dependent' and 'bogus' self-employment leading to unclear legal situations offers an important way to reduce precariousness, social costs and improve firms' productivity Reinforcing reintegration and rehabilitation efforts requires more involvement of the employers for re-training or workplace adaptation. However, enforcing preventive and corrective measures by small enterprises remains burdensome.

a. An adequate level of protection from all risks that may arise at work, with due support for implementation, notable in micro and small enterprises, shall be ensured.

b) EU acquis

(1) European Commission's view

Article 31 of the Charter of Fundamental Rights sets out: *Every worker has the right to working conditions which respect his or her health, safety and dignity.*

(2) Our view

Article 31(1) CFREU, as quoted by the Commission, is complemented by the protection against unreasonable working time (Article 31(2) CFREU, see below 24).

As regards secondary legislation, health and safety at work is the most widely regulated area in EU labour law (together with anti-discrimination legislation). Indeed, since 1989, the Workplace Health and Safety Framework Directive 89/391/EEC has formed the basis for all protection in this respect. It has been complemented by more than 20 further (so-called 'individual') directives regulating specific aspects.[81] As an important part of health and safety at the workplace the Working Time Directive 2003/88/EC should also be mentioned here, but given its particular relevance it is dealt with as a social right on its own (see below 24.).

In defining 'Health protection and safety at the workplace' (No. 19), the Community Charter requires, among other things, the 'balanced participation of workers':

19. Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made.

The measures shall take account, in particular, of the need for the training, information, consultation and *balanced participation of workers* as regards the risks incurred and the steps taken to eliminate or reduce them.

The provisions regarding implementation of the internal market shall help to ensure such protection. (Emphasis added)

Concerning international and European standards there are numerous ILO Conventions (in particular Occupational Safety and Health Convention, 1981 (No. 155) with its Protocol of 2002 to the Occupational Safety and Health Convention, 1981[82] and Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)), as well as further provisions such as Article 7 ICESCR, Article 3 ESC and Article 8 ECHR.

81. See the compilation of European directives on safety and health at work: https://osha.europa.eu/en/safety-and-health-legislation/european-directives.

82. See ILO (2009).

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out that the Union may adopt directives setting out minimum requirements, as well as support and complement the activities of the Member States for the improvement of the working environment to protect workers' health and safety.

(2) Our view

Article 153(1)(a) TFEU refers to the improvement in particular of the working environment to protect workers' health and safety. As a result, Article 153(2)(b) TFEU allows for a legal basis for a full legislative competence of the Commission in the form of a directive.

d) Evaluation

(1) Content

With its proposal the Commission does not take into account the obligation of improving working conditions (see in particular Articles 151(1) and 153(1)(a) TFEU), requiring only an 'adequate' level of protection. Moreover, the participatory aspect in defining respective policies is missing.

(2) Legislation

As described above (see (2)) full legislative competence exists but only with 'improvement … of the working environment to protect workers' health and safety' (Article 153(1)(a) TFEU.

e) Proposal

The formulation should read as follows: 'Right to a high level of healthy and safe working conditions and to participate in setting prevention policy'.

10. Social dialogue and involvement of workers

a) Content (as defined by the Commission)

Well-functioning social dialogue requires autonomous and representative social partners with the capacities to reach collective agreements. Given the decreases in terms of organisational density and representativeness, social partners need to further build their capacities to engage in a better functioning and effective social dialogue. The engagement of social partners at EU and national level is crucial

for the success of design and implementation of economic and social policies, including in efforts to safeguard employment in periods of economic downturns. Moreover, new forms of work organisation such as in the services sector and in the digital economy make the involvement of workers uneven, and their information and consultation more complex.

a. Social partners shall be consulted in the design and implementation of employment and social policies. They shall be encouraged to develop collective agreements in matters relevant to them, respecting national traditions, their autonomy and right to collective action.

b. Information and consultation shall be ensured for all workers, including those working digitally and/or operating across borders, or their representatives in good time, in particular in the case of collective redundancies, transfer, restructuring and merger of undertakings.

b) EU acquis

(1) European Commission's view

Article 12 and Article 27 of the Charter of Fundamental Rights set out, respectively: *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. 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 Union law and national laws and practices.*

Article 28 of the Charter of Fundamental Rights sets out: *Workers and employers, or their respective organisations, have, in accordance with Union 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.*

Article 151 TFEU sets the Union and the Member States shall have as their objective the promotion of dialogue between management and labour. Article 152 TFEU provides that the Union recognises and promotes the role of social partners and shall facilitate dialogue between them.

(2) Our view

The Commission mentions only Articles 12, 27 and 28 CFREU, and Articles 151 and 152 TFEU. However, there is much more '*acquis*' than that:

Concerning *information and consultation* the Community Charter contains 'participation' as an important further element and provides as follows:

> 17. Information, consultation and *participation* for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of

companies having establishments or companies in several Member States of the European Community.

18. Such information, consultation and participation must be implemented in due time, particularly in the following cases:

- when *technological changes* which, from the point of view of working conditions and work organisation, have major implications for the work force are introduced into undertakings;
- in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;
- in cases of collective redundancy procedures;
- when *trans-frontier workers* in particular are affected by employment policies pursued by the undertaking where they are employed. (Emphases added)

Concerning secondary legislation an important set of standards has been adopted, among other things in relation to the general framework for information and consultation (Directive 2002/14/EC) and to works councils (Directive 2009/38/EC), including directives related to specific situations, such as transfer of undertaking (Directive 2001/23/EC), collective redundancies (Directive 98/59/EC) and insolvency (Directive 2008/94/EC) or specific forms of enterprises such as SEs (Directive 2001/86/EC), European Cooperative Societies (Directive 2003/72/EC) and possibly the SUP, as well as trade union protection clauses (among others, the ILO's Workers' Representatives Convention, 1971 (No. 135)). Several other ILO Conventions contain elements of information and consultation.[83] Moreover, Articles 21, 22 and 29 RESC provide for information and consultation in relation to various matters, whereas Article 28 RESC guarantees protection of workers' representatives.

As regards the specificity of '*Social Dialogue*' at EU level the Commission refers to Articles 151 and 152 TFEU, as well as to Articles 154 and 155 TFEU (in relation to the legal basis, see below). This is not sufficient to describe the EU *acquis*. Indeed, the trilateral Social Dialogue concerns mainly consultations of the social partners according to Article 154 TFEU, whereas the bilateral Social Dialogue has led to a number of framework agreements, four of which have been implemented by a Directive,[84] whereas the other agreements[85] were implemented 'autonomously', according to Article 155 TFEU.

83. See, for example, Night Work Convention, 1990 (No. 171) (Article 10), Asbestos Convention, 1986 (No. 162) (Article 6(3)), Termination of Employment Convention, 1982 (No. 158) (Article 13), Occupational Safety and Health Convention, 1981 (No. 155) (Article 19(e) and Article 20 on 'cooperation').

84. Directive 2010/18/EU on the Framework Agreement implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, Directive 1999/70/EC on the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Directive 97/81/EC concerning the Framework Agreement on Part-Time work concluded by UNICE, CEEP and the ETUC, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

85. See for more details: Framework agreement on inclusive labour markets (2010), Framework agreement on harassment and violence at the workplace (2007), Framework agreement on stress at work (2004), Framework agreement on telework (2002).

In relation to *trade union rights* the Commission refers only to Articles 12 and 28 CFREU. Nevertheless, there are further instruments, such as the Community Charter which – under the heading 'Freedom of association and collective bargaining' – describes the respective rights in more detail (Nos. 11–14). Moreover, a whole range of relevant European and international (human rights and labour) standards, as well as the case law of the competent courts and supervisory bodies are relevant. In particular, Article 8 ICESCR, ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98),[86] Labour Relations (Public Service) Convention, 1978 (No. 151) and Collective Bargaining Convention, 1981 (No. 154), Article 11 ECHR,[87] Article 5 and 6 ESC.[88]

c) Legal basis

(1) European Commission's view

Article 152 TFEU provides that the Union recognises and promotes the role of social partners and shall facilitate dialogue between them.[89]

Article 153 TFEU sets out that the Union shall adopt minimum requirements, as well as support and complement the activities of the Member States in the field of information and consultation of workers and representation and collective defence of the interest of the workers and employers. Article 154 and 155 TFEU give management and labour a role in the legislative process.

(2) Our view

In respect of legislative competences workers' representation includes the following:

- *information and consultation of workers* is covered by Article 153(1)(e) TFEU and is a shared competence. Article 153(2)(b) TFEU provides for a full competence for the adoption of a directive.
- for the *representation and collective defence of workers and employers, including codetermination* Article 153(1)(f) TFEU provides for shared competence, but requires unanimity (Article 153(2)(3) TFEU). Moreover, Article 153(5) TFEU expressly excludes the right of association and the right to strike, as well as the right to impose lock-outs from legislative competences.
- *collective bargaining* falls under the right to representation and collective defence (Article 153(1)(f) TFEU) and is a shared competence (requiring unanimity, see above).

86. See ILO (2012b: 17 ff). The principal case law of the Committee on Freedom of Association (CFA) is compiled in the 'Digest of decisions of the Committee on Freedom of Association (Fifth (revised) edition, 2006)'; a database is accessible for all cases examined by the CFA (http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::NO:20060::).

87. For the jurisprudence of the ECtHR see Factsheet 'Trade Union Rights'. See also Van Hiel (2013: 287), Jacobs (2013: 309), Dorssemont (2013: 333).

88. See the contributions by A. Jacobs and F. Dorssemont (Bruun et al. 2016).

89. As it is not clear whether the Commission considers this Article as substantive acquis and/or competence title it is repeated here.

Furthermore, according to Article 156 TFEU, the Commission shall encourage cooperation and facilitate coordination between Member States on the issue of the right of association and collective bargaining between employers and workers. This Article could be the legal basis for non-binding initiatives from the Commission.

According to the Commission, Article 151 TFEU and 152 TFEU can be invoked for both EU and national social dialogue; Articles 154 to 155 TFEU in particular when it comes to EU social dialogue.

d) Evaluation

(1) Content

This policy domain is of utmost importance for trade unions. In principle, it should include all elements of collective rights. They are aimed at counter-balancing the predominance of employers (and their associations). The approach used by the Commission does not cope with the relevance required.

Concerning *trade union rights* the Commission's proposal lacks a reference to the 'right to form and join trade unions'. It is not clear what 'develop collective agreements' is supposed to mean (is it 'conclude'?). Moreover, the right to collective bargaining is not mentioned; only 'encouragement' is obligatory. Concerning the 'right to collective action' it is inacceptable that it is only mentioned as something to be respected but not as something to be guaranteed. Moreover, the right to strike is not expressly mentioned. In any event, the respect of national traditions and the autonomy of trade unions have to be ensured.

As regards '*information and consultation*' it could be noted positively that it is qualified in several respects ('working digitally and/or operating across borders' and 'good time'). However, the (non-exhaustive) list mentioning 'in particular … collective redundancies, transfer, restructuring and merger of undertakings' does, in principle, not go beyond the present EU *acquis*. Moreover, the aspect of 'participation' is not (any more) contained as part of 'involvement'. This is all the more relevant when considering board level representation.

In any event, both rights mentioned above should aim at ensuring the effective application of the higher standards set by EU legislation and, in particular, international standards, as well as those of EU, Council of Europe and ILO jurisprudence.

(2) Legislation

As indicated above (see (2)) legislative competence varies according to the different aspects of collective rights. Concerning information and consultation, as well as 'codetermination' (including the protection of workers' representatives) Article 153 TFEU provides the best legal foundation for directives.

(3) Placement

Placement at the end of Chapter II is not appropriate as it is in (total) contrast to the order in the 'Solidarity' Title of the CFREU, which starts with the collective

rights (Articles 27 and 28 CFREU). In the new structure (see below VI.), it will therefore be proposed to shift it to the beginning of this Chapter.

e) Proposal

> The formulation should read as follows: 'Right to form and join trade unions, right to collective bargaining and collective action including the right to strike as well as right to social dialogue, information and consultation as well as participation, all of which are also to be promoted at all relevant levels'.

C. Chapter III: Adequate and sustainable social protection

It appears that Chapter III covers all elements of social law (besides labour law dealt with in Chapter II). There is, however, a structural problem that arises in relation to, on one side, the mixture of different elements or, on the other side, a separation of the same element into different branches:

- social security (see below 13 and 14);
- social services (see below 17, 18 and 20);
- a combination of both (see below 11, 12 and 16);
- social assistance (see below 15).

Although it might appear at first glance to address the problems as they exist, this approach is very problematic because the three fields mentioned are governed by different approaches and principles (admittedly sometimes overlapping).

In dealing with the following points, general problems will be addressed in more detail only the first time they arise; for further points concerning the same general problem, a reference to this first analysis will be made.

Generally speaking, the list presented below is neither coherent nor complete. It will therefore be necessary to complement it and to provide it with a more coherent structure (see below VI.)

11. Integrated social benefits and services

a) Content (as defined by the Commission)

In some cases, the multiplicity of benefits and services, agencies, and application procedures make it difficult for people to access all the support that they need. Lack of integrated benefits and services also reduces their effectiveness in addressing poverty, as well as supporting social and labour market integration. A

three-fold alignment between social benefits, active support and social services is key to effective support. Such alignment should concern eligibility and coverage, coordinated offers of support and maintaining some entitlements when re-entering work or self-employment. Better integration of benefits and services can improve the cost-effectiveness of social protection.

a. Social protection benefits and services shall be integrated to the extent possible in order to strengthen the consistency and effectiveness of these measures and support social and labour market integration.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out: *The Union recognises and respects the entitlement to social security benefits and social services*.

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection and the combating of exclusion.

(2) Our view

Besides Article 34(1) CFREU and Article 151(1) TFEU to which the Commission refers the Community Charter under the heading of 'Social protection' provides for the following:

> According to the arrangements applying in each country:
>
> 10. Every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits.
>
> Persons who have been unable either to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation.

No general secondary legislation in this connection exists for the time being. However, in the context of free movement of workers the coordination of social security systems is governed by Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 laying down the procedure for implementing Regulation No. 883/2004 and thus providing for common rules to protect social security rights and entitlements when moving within the EU. Such regulations find grounds in Article 21 TFEU, which provides that '[e]very citizen of the Union has the right to move and reside freely within the territory of the Member States' and in Article 45 TFEU providing for the freedom of movement for workers (coupled with the competence for social security coordination, according to Article 48 TFEU). Moreover, the equal treatment principle is addressed in Directive 79/7/EEC providing for

the progressive implementation of the principle of equal treatment for men and women in matters of social security.[90]

Concerning international and European standards Article 22 UDHR declares the right to *social security* as a human right and is completed by Article 25 UDHR on the right to an adequate standard of living, including 'necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. Article 9 ICESR[91] also provides for a right to social security.

The ILO's Social Security (Minimum Standards) Convention, 1952 (No. 102) defines the basic requirements for social security benefits.[92] It has been further developed by more recent Conventions concerning specific branches of social security (they will be referred to when we come to these branches). At European level, Article 12 ESC provides for the right to social security. Finally, the European Code of Social Security[93] (revised) should be mentioned (all the more so because Article 12(2) RESC) refers to it).[94]

As regards *social assistance*, besides No. 10(2) of the Community Charter (quoted above) Article 13 RESC provides for the right to social and medical assistance.

Finally, the right to benefit from *social welfare benefits* is recognised by Article 14 ESC.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the modernisation of social protection systems and the integration of persons in the labour market.

(2) Our view

As far as 'social security and social protection of workers' is concerned, Article 153(1)(d) in combination with (2)(b) TFEU opens a path for the adoption of a Directive, albeit one that requires unanimity in accordance with Article 153 (2) (3) TFEU. Moreover, such provisions 'shall not affect the right of Member States

90. See for further details (also in respect of the consultation): http://ec.europa.eu/justice/newsroom/gender-equality/opinion/150901_en.htm.

91. On 23 November 2007, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 19 on the Right to Social Security under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

92. See ILO (2012b) in relation to the social security of migrant workers the Maintenance of Social Security Rights Convention, 1982 (No. 157) sets the relevant standards.

93. http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b65e.

94. Particularly in relation to the protection of property (Article 1 Protocol No. 1 ECHR) the ECtHR has developed important case law (Social security as a human right : the protection afforded by the European Convention on Human Rights).

to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). In addition, the Commission refers to 'the integration of persons excluded from the labour market'[95] (Article 153(1)(h) TFEU) for which the adoption of a Directive would also be possible following the ordinary legislative procedure). The Commission further mentions the 'modernisation of social protection systems' (Article 153(1)(k) TFEU). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned. The same would apply to 'combating of social exclusion' (Article 153(1)(j) TFEU), not mentioned by the Commission.

Concerning services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation).

d) Evaluation

(1) Content

This approach deals with important and very far-reaching elements: social (protection) benefits, social services and their integration. It therefore requires a definition of all those elements.

As regards '*social protection benefits*' neither the proposal as such nor the introduction provide a clear definition or concept. However, a broad understanding appears to form the basis of this approach (the heading addresses 'social benefits' overall). Therefore, both social security and social assistance benefits appear to be addressed.

Concerning *social security* the ILO's Social Security (Minimum Standards) Convention, 1952 (No. 102) defines nine branches:

1. medical care (Part II); see below 12,
2. sickness benefit (Part III); see below 12,
3. unemployment benefit (Part IV); see below 14,
4. old-age benefit (Part V); see below 13,
5. employment injury benefit (Part VI), at least to a certain extent, see below 16)
6. family benefit(Part VII), at least to a certain extent, see below 17,
7. maternity benefit (Part VIII),
8. invalidity benefit (Part IX), see below 13 and, at least to a certain extent, see below 16,
9. survivor's benefit (Part X), should normally be included in pensions, see below 13.

95. 'Without prejudice to Article 166' TFEU.

New branches have been developed (although they have not yet received general international recognition), such as long-term care (see below 17).

The area of *social assistance* is to an important extent covered by the right to a minimum income (see below 15) also in relation to disability benefits (see below 16).

The concept of *social services* covers a very wide area. The welfare state is, to an important extent, based on such a concept. This is clearly demonstrated by the example of 'health care'. As the European Commission points out, 'These services are a vital means of meeting EU objectives such as social, economic and territorial cohesion, high employment, social inclusion and economic growth'.[96] Therefore, the quality of social services should be at the heart of any reference in a pillar of social rights. According to Article 14 TFEU services of general interest in the European Union should 'operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions'. It provides the legal basis for services of general interest in the EU. The 2007 Communication on 'Services of general interest, including social services of general interest: a new European commitment', as well as the 2010 'Voluntary European Quality Framework' are the main Commission initiatives related to social services. In 2006, Directive 2006/123/EC on services in the internal market was adopted, which deals essentially with certain services of general economic interest; in other words, that include an economic relationship between supplier and consumer. According to the Commission, a list of social services (services of general interest) should in particular contain health care, social security, employment and training services, social housing, child care, long-term care (elderly and people with disabilities), social assistance services, social assistance (social welfare or benefits), social housing, training and employment services.[97] A broader, more complete approach would include: education, water,[98] energy, telecoms and transport. In comparison, services of general interest of a non-economic nature are security, justice, compulsory education, health care and social services.[99] All require adequate financial resources and qualified professionals.

The new element of the Commission's proposal is the *integration* of both social protection benefits and social services. A recent study stresses the need for 'integrated social services delivery' (one-stop shops) in which the integration of social services is seen as improving access to social services, especially for disadvantaged groups, as well as coping with new types of social risk and meeting the growing need for prevention and coordination between complex services.[100] Although efficiency is a positive element the specific relationship to 'labour market integration' might turn out to limit the usefulness of these measures.

96. http://ec.europa.eu/social/main.jsp?catId=794&langId=en.
97. See also European Commission (2006).
98. See, for example, the European Citizen's Initiative on 'Water is a human right', http://www.right2water.eu/news/right2water-campaign-lives-epsu-call-commission-act-now-eci-right2water-brussels-action-world.
99. In its proposals concerning long-term care is concerned the Commission expressly refers to 'provided by adequately qualified professionals shall be ensured' (see below I.A.17.a).
100. http://ec.europa.eu/social/main.jsp?catId=1169&langId=en

Concerning *personal scope* the Commission does not explicitly mention self-employed persons. However, in relation to health care it provides that 'the participation of the self-employed in insurance schemes shall be encouraged' (see below 12.a)). Even if this formulation might not be sufficient given the increasing problem of bogus 'self-employment' this problem should be addressed in a more systematic way here.

(2) Legislation

For 'social security and social protection of workers' the competence is clearly enshrined in Article 153(1)(d) TFEU, thus opening the way for adoption of a Directive (albeit with the unanimity requirement) and, with regard to services of general economic interest, for the adoption of a Regulation (see above c)).

e) Proposal

The formulation should read as follows:

'Right to good quality social protection benefits, in particular to those based on all branches of social security and social assistance systems ensuring a decent standard of living',

'Right to provision of good quality, availability, affordability and accessibility of social services adeaquately financed and provided by specifically qualified professionals' and

'Right to effective integration of all social benefits and services ensuring a decent living of the persons concerned'.

12. Healthcare and sickness benefits

a) Content (as defined by the Commission)

Population ageing is putting increased pressure on the financial sustainability of health systems and the ability to provide adequate healthcare for all.. For instance, high cost of treatment relative to income, or too long waiting periods can lead to unmet needs for medical care. Ensuring universal access to high quality care while guaranteeing the financial sustainability of health systems, encouraging the cost-effective provision of care, and encouraging health promotion and disease prevention requires increased efforts in improving the efficiency and effectiveness of health systems, and can improve the ability of healthcare systems to cope with the challenges. Arrangements for sickness benefits and/or paid sick leave vary considerably in what concerns waiting days, duration, replacement levels and control mechanisms. Securing an adequate minimum replacement level of sickness benefits and encouraging rehabilitation and reintegration while, simultaneously, maintaining the financial sustainability of such schemes remains a challenge.

a. Everyone shall have timely access to good quality preventive and curative health care, and the need for healthcare shall not lead to poverty or financial strain.

b. Healthcare systems shall strive to safeguard its sustainability and encourage the cost-effective provision of care, while encouraging health promotion and disease prevention, in order to improve the ability of healthcare systems to cope with challenges.

c. All workers, regardless of contract type, shall be ensured adequately paid sick leave during periods of illness; the participation of the self-employed in insurance schemes shall be encouraged. Effective reintegration and rehabilitation for a quick return to work shall be encouraged.

b) EU acquis

(1) European Commission's view

Article 35 of the Charter of Fundamental Rights sets out: *Everyone has the right of access to preventative health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.*

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection.

Article 168 TFEU sets out that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities

(2) Our view

Besides Article 35 CFREU and Articles 151(1) and 168 TFEU referred to above, Article 11 ESC guaranteeing the right to protection of health should be mentioned.[101] Generally speaking, medical care and illness benefits are two branches of social security protection (see above 11.d); for all the other sources concerning social benefits and social services in general, see above 11.b)). Additionally, the ILO's Medical Care and Sickness Benefits Convention, 1969 (No. 130) and Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) should be taken into account.

101. For ECtHR jurisprudence, see the Factsheet Health.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers and the modernisation of social protection systems.

Article 168 TFEU sets out that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.[102]

(2) Our view

As far as 'social security and social protection of workers' is concerned, Article 153(1)(d), in combination with (2)(b) TFEU, opens the way for the adoption of a Directive, albeit requiring unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'modernisation of social protection systems' (Article 153(1)(k) TFEU). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned.

Article 168(5) TFEU allows for legislation according to the ordinary legislative procedure, but only for 'incentive measures', expressly 'excluding any harmonisation of the laws and regulations of the Member States'. Last but probably not least, for services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation)).

d) Evaluation

(1) Content

The Commission's proposals in relation to health care deal with a range of issues.

The first element (a) qualifying health care can, in principle, be seen as positive. However, the relationship to (the prevention of) poverty or financial strain appears to be at far too low a level. Indeed, according to Article 25 UDHR the right to an adequate standard of living should be guaranteed. In so far as the second element (b) refers to 'cost-effective provision of care' the danger arises that, in practice, reduction of costs will take priority over high level health care; this is to be avoided. Concerning the third element (c) the right to 'paid sick leave' can be considered to be covered by the general proposal (see above 11.e), 'all branches of

102. The reference to Article 168 TFEU is repeated here because it contains certain legislative competences but only for 'incentive measures' (para. (5)).

social security'). However, for rehabilitation, instead of the 'quick return to work' a 'good quality' standard should be ensured (with the aim of a full recovery of the relevant person's health in the definition of the WHO). The protection of self-employed persons should be addressed in a general way (see above (1)).

(2) Legislation

As health care and rehabilitation can both be considered as elements of social protection a Directive would be possible (see above c)).

e) Proposal

The formulation should read as follows: 'Right to good quality preventive and curative health care' and the 'Right to good quality rehabilitation'.

13. Pensions

a) Content (as defined by the Commission)

Rising longevity and a shrinking working age population raise a double challenge of ensuring the financial sustainability of pensions and being able to provide an adequate income in retirement. Linking the statutory age to life expectancy and reducing the gap between the effective and statutory retirement age by avoiding early exit from the labour force are important for reconciling the long-term sustainability of public finances while maintaining inter-generational fairness. Pension inadequacy is an additional challenge in several Member States. A high gender pension gap also exists in most countries, with women's lower earnings and accumulated career gaps leading to lower pension contributions, and ultimately lower pension entitlements. The self-employed and those in atypical employment also experience higher pension adequacy risks and lower coverage of occupational pensions.

a. Pensions shall ensure all persons a decent standard of living at retirement age. Measures shall be taken to address the gender pension gap, such as by adequately crediting care periods. According to national specificities, the participation of the self-employed in pension schemes shall be encouraged.
b. Pension systems shall strive to safeguard the sustainability and future adequacy of pensions by ensuring a broad contribution base, linking the statutory retirement age to life expectancy and by closing the gap between the effective retirement and statutory retirement age by avoiding early exit from the labour force.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out that: *The Union recognises and respects the entitlement to social security… in the case of loss of old age… [and]… the right to social assistance for those who lack sufficient resources.*

Article 151 TFEU sets the Union and the Member States shall have as their objective proper social protection ….. and the combating of exclusion.

(2) Our view

Besides Article 34(1) CFREU and Article 151(1) TFEU referred to above pensions form three branches of overall social security protection (see above 11.d); for all the other sources concerning social benefits and social services in general, see above 11.b). Additionally, the ILO's Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128) provides for more advanced protection.

Concerning secondary legislation, Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, as well as Directive 2014/50/EU on the minimum supplementary pension rights of mobile workers' pension rights (to be transposed into national law by 21 May 2018) provide for the protection of specific (supplementary) pension elements.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the combating of social exclusion, and the modernisation of social protection systems.

(2) Our view

As far as 'social security and social protection of workers' is concerned Article 153(1)(d), in combination with (2)(b) TFEU, opens the way for the adoption of a Directive, albeit requiring unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'combating of social exclusion' and the 'modernisation of social protection systems' (Article 153(1)(j) and (k) TFEU, respectively). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned).

d) Evaluation

(1) Content

As part of social security systems (see above 11.d) for all the other sources concerning social benefits and social services in general, see above 11.b)) pensions normally cover three risks: the first is covered by old-age pensions, the second by survivors' benefits and the third by invalidity pensions (often including disability pensions). They are normally part of the social security systems in the EU member states, but there is also an important range of supplementary pension schemes and they can even be obligatory.

The right to pensions can be considered to be covered by the general proposal (see above 11.e), 'all branches of social security'). The protection of self-employed persons should be addressed in a general way (see above 11.d)). However, specific reference to 'the gender pay gap' might be interesting but the effective implementation of the principle of 'equal pay for work of equal value' should quickly be ensured so that protection by 'credit points' should concern only those for whom this principle has not yet been achieved. Also important (and often related to the causes of the gender pay gap) is the protection of those who interrupt their working life in order to fulfil family obligations (in particular, care) which is mostly done by women. As the main new aspect supplementary pensions will be the core of the proposal.

The second element is not part of a social right. It contains several (very) negative restrictive conditions, such as 'linking the statutory retirement age to life expectancy', which is supposed to lead to always later retirement and 'closing the gap between effective retirement and statutory retirement age'. In practice this amounts to an assault on pre-retirement policies (this is all the more dangerous as it does not take into account the sometimes important health reasons that lead workers to ask for pre-retirement).

(2) Legislation

As pensions are elements of social security systems a Directive would be possible (see above 11.c)). Falling outside the normal social security systems, supplementary pensions in occupational systems could be considered to be working conditions (see the parallel development in the area of equality between men and women, which led to the inclusion of occupational pension systems in the material scope of Directive 2006/54/EC).

e) Proposal

The formulation should read as follows: 'Right to quality supplementary pensions ensuring portability of entitlements'.

14. Unemployment benefits

a) Content (as defined by the Commission)

Effective unemployment benefits succeed to allow job search and improve skills matching, provide economic security during unemployment spells, prevent poverty and allow automatic stabilisation in economic downturns. In some cases the coverage of unemployment benefits is very low due to strict eligibility requirements. The duration of benefits in some Member States, as well as the enforcement of conditions for job search and participation in active support are a concern.

***a. Action to support the unemployed shall include the requirement for active job search and participation in active support combined with adequate unemployment benefits. The duration of benefits shall allow sufficient time for job search whilst preserving incentives for a quick return to employment*[103].**

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out: *The Union recognises and respects the entitlement to social security benefits … in the case of loss of employment…*

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection and the combating of exclusion.

(2) Our view

Besides Article 34(1) CFREU and Article 151(1) TFEU referred to above unemployment benefits form one branch of the overall social security protection (see above 11.d); for all the other sources concerning social benefits and social services in general, see above 11.b)). Additionally, the ILO's Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) should be taken into account. It might be referred to in the current debate on European unemployment insurance, as one option for stabilising country specific economic cycles.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the combating of social exclusion, and the modernisation of social protection systems.

103. As set out in Principle 3 above.

(2) Our view

As far as 'social security and social protection of workers' is concerned Article 153(1)(d), in combination with (2)(b) TFEU, opens the way for the adoption of a Directive, although it requires unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'combating of social exclusion' and the 'modernisation of social protection systems' (Article 153(1)(j) and (k) TFEU, respectively). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned.

Concerning services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation).

d) Evaluation

(1) Content

The second element is not part of a social right. It consists mainly of (very) negative restrictive conditions such as 'the requirement for active job search', which is not only a clear contradiction of the abovementioned aim of 'action to support the unemployed', but also creates an obligation which is in contradiction of a social rights-based approach. Therefore, the general guarantee in relation to all branches of social security should apply.

(2) Legislation

As unemployment benefits are elements of social security systems a Directive would be possible (see above 11.c))).

α) **Proposal**

As unemployment benefits are elements of social security systems (see above 11.e)) no specific right would be required.

15. Minimum income

a) Content (as defined by the Commission)

Minimum income for persons in or at risk of poverty and lacking other means of subsistence is provided by most but not all Member States. However, current challenges include inadequacy of benefit levels making it impossible

for beneficiaries to escape poverty, low coverage, and non-take-up of minimum income support due to complexity in accessing these arrangements. For those of working age, weak links to active support and social services, as well as benefits not tapered when re-entering employment, can lead to benefits traps and disincentives to work. Income security insufficiently covers those who exhaust their unemployment benefits, with weak coordination between unemployment and minimum income benefits. For the elderly, in most Member States minimum income provisions are insufficient in lifting those without any other resources out of poverty.

a. Adequate minimum income benefits shall be ensured for those who lack sufficient resources for a decent standard of living. For those of working age, these benefits shall include requirements for participation in active support to encourage labour market (re) integration.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out: *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.*

Article 151 TFEU sets the Union and the Member States shall have as an objective the combating of exclusion.

(2) Our view

Besides Article 34(1) CFREU and Article 151(1) TFEU to which the Commission refer the Community Charter (No. 10(2)) under the heading of 'Social protection' in relation to *social assistance* for the following provides:

> According to the arrangements applying in each country:
>
> 10. ... Persons who have been unable either to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation.

Moreover, Article 13 ESC guarantees the right to social and medical assistance.

c) Legal basis

(1) European Commission's view

> Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the combating of social exclusion and the integration of persons in the labour market.

(2) Our view

In the second place but more importantly as regards legislative competences, the Commission refers in substance to 'the integration of persons excluded from the labour market',[104] which allows for the adoption of a Directive following the 'ordinary legislative procedure (Article 153(1)(h) in combination with (2)(b) TFEU).[105]

In the first place, the Commission mentions the 'combating of social exclusion' (Article 153(1)(j) TFEU) for which the adoption of a Directive is excluded (according to the limitation contained in Article 153(2)(b) to the fields defined in para. (1)(a) to (i) TFEU thus excluding the subject (j) just mentioned).

d) Evaluation

(1) Content

The first part of the Commission's proposal can be considered positive. However, the level in question should not only be adequate but guarantee 'a decent standard of living' (see Article 34(1) CFREU). Conversely, the second part is a very important restriction of this right ('shall include requirements'). It should therefore not be retained.

(2) Legislation

If defined in the way proposed the competence for adopting a Directive would be based on Article 153(1)(c) in combination with (2)(b) TFEU (see above c))).

(3) Placement

The placement will have to be reconsidered in accordance with the systematic approach to social protection in the new structure proposed (see below VI).

e) Proposal

> The formulation should read as follows: The right to social assistance enshrined in the respective proposal above (see 0 should be supplemented by 'including minimum income'

104. 'Without prejudice to Article 166' TFEU.

105. Insofar as social assistance is also to be considered 'social protection' the competence concerning 'social security and social protection of workers' (not mentioned by the Commission) would apply (Article 153(1)(d) in combination with (2)(b) TFEU), although it would require unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU).

16. Disability

a) Content (as defined by the Commission)

People with disabilities are much higher risk of poverty and social exclusion than the general population. They face the lack of adequate accessibility in the work-place, discrimination and tax-benefit disincentives. The design of disability benefits can lead to benefit traps, for example when benefits are withdrawn entirely once (re-)entering employment. The availability of support services can also affect the capacity to participate in employment and community life.

a. Persons with disabilities shall be ensured enabling services and basic income security that allows them a decent standard of living. The conditions of benefit receipt shall not create barriers to employment.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out: *The Union recognises and respects the entitlement to social security… in the case of illness.*

Article 26 of the Charter of Fundamental Rights sets out: *The Union recognises and respects the right of persons with disabilities to benefit from resources designed to ensure their independence, social and occupational integration and participation of life in the community.*

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection and the combating of exclusion.

(2) Our view

Besides the Commission's references to Articles 26 and 34 CFREU, as well as Article 151(1) TFEU, the protection of persons with disabilities plays an important role in EU law. This is particularly well demonstrated by the fact that the EU has acceded to the UN Convention on the Rights of Persons with Disabilities, which is in fact the only international human rights instrument which the EU directly has made part of the EU legal order. Also No. 26 of the Community Charter specifically protects 'Disabled persons'. Moreover, discrimination on this ground is prohibited by Article 21(1) CFREU and, accordingly, strengthened by secondary legislation, such as the Employment Equality Framework Directive 2000/78/EC.

Concerning international and European standards the ILO's Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), as well as Article 15 ESC should be mentioned.[106] In relation to disability as ground for non-discrimination see above 6.

106. For ECtHR jurisprudence see Factsheet Persons with disabilities and the ECHR.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the combating of social exclusion, and the modernisation of social protection systems.

(2) Our view

As far as 'social security and social protection of workers' is concerned Article 153(1)(d), in combination with (2)(b) TFEU, opens the path for the adoption of a Directive, although it requires unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'combating of social exclusion' and the 'modernisation of social protection systems' (Article 153(1)(j) and (k) TFEU, respectively). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU and thus excludes the subject (k) just mentioned.

d) Evaluation

(1) Content

The first part of the Commission's proposal could be considered positive (the word 'basic' should be replaced by 'minimum' and 'allows' should be replaced by 'ensures'), but it is already included in the general right (see above 11.e)), also insofar as invalidity pensions would be concerned). Conversely, the second part is a very important restriction of this right ('shall not create barriers'), because it can always be argued that a burden on employers is a barrier to employment. It should therefore not be retained.

(2) Legislation

As benefits in case of disability are either elements of social security systems or part of the wider social protection system a Directive would be possible (see above 11.c))).

e) Proposal

The formulation should read as follows: The right to social protection benefits enshrined in the respective proposal above (see 11.e)) should be supplemented by 'including in case of disability'.

17. Long-term care

a) Content (as defined by the Commission)

Population ageing, changing family structures and women's increased participation in the labour market all contribute to the increased demand for long-term care services. Family carers, usually women, often fill the gap left by unavailable or costly institutional care services. Formal home-based care, although preferred by many beneficiaries and family members remains under-developed, making informal care is often the only option for many families, putting a high financial burden on those affected. Ensuring access to adequate long-term care services, while guaranteeing the financial sustainability of long-term care systems, thus requires increased efforts in improving the provision and financing of long-term care.

a. Access to quality and affordable long-term care services, including home-based care, provided by adequately qualified professionals shall be ensured

b. The provision and financing of long-term care services shall be strengthened and improved in order to ensure access to adequate care in a financially sustainable way.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental rights sets out: *The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as…dependency*.

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection.

(2) Our view

Besides the two references by the Commission to Article 34(1) CFREU and Article 151(1) TFEU it should be noted that, besides children (see below 18) elderly persons are probably the group most affected by long-term care. In this respect, Article 25 CFREU provides for recognition of and respect for 'the right of the elderly to lead a life in dignity and independence and to participate in social and cultural life'.[107] The Community Charter also addresses elderly persons:

> According to the arrangements applying in each country:
>
> 24. Every worker of the European Community must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living.

107. For ECtHR jurisprudence see Factsheet Elderly people and the ECHR.

> 25. Every person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs.

Within the framework of the ILO an Older Workers Recommendation, 1980 (No. 162) has been adopted. In the same form but with wider scope and more recently (in February 2014) the Council of Europe addressed a Recommendation on the promotion of human rights of older persons to its Member States dealing, among other things, with problems of care.

c) Legal basis

(1) European Commission's view

> Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers and the modernisation of social protection systems.

(2) Our view

Insofar as 'social security and social protection of workers' is concerned Article 153(1)(d) in combination with (2)(b) TFEU opens the way for the adoption of a Directive, although it requires unanimity according to Article 153 (2)(3) TFEU). Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'modernisation of social protection systems' (Article 153(1)(k) TFEU). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned.)

Concerning services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation).

d) Evaluation

(1) Content

In general, the rights-based essence of both elements appears to be covered by the general proposal (see above 11.e)). For sake of clarity an explicit reference to long-term care should be included.

(2) Legislation

It will depend on the area of action envisaged: the more it is related to elements of social security systems or, in a wider sense, social protection systems a Directive

would be possible (see above 11.c)). If, however, the focus is more on the provision for long-term care in the sense of social services the principles and conditions could be defined by a Regulation (Article 14 TFEU).

e) Proposal

> The formulation should read as follows: The right social services enshrined in the respective proposal above (see above 11.e)) should be supplemented by 'including in case of long-term care'.

18. Childcare

a) Content (as defined by the Commission)

Childcare services improve the cognitive and social development of children, especially those living in disadvantaged households, and enhance educational and labour market prospects later on in life. Formal childcare is also a key tool for work-life balance, encouraging parental employment, especially for women. However, limited availability, access, affordability and quality remain major obstacles and hamper children's development. The access of children from disadvantaged backgrounds to these services also remains challenging.

a. access to quality and affordable childcare services, provided by adequately qualified professionals, shall be ensured for all children.

b. Measures shall be taken at an early stage and preventive approaches should be adopted to address child poverty, including specific measures to encourage attendance of children with disadvantages backgrounds.

b) EU acquis

(1) European Commission's view

Article 24 of the Charter of Fundamental Rights sets out: *Children shall have the right to such protection and care as is necessary for their well-being*.

Article 151 TFEU sets the Union and the Member States shall have as objectives proper social protection .

(2) Our view

The Commission only refers to Article 24 CFREU and Article 151(1) TFEU. Additionally, according to Article 33(1) CFREU the family shall enjoy legal, economic and social protection. Moreover, Article 34(1) CFREU recognises and respects the entitlement to social security benefits and social services.

However, there is no secondary (harmonisation) legislation. Instead, the social security coordination rules (in particular Regulation EC No. 883/2004) cover benefits in relation to children, which are considered 'family benefits.[108]

In any event, childcare has been dealt with using the open method of coordination in the form of the 'Barcelona targets on childcare facilities'. Childcare and benefits are also part of a good work/life balance and the well-being of workers. It can also contribute to achieving major EU policy goals: stimulating employment (especially among women and older workers) and growth; promoting children and youth development; and eventually achieving gender equality. This includes improving the provision of availability, quality, affordability and accessibility of care.

Concerning international and European standards, besides the general provisions concerning the right to social security (see above 11.b)) the ESC secures – in particular in Article 16 – the right of the family to social, legal and economic protection and in Article 17 the right for mothers and children, irrespective of marital status and family relations, to appropriate social and economic protection. It is the responsibility of states to take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the social security and social protection of workers, the combating of social exclusion, and the modernisation of social protection systems.

(2) Our view

As far as 'social security and social protection of workers' is concerned Article 153(1)(d), in combination with (2)(b) TFEU, opens the way for the adoption of a Directive, although it requires unanimity according to Article 153 (2)(3) TFEU. Moreover, such provisions 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' (Article 153(4) 1st indent TFEU). The Commission further mentions the 'combating of social exclusion' and the 'modernisation of social protection systems' (Article 153(1)(j) and (k) TFEU, respectively). This competence does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned).

108. 'Family benefit' means all benefits in kind or in cash intended to meet family expenses ...' (Article 1(z) Regulation 883/2004), see also the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) which, in its Part VII. 'Family Benefit', provides in Article 40 that the 'contingency covered shall be responsibility for the maintenance of children as prescribed'.

Concerning services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation).

d) Evaluation

(1) Content

Generally speaking, the provision of care should include the aspect of care for dependants and elderly people and not just children, as a cross-cutting issue in the reconciliation of family, private and professional life. In the ETUC's view[109] there is a strong need for a coherent policy with regard to reconciliation. This should offer: good quality, available and affordable child and elderly care facilities. This goes hand in hand with a variety of paid leave options that should be taken by both parents and especially encourage men to use them. Also important are recognition of the role of fathers with regard to childcare (see above on reconciliation of professional and family life (1)), flexible working time arrangements and the possibility to reduce or extend one's working time (reversible part time work), as well as substantial investment in public services.

Against this background, the respective benefits can be seen as covered by the right to social security in the form of family benefits (see above 11.d)). The first element of childcare as part of social services can be considered to be covered by expressly including childcare in the social services proposal (see above 11.e)). The second element – on preventive measures against child poverty – is new, however, and requires specific recognition as a right.

(2) Legislation

See above (2).

e) Proposal

> The right social services enshrined in the respective proposal above (see 11.e)) should be supplemented by 'including in case of childcare'. A new right should be formulated: 'Right to effective measures against child poverty'.

109. ETUC (2015).

19. Housing

a) Content (as defined by the Commission)

Lack of adequate housing and housing insecurity continues to be a large concern across the EU, leading to increasing financial risk taking, evictions, arrears in rental and mortgage payments, and in some extreme cases, homelessness. Restrictions to supply in housing sector and rental market distortions are contributing to the lack of availability. Lack of adequate housing also remains a barrier for labour mobility, for the establishment of young people on the labour market and for fulfilment of life plans and independent living.

a. Access to social housing or housing assistance shall be provided for those in need. Protection against eviction of vulnerable people shall be ensured, and support for low and medium income households to access home property provided.

b. Shelter shall be provided to those that are homeless, and shall be linked up to other social services in order to promote social integration.

b) EU acquis

(1) European Commission's view

Article 34 of the Charter of Fundamental Rights sets out: *In order to combat social exclusion and poverty, the Union recognises and respects the right to…housing assistance so as to ensure a decent existence for all those who lack sufficient resources…*

Article 151 TFEU sets the Union and the Member States shall have as an objective the combating of exclusion.

(2) Our view

Besides the two provisions mentioned by the Commission, in particular Article 3(3)(2) TEU setting out that the Union shall combat social exclusion is also relevant. Moreover, Article 31 RESC concerning the 'right to housing', as well as the relevant case law of the ECSR[110] should be mentioned.[111] At international level,

110. See, for example, ECSR Conclusions 2015, Statement of Interpretation on Article 31(2) RESC ('The Committee considers that eviction from shelters without the provision of alternative accommodation must be prohibited.'), ECSR 2 July 2014 Decision on the Merits - No. 86/2012 - *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands,* http://hudoc.esc.coe.int/eng?i=cc-86-2012-dmerits-en.

111. See, more generally, Recommendation of the Commissioner for Human Rights on the implementation of the right to housing - CommDH(2009)5 – 30/06/2009, https://wcd.coe.int/ViewDoc.jsp?p=&id=1463737&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679&direct=true.

Article 11(1) ICESCR provides for the right to adequate housing, concerning which the CESCR has adopted two General Comments.[112]

c) Legal basis

(1) European Commission's view

Article 153 TFEU sets out the Union shall support and complement the activities of the Member States' in the combating of social exclusion.

(2) Our view

The competence mentioned by the Commission in relation to 'combating of social exclusion' (Article 153(1)(j) TFEU) does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (k) just mentioned). The Union's role remains limited to 'measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States' (Article 153(2)(a) TFEU). Additionally, the Commission has only a technical coordination role in social policy matters (Article 156 TFEU).

d) Evaluation

(1) Content

For the exercise of the right to human dignity the right to housing is of specific importance. The same applies to the exercise of many of the other social rights, in particular the right to work. The protection is specifically needed for vulnerable groups, such as migrants and refugees.

The principles formulated in the Annex are surprising inasmuch as they go beyond existing levels of protection. For example, 'support for low and medium income households to access home property' is a property-creating element that appears to exceed the normal understanding of social rights. Concerning the content of social housing, however, there is no qualitative element that would ensure the exercise of a right to adequate housing. Therefore, it appears necessary to specify these elements. This would include the protection against eviction as well as at least shelter.

112. General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en; General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en; for a more comprehensive compilation of international standards see http://www.ohchr.org/EN/Issues/Housing/Pages/InternationalStandards.aspx; see also the Factsheet No. 21 (Rev. 1) 'The right to adeaquate housing', http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

(2) Legislation

Even in relation to combating social exclusion there is only a very limited legislative competence (see above c)(2)).

e) Proposal

The formulation should read as follows: 'Right to quality, safe and affordable social housing for those persons in need.'

20. Access to essential services

a) Content (as defined by the Commission)

Essential services, such as broadband, transport, energy (such as electricity and heating) and financial services (such as a bank accounts), which ensure the full social inclusion of people in society, as well as to ensure equal opportunities to access employment, are not always available or accessible to everyone in need of them. Barriers to access include affordability, lack of infrastructure, or failure to meet accessibility requirements for people with disabilities.

a. Affordable access to essential services including broadband, energy, transport, and financial services, shall be ensured for all people. Measures to support access to these services shall be available for those in need.

b) EU acquis

(1) European Commission's view

Article 151 TFEU sets the Union and the Member States shall have as their objective proper social protection ..... and the combating of exclusion.

(2) Our view

Already at EU level, there are several elements that should be taken into account. First, Article 36 CFREU provides for 'access to services of general economic interest':

> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Second, Article 14 TFEU (ex-Article 16 TEC) guarantees a framework for 'services of general economic interest' (and provides a certain legal basis, see below c)):

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union, as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Second, more specifically Article 1 of Protocol (No 26) On Services of General Interest complementing Article 14 TFEU provides:

> The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
>
> – the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
> – the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
> – a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Concerning secondary legislation the Commission in a Communication 'A Quality Framework for Services of General Interest in Europe' states under the heading 'Ensuring access to essential services':

> The sectoral legislation adopted at EU level has always carefully balanced the need to increase competition and the use of market mechanisms with the need to guarantee that every citizen continues to have access to essential services of high quality at prices that they can afford.[113]

113. European Commission (2011: 9).

and names the following examples:[114]

- postal services,[115]
- basic banking services,[116]
- transport,[117]
- energy,[118]
- Electronic communications.[119]

c) Legal basis

(1) European Commission's view

–

(2) Our view

Concerning services of general economic interest, Article 14 TFEU provides for a legislative competence as regards the respective principles and conditions (in the form of a Regulation). In rejecting a European citizens' initiative (ECI) on long-term care[120] the General Court has most recently favoured a restrictive approach.[121]

There is, however, a legal basis as regards services in general. For example, the Postal Services Directive 2008/6/EC, was based on ex-Articles 47(2), Articles 55 and 95 TEC (now Articles 53(2), Articles 62 and 114 TFEU), which relate mainly to legislative competences in the areas of services and approximation of laws.

114. 'The examples below illustrate the pro-active approach which the Commission takes in this field.' Ibid.; for the description of the different sectors see pp. 9 12.

115. The objectives for postal services have been implemented in EU law through the Postal Services Directive - Directive 97/67/EC. This directive established a regulatory framework for European postal services and was amended by Directive 2002/39/EC and Directive 2008/6/EC, http://ec.europa.eu/growth/sectors/postal-services/legislation/index_en.htm.

116. Bank accounts are essential tools for all consumers. It is therefore necessary to guarantee that they are accessible to all citizens in the EU and that consumers have appropriate means to choose the product which best fits their needs, Directive 2014/92/EU, http://ec.europa.eu/finance/finservices-retail/inclusion/index_en.htm.

117. See the links to the Transport directives (road, maritime, rail, air etc.) http://ec.europa.eu/transport/media/infringements/directives/index_en.htm.

118. See, for example, Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC [See amending act(s)].

119. See, for example, the 'Telecoms Package', adopted in 2002 and amended in 2009 including four 'specific' Directives which regulate specific aspects of electronic communications (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Al24216a:
– Directive 2002/20/EC or 'Authorisation Directive';
– Directive 2002/19/EC or 'Access Directive';
– Directive 2002/22/EC or 'Universal Service Directive';
– Directive 2002/58/EC or 'Directive on privacy and electronic communications'.

120. 'Right to Lifelong Care: Leading a life of dignity and independence is a fundamental right!'

121. GC, Judgment 19 April 2016 – T-44/14 – Costantini – paras. 23 ff.

d) Evaluation

(1) Content

The concept of 'essential services' or 'services of general (social) interest' in the context of human rights is fairly new. It follows the idea of the need for a framework that would in a more general way guarantee adequate or even good living conditions. Its various facets range from services in the sense of securing social inclusion and/or social cohesion to justification of the limitations to the right to strike within the framework of the ILO. In the Annex, however, its content appears to be neither clear[122] nor related to the *acquis* concerning services of general interest, a concept which is very much aimed at limiting the internal market's economic prerogatives (see in the context of competition rules Article 106 TFEU). It should be noted that the Commission in its Communication 2011[123] described the aim as

122. See related definitions the Commission provided in its Communication, 'A Quality Framework for Services of General Interest in Europe' (COM(2011) 900 final – 20.12.2011 – http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf, pp. 3–4) , however also without defining clearly the concept of 'essential services'.
'**Basic concepts**
The debate on services of general interest suffers from a lack of clarity on terminology. The concepts are used interchangeably and inaccurately. Stakeholders have asked the Commission to provide clarity. In doing so, however, the Commission is bound by EU primary law and the Court's case-law. Moreover, the concepts are dynamic and evolve.
Service of general interest (SGI): SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities (see the definition of SGEI below) and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination.
Service of general economic interest (SGEI): SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.
Social services of general interest (SSGI): these include social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role. While some social services (such as statutory social security schemes) are not considered by the European Court as being economic activities, the jurisprudence of the Court makes clear that the social nature of a service is not sufficient in itself to classify it as non-economic. The term social service of general interest consequently covers both economic and non-economic activities.
Universal service obligation (USO): USO are a type of PSO which sets the requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price. The definition of specific USO are set at European level as an essential component of market liberalization of service sectors, such as electronic communications, post and transport.
Public service: Public service is used in Article 93 TFEU in the field of transport. However, outside this area, the term is sometimes used in an ambiguous way: it can relate to the fact that a service is offered to the general public and/or in the public interest, or it can be used for the activity of entities in public ownership. To avoid ambiguity, this Communication does not use the term but follows the terminology "service of general interest" and "service of general economic interest".'

123. See European Commission (2011: 3).

'to present the quality framework which consists of three complementary strands of action', one of the three being:

> Ensuring access to essential services: the Commission will take forward its commitment to ensure access for all citizens to essential services in specific sectors building on recent actions in the field of basic banking, postal services and telecommunications.

Against this background, a narrow concept would not appear appropriate to cover the provision of services in the interest of the population as a whole or of targeted groups with specific needs. The concept of 'essential services' should therefore be extended by referring more generally to 'services of general interest'.

(2) Legislation

Whereas the legislative competences in the area of general economic interest are, according to Article 14 TFEU, limited to 'principles and conditions' the more general services-related competences would allow for wider legislative activities. However, not being socially oriented will in itself see elements of universal services or services of general interest more as an exception. Moreover, Article 114(2) TFEU provides that the approximation of laws 'shall not apply to … the rights and interests of employed persons'.

e) Proposal

The formulation should read as follows: 'Right to quality, safe and affordable services of general interest, in particular for those persons in specific need.'

V. Detailed analysis and proposals concerning additional domains in the form of rights

The rights listed above are, however, do not respond (sufficiently) to the 'Changing realities of Europe's societies' nor to the 'Changing realities of the world of work', although they were defined as starting points for the initiative (see above C.). Whereas it would be too far-reaching for the purpose of this paper to deal with the aspects concerning the 'changing realities of the world of work',[124] we shall look specifically at the need to respond to the challenges arising from the 'changing realities of the world of work'. This is also in line with the approach of the initiative, which clarifies that the list is not exhaustive ('such as'). Also for the sake of coherence concerning social rights, certain of them are missing (for example, the right to reasonable working time). However, this (additional list) is not exhaustive either.

A. New provisions related to Chapter I

21. Right to effective enforcement

a) Content

The formulation refers to all (sorts of) rights and access to justice (which in itself is a right). It covers a wide range of specific elements, such as:

- Information about (substantive and procedural) rights,
- Access to and effective supervision by authorities (in particular labour inspection),
- Access to justice, effective remedy and fair trial,
- Effective sanctions and so on.

b) EU acquis

Concerning access to justice, there is obviously the general right to an effective remedy and to a fair trial (Article 47 CFREU) based on Articles 6 and 13 ECHR.[125] As regards secondary legislation, most social directives contain (at least to a certain extent) provisions on (effective) implementation. As regards possible victimisation of persons exercising their rights, for example, the Anti-discrimination Directives (Article 9 Directive 2000/43/EC, Article 11 Directive 2000/78/EC and Article 24 Directive 2006/54/EC) prohibit such activities.

124. It would, for example, appear important to address the very important issues of migration and asylum.

125. The ECtHR jurisprudence on Article 6 ECHR (right to a fair trial) is very much developed.

In relation to international and European standards, in particular the ILO's Labour Inspection Convention, 1947 (No. 81)[126] (together with its Protocol of 1995 to the Labour Inspection Convention, 1947) and Labour Inspection (Agriculture) Convention, 1969 (No. 129) should be mentioned. Article A(4) RESC provides that each state 'shall maintain a system of labour inspection appropriate to national conditions'.

Generally speaking, it should be recalled that the principle of effectiveness is also included in all the rights enshrined in the ESC/RESC ('With view to ensuring the effective exercise of the right …').

c) Legal basis

As the implementation of rights guaranteed at EU level is an important part of the rights themselves all directives for which a legal basis was found previously can provide for effective implementation.

d) Motivation

All four elements mentioned above (see above a)) are crucial for the effectiveness of the rights guaranteed. It starts with information requirements (awareness-raising measures) which have to be easily understandable. In particular in the employment relationship workers – persons who are by definition in a dependent situation – exercising their rights face the danger of being sanctioned by the employer (an important example is 'whistleblowing', see below under 28.). This right responds to this danger and aims at protecting their position by prohibiting any form of (direct or indirect) sanction (victimisation).

> Effective enforcement must also be guaranteed in relation to trade agreements which the EU is negotiating or concluding, such as CETA and TTIP. This raises the question of extra-territorial application. More generally, the EU and the Member States have to guarantee that fundamental social rights be fully respected, protected and fulfilled by employers, in particular within the framework of multinational enterprises.[127]

126. See ILO (2006).

127. See, for example, at UN level the text of 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' in English; at ILO level the ILO Tripartite declaration of Principles concerning Multinational Enterprises, the latest report for the 105th International Labour Conference: Report IV: Decent work in global supply chains and even in ILO Conventions (e.g. Prevention of Major Industrial Accidents Convention, 1993 (No. 174) (Part VI. Responsibility of Exporting States, Article 22, on information obligations); at Council of Europe level Recommendation CM/Rec(2016)3 to member States on human rights and business.

e) Proposal

> The formulation should read as follows: 'Right to an effective enforcement of all rights, including the effective supervision by, among others, labour inspection, the right to an effective remedy and to a fair trial as well as measures to ensure awareness of all rights in an easily understandable way.'

22. Right to most favourable conditions

a) Content

Such a right settles the (sometimes problematic) relationship between different (levels of) standards coming from different, in particular from national, European and international sources. It can be the relationship between standards arising from legislation or collective agreements. In case there are diverging contents such a right will ensure that the provision with the most favourable content for workers will apply.

b) EU acquis

Generally speaking, Article 53 CFREU contains such a 'conflict' clause. However, the CJEU has interpreted it in a narrow (if not to say in an opposite) way. As regards more particularly the relationship between the EU and national legislation in the social field it is, in principle, defined by Article 153(2)(b) TFEU, ensuring that EU secondary legislation is guaranteeing a level of protection which can be improved at national level (but by no means undermined). This principle of the most favourable clause is expressly recognised even in certain directives which were based on legal bases for harmonisation of internal market provisions.[128] One could even argue that this principle was to be applied in all situations in which social aspects are at stake. However, in its *Laval* judgment the CJEU changed the content of such a provision to be no longer only a minimum but now (its contrary) a 'maximum' provision.[129] But such an interpretation can never apply to legislation based on Article 153 TFEU. Concerning international and European standards, in particular in the field of human rights this is a general principle which finds its expression in nearly all human rights instruments, at least in the relationship between international and domestic law (see Article 19(8) ILO Constitution, Articles 53 ECHR, Article 32 ESC and Article H RESC).

128. See, for example, Article 7 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship which was based on the then Article 100 TEC (later Article 95 TEC, now Article 114 TFEU). At the time of its adoption no social competences were available yet. Therefore, the internal market competences were used.

129. CJEU Judgment (see above note 25), para. 80.

c) Legal basis

Even if there were no general legal basis there are obligatory elements as far as secondary legislation under Article 153 TFEU (as minimum requirements in relationship to national law which can go beyond the level of protection provided for in EU legislation according to Article 153(4)2nd indent TFEU) is concerned. Moreover, there should be (at least the political) obligation to use in all cases of secondary legislation based on other (in particular harmonisation) competences a clear formulation in this sense.[130] Accordingly, secondary legislation should provide for this principle also in relation to other possible legal sources.

d) Motivation

It appears necessary to clarify (once and for all) this principle in the form of a right guaranteeing that in conflicts of level of protection the most favourable standard for the person concerned (be it a worker or – for example in the social security field – the insured person) applies. Of course, there is the question of how to define what is 'most favourable'. In order to ensure the effectiveness of this right it is important to use the most limited element for comparison (and, in any event, to avoid the use of any further elements to be taken into account).

e) Proposal

> The formulation should read as follows: 'Right to the most favourable conditions in case of conflict between different sources of law'.

23. Right to non-regression

a) Content

This right is aimed at a transversal protection (that is, in relation to all the specific rights mentioned above).

b) EU acquis

The objectives of the EU include 'social progress' (Article 3(3)(1) TEU). More specifically, the Social Policy objectives contain the principle of harmonisation upwards (Article 151(1) TFEU: 'improved living and working conditions', 'harmonisation, while their improvement is maintained'). It should also be noted that Article 153(1)(a) TFEU explicitly refers to the 'improvement in particular of the working environment'. Along the same lines, the Community Charter contains several references to the improvement of social legislation (in particular Nos.7 and

130. See for example Article 37 (More favourable national provisions) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

19[131]). Many directives in the social field contain a non-regression clause. However, they are formulated in a general (and to a certain extent vague) manner. Moreover, they are limited to the moment of transposition of the content of the given directive into national law. Finally, the case law of the CJEU has not yet made positive use of one of these clauses. International and European standards also contain references to the necessary upward trends, such as the horizontal provision of Article 2(1) ICESCR ('progressively') or as limits to restrictions Article G(1) RESC. More specifically certain provisions in the ESC/RESC explicitly have a dynamic dimension, such as Article 2(1) ESC on progressive working time reduction or Article 12(3) ESC on progressively raising the social security to a higher level.

c) Legal basis

One might be of the opinion that there is no legal basis for a general right. However, the (level of) working conditions can be defined under Article 153(1)(b) TFEU. Consequently, it would appear possible to provide for such a right under this Article (at least for all matters covered by it). In any event, there is the possibility to formulate such a right in each of the directives (even if they are not based on Article 153 TFEU).

d) Motivation

Particularly within the framework of austerity measures the EU is increasingly adopting measures aimed at and effectively lowering the level of social protection. Therefore, on the basis of the EU *acquis* (see above b)) such a right appears necessary and would provide important guarantees against such an approach.

e) Proposal

The formulation should read as follows: 'Right to non-regression'.

24. Right to work

a) Content

The right to work in a social market economy does not guarantee a right to a specific workplace. Nevertheless, there are important elements which can be considered an integral part thereof. In particular the following should be provided for:

- the political aim of full employment,
- the opportunity to earn a living by work which is freely chosen, in particular:
- the prohibition of forced and compulsory labour,
- the provision of effective employment services,
- the prohibition of unfair dismissal (see above 7).

131. See quotations under 2.b)(2) and 9.b)(2), respectively.

b) EU acquis

The *right to work* as such has not yet been recognised by EU law. Nevertheless, the full employment objective was introduced into EU primary law (Article 3(3)(1) TEU) by the Lisbon Treaty. The objectives of a 'high level of employment' (Article 9 TFEU) and 'lasting high employment' (Article 151(1) TFEU) are also mentioned. More specifically, Title IX on employment of Part III of the TFEU, among other things, establishes a framework of procedures in this respect.

Concerning international and European standards guaranteeing the right to work, such as Article 6 ICESCR (together with its General Comment No. 18),[132] as well as Article 1 ESC should also be taken into account. The latter provides that the States concerned undertake: (1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible; (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; and (4) to provide or promote appropriate vocational guidance, training and rehabilitation.[133] In its 'priority' Convention on employment (Employment Policy Convention, 1964 (No. 122))[134] the ILO defines the principle of 'full, productive and freely chosen employment' and it prohibits forced labour by two of its fundamental rights Conventions (the Forced Labour Convention, 1930 (No. 29) with its Protocol of 2014 to the Forced Labour Convention, 1930 and the Abolition of Forced Labour Convention, 1957 (No. 105)).[135] Article 4 ECHR provides for the prohibition of slavery and forced labour.[136]

Article 34(3) CFREU enshrines the aim of *combating social exclusion* and poverty, which is also to be found Article 30 RESC containing the right to protection against poverty and social inclusion. Moreover, based on Title IX on employment of Part III of the TFEU, the Commission issued the 2008 Recommendation on the active inclusion of people excluded from the labour market.[137] In 2013 a study proposed an evaluation of the implementation of the Commission Recommendation on active inclusion.[138] It also bases its activation policies on the Social Investment Package (SIP), as well as the European Social Fund. The European Social Partners signed a 'Framework agreement on inclusive labour markets' in 2010.

c) Motivation

The *right to work* is of the utmost importance for the exercise of fundamental social rights. In the terms of General Comment No. 18 CESCR its fundamental

132. E/C.12/GC/18, http://www.refworld.org/docid/4415453b4.html.
133. Not be confused with the US so-called 'right to work' law, which is legislation that allows a person to work at any place of employment without being forced to join a union as a condition of employment.
134. See ILO (2004).
135. See ILO (2007).
136. See the Factsheet on the ECtHR's case law on Slavery, servitude and forced labour.
137. Recommendation from the Commission (2008/867/EC) See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:307:0011:0014:EN:PDF.
138. Frazer and Marlier (2013).

value is formulated as follows: 'The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity.'[139] Its importance is further demonstrated by the fact that the two international standards of social rights place the right to work at the beginning. Indeed, the ESC starts the substantive rights in Article 1 with the right to work. The same applies to Article 6 ICESCR also recognising the right to work, which is also to be found at the beginning of the substantive rights (Part III).[140] Certain aspects such as the prohibition of forced and compulsory labour are also to be mentioned.

> The Commission stresses more 'active inclusion' enabling every citizen, notably the most disadvantaged, to fully participate in society, including having a job, adequate income support, inclusive labour market and access to quality services, so as to get, keep and/or go back to work. This aspect, however, should not need to be highlighted if the right to work is effectively guaranteed. Therefore it is not explicitly mentioned here.

d) Legal basis

There is a competence on 'social exclusion' which, however, does not allow for the adoption of a Directive (according to the limitation contained in Article 153(2)(b) to the subjects defined in para. (1)(a) to (i) TFEU, thus excluding the subject (j)).

e) Proposal

The formulation should read as follows: 'Right to work'.

B. New provisions related to Chapter II

25. Right to dignity at work

a) Content

Dignity at the workplace is directly related to the fundamental principle of human dignity. It has several aspects, such as the prohibition of harassment and recognition of the reputation of the worker.

b) EU acquis

Article 1 CFREU requires that '[h]uman dignity is inviolable. It must be respected and protected.' More specifically Article 31 CFREU provides that '[e]very worker hat the right to working conditions which respect his or her … dignity.'

139. E/C.12/GC/18, http://www.refworld.org/docid/4415453b4.html, para. 1.
140. Parts I (Article 1) and II (Articles 2 – 5) of the ICESCR deal with horizontal issues.

In EU secondary legislation the anti-discrimination directives (the Anti-racism Directive 2000/43/EC, the Employment Equality Framework Directive 2000/78/EC and the Gender Equality Directive 2006/54/EC) all include 'harassment' in the definition of discrimination. On 26 April 2007, the Social Partners at EU level concluded a Framework agreement on harassment and violence at work.

> Concerning international and European standards Article 26 RESC contains the right to dignity at work. Article 8 ECHR guarantees the 'Right to respect for private and family life'.[141]

c) Legal basis

Article 153(1)(b) in combination with para. (2)(b) TFEU provides a legislative competence for a directive as it concerns working conditions in general. Inasmuch as the violation of the worker's dignity has a negative impact on the worker's health, Article 153(1)(a) TFEU concerning the working environment can serve as additional legal basis.

d) Motivation

In particular because of the dependent situation of workers their dignity is under potential threat. It deserves specific protection. Concerning the explicit prohibition of *harassment* it should be noted that it is only guaranteed in relation to the eight grounds for discrimination (see Article 19 TFEU). The Framework agreement has not yet been transposed into a Directive. Therefore, this aspect of the worker's dignity should be considered a part thereof. No legislative activities have been initiated as regards the worker's *reputation*. This aspect has to be seen as independent from discrimination or health and safety. Nevertheless, it also needs protection.

e) Proposal

The formulation should read as follows: 'Right to dignity at the workplace'.

26. Right to reasonable working time

a) Content

Working time encompasses in particular (limitation in order to guarantee) reasonable daily and weekly working hours; daily and weekly rest periods; annual paid leave. As mentioned in the preamble of the EU Working Time Directive 2003/88/EC (WTD), 'the improvement of workers' safety and health at work is an objective which should not be subordinated to purely economic considerations'.

141. See for the ECtHR's case law on reputation in general the Factsheet 'Protection of reputation'.

b) EU acquis

Article 31(2) CFREU provides that '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.' In secondary legislation, the WTD concerning certain aspects of the organisation of working time contains 'certain aspects' thereof. In particular the definition of maximum daily working hours is missing. Concerning international and European standards one can again refer to a number of ILO Conventions, in particular the first Convention ever adopted: Hours of Work (Industry) Convention, 1919 (No. 1) stating the '8-hours a day' rule,[142] Article 7 ICESCR and Article 2 ESC.

c) Legal basis

Article 153(1) (a) TFEU refers to the improvement in particular of the working environment to protect workers' health and safety. Working time falls under the health and safety of workers. As a result, the Article 153(2)(b) TFEU allows for the adoption of a Directive.

d) Motivation

Although it can easily be admitted that there are different 'rights' in this respect the general principle should be ensured by referring to the main limitation, which is that workers should not be obliged to work beyond reasonable limits. According to the ETUC, 'The starting point for any debate on the WTD must be the recognition that the EU and all its Member States have a double legal obligation, i.e. to ensure that every worker has a right to limitation of his working hours which is implemented in a way which respects his health, safety and dignity (Article 31 CFREU), and (in particular according to Article 2(1) ESC to progressively reduce (long) working hours, while improvements are being maintained (Article 151(1) TFEU). This provision is also to be interpreted as a non-regression obligation that any new social legislation has to serve this objective.' 'Maintaining the opt-out, extending the reference periods and weakening the position on on-call time and compensatory rest would contradict health and safety principles that are based on solid evidence and research.[143] Therefore a reference to those principles appears necessary.

e) Proposal

The formulation should read as follows: 'Right to a working time compatible with workers' health and safety and their personal needs'

142. See ILO (2005).
143. ETUC (2011).

27. Right to the protection of personal data in the employment relation

a) Content

Data protection is increasingly becoming relevant in the 'world of work', which is being affected more and more by digitalisation. The protection of personal data is closely related to human dignity and the right to private life.

b) EU acquis

Article 8 CFREU provides for the 'Protection of personal data' in general. This is coupled by Article 16 TFEU, also stating that 'everyone has the right to the protection of personal data'. As regards secondary legislation, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data is being replaced by the most recently adopted (but not yet officially published) General Data Protection Regulation (GDPR). This general protection is (increasingly) supplemented by a number of Directives on specific issues. Moreover, data protection is becoming increasingly important in the globalisation context, in particular in relations between the EU and the USA. Although there is no specific Directive on the protection of personal data in the employment relation Article 82 GDPR contains certain protection in relation to 'Processing in the employment context'. In institutional terms, the European Data Protection Supervisor (EDPS)[144] is supposed to control the data protection rules. Concerning European standards, data protection in the Council of Europe is addressed by several instruments, in particular by the Data Protection Convention No. 108 (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data). However, based on the protection of private life (Article 8 ECHR) ECtHR jurisprudence has developed important guarantees in this respect.[145] In the same vein, but going further the ECSR has derived a number of principles from Article 1(2) ESC.

c) Legal basis

Article 16(2) TFEU provides for a legal basis for data protection in general and therefore at the workplace in particular. It could (and perhaps should) be supplemented by a reference to Article 153(1)(b) TFEU).

d) Motivation

The protection of personal data at the workplace is a very sensitive area. Employers obtain an enormous amount of personal data on each individual worker not only related to the (quality of) work but also (at least via social media) about their

144. https://secure.edps.europa.eu/EDPSWEB/edps/EDPS?lang=en.

145. For the jurisprudence see the Factsheet Protection of personal data; moreover the 'Handbook on European data protection law' (English) provides for a comprehensive description of EU and CoE rules.

personality. In times of digitalisation, this is all the more true as new technologies are being developed at an increasing speed which are aimed at or at least directly affect the control of workers. All these developments require effective protection.

e) Proposal

The formulation should read as follows: 'Right to the protection of personal data in the employment relation'.

28. Right to freedom of expression including the right to whistleblowing

a) Content

The protection of freedom of expression in the employment relationship is required inasmuch it forms part of the fundaments of democratic societies in general and the enjoyment of human dignity by exercising those rights also at the workplace in particular. In this context, the protection of whistle-blowers in the employment relationship (and beyond) is becoming increasingly important. The protection should ensure that in case of a whistleblowing no sanctions in relation to the person concerned should be possible (in particular, prohibition of dismissal).

b) EU acquis

Article 11 CFREU provides for the right to freedom of expression. The relevant explanations expressly refer to Article 10 ECHR.[146] In its increasing case law the ECtHR has found a violation of freedom of expression in the case of whistleblowing.[147] Besides that only a few elements in EU law contain such a protection, although an increasing number of international standards refer to such a right;[148] for example, the UN Convention against Corruption (UNCAC, Article 33) and ILO Convention No. 158 (Article 5(c)).

c) Legal basis

It would appear logical to consider the protection of whistle-blowers at the workplace as a 'working condition'. Therefore, Article 153(1)(b) TFEU would form a legal basis.

146. See Voorhoof and Humblet (2013: 237).
147. See, for example, ECtHR cases *Heinisch v. Germany*, 21 July 2011, *Bucur and Toma v. Romania*, 10 January 2013.
148. For more details see, Fischer-Lescano (2016: 4ff and 68 ff).

d) Motivation

Looking at the new challenges in the world of work it appears obvious that the complexity and in-transparency of more and more processes requires that the persons who have an inside (and potentially expert) view be provided with the possibility to make abuse of powers and other acts of maladministration public without the fear of sanctions. Thus they contribute to more efficient public control. More generally, the right should be given an overarching framework by referring to the 'freedom of expression'.

e) Proposal

> The formulation should read as follows: 'Right to freedom of expression, in particular Right to whistleblowing'

29. Right to protection of specific groups

The Annex mentions only a few groups of people who need specific protection (such as persons with disabilities, see above 16.). Nevertheless, there are children (to be prohibited from working) and young workers (to be protected against inadequate working conditions). Specific protection is also needed in relation to migrant workers. Finally, workers in several sectors require specific protection (maritime, dock work), all the more as technological developments are changing the patterns of work.

VI. Specific considerations as to the structure

On the basis of the structure proposed by the Commission the list of rights (including the rights newly proposed) needs a different logical order because in its first version, as well as in its presently proposed amended version, the order of the domains or rights lacks internal coherence. That is why – on the basis of the proposed wording of the rights in the extended list – a more coherent order is suggested. It should start with a part on rights of general application and, subsequently, should contain the main part of the (more) specific rights divided into two sections, namely labour rights and social welfare rights. The former might be considered to be workers' rights, but as the latter should in particular apply to workers it would not be appropriate that the former should be more targeted towards labour (but it could also be considered to call them 'employment rights'). The 'social welfare rights' are intended to cover all the other rights that have a wider social (security/assistance/services) perspective.

Chapter I: General provisions and access to the labour market

Section 1: Effective exercise of rights

- Right to an effective enforcement of all rights, including the effective supervision by amongst other, labour inspectorate, the right to an effective remedy and to a fair trial as well as measures to ensure awareness of all rights in an easily understandable way (see above 21.e)),
- Right to most favourable conditions in case of conflict between different sources of law (see above 22.e)),
- Right to non-regression (see above 23.e));

Section 2: General provisions

- Right to equal treatment in particular in employment and occupation (see above 6.e)),
- Right to equal treatment between men and women, in particular to equal pay (see above 5.e)),
- Right to the protection of personal data in the employment relation (see above 27.e));

Section 3: Access to labour market

- Right to **work** (see above 24.e)),
- Right to free and quality **placement services** (see above 3.e)),
- Right to protection against **precarious work** (see above 2.e)),
- Right to youth employment including that all **people under the age of 25** years shall receive a good-quality offer within a period of four months of becoming unemployed or leaving formal education:

- of employment according to the principle of non discrimintation at the work place (or right to equal treatement for equal work),
- of continued education,
- of a decently paid apprenticeship or of a decently paid traineeship, (see above I.A.1.e);

Chapter II: Employment rights

Section 1: Collective rights

- Right to form and join **trade unions**, right to collective bargaining and collective action including the right to strike (see above 10.e)),
- Right to **Social dialogue**, information and consultation as well as participation (see above 10.e)), all of which are also to be promoted at all relevant levels;

Section 2: Individual rights

- Right to **dignity** at the workplace (see above 25.e)),
- Right to a written **contract of employment** (see above 7.e)),
- Right to protection in case of a **probation period** (see above 7.e)),
- Right to minimum pay guaranteeing at least a **fair remuneration** (see above 8.e),
- Right to a **working time** compatible with workers' health and safety and their personal needs (see above 26.e)),
- Right to high level of **healthy and safe working conditions** and to participate in the prevention policy (see above 9.e)),
- Right to **maternity protection** and **reconciliation of family and professional life** (see above 5.e)),
- Right to quality lifelong **Learning** and vocational (re-)training (see above 1.e)),
- Right to **paid educational leave** ensuring portability of entitlements (see above 3.e)),
- Right to **freedom of expression**, in particular Right to **whistleblowing** (see above 28.e)),
- Right to protection against unfair **dismissal** (with obligation to reinstatement) (see above 7.e)),
- Right to quality **supplementary pensions** ensuring portability of entitlements (see above 13.e));

Chapter III: Social protection rights

- Right to effective **integration** of all social benefits and services ensuring a decent living of the persons concerned'. (see above 11.e));

Section 1: Social protection

- Right to good quality **social protection benefits** in particular to those based on all branches of social security including in case of disability' (see above 16.e)), and social assistance systems including minimum income' (see above 15.e)) ensuring a decent standard of living' (see above 11.e)),
- Right to good quality **rehabilitation** (see above 12.e)),
- Right to effective measures against **child poverty** (see above 18.e));

Section 2: Social services

- Right to provision of good quality, availability, affordability and accessibility of **social services** adequately financed and provided by specifically qualified professionals (see above 11.e)), including in case of long-term care (see above 17.e)) and childcare (see above 18.e)),
- Right to good quality preventive and curative **health care** (see above 12.e)),
- Right to quality, safe and affordable social **housing** for those persons in need (see above 19.e)).

References

Bruun N. (2013) Prohibition of discrimination under Article 14 European Convention on Human Rights, in Dorssemont F., Lörcher K. and Schömann I. (eds.) European Convention on Human Rights and the employment relation, Oxford, Hart Publishing, 367-380.

Bruun N., Lörcher K., I. Schömann I. and Clauwaert S. (eds.) (2016) The European Social Charter and the employment relation, Oxford, Hart Publishing. [Forthcoming]

Cisotta R. and Gallo D. (2014) The Portuguese Constitutional Court Case Law on austerity measures: a reappraisal, Working paper 04-2014, Roma, LUISS UniversityPress. http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf

Dorssemont F. (2013) The right to take collective action under Article 11 ECHR, in Dorssemont F., Lörcher K. and Schömann I. (eds.) European Convention on Human Rights and the employment relation, Oxford, Hart Publishing, 333-366.

Dorssemont F., Lörcher K. and Schömann I. (eds.) (2013) The European Convention of Human Rights and the employment relation, Oxford, Hart Publishing.

ETUC (2011) The Working Time Directive: limitation of working hours and greater influence of workers for the benefit of healthier working lives, ETUC Resolution, adopted at the Executive Committee on 8-9 March 2011. https://www.etuc.org/sites/www.etuc.org/files/Resolution-on-The-WTD-Limitation-of-working-hours-and-greater-influence-of-workers-for-the-benefit-of-healthier-working-livesEN_2__2.pdf

ETUC (2015) ETUC position on first-stage consultation of the EU social partners on a 'New start' for work-life balance. https://www.etuc.org/documents/etuc-position-first-stage-consultation-eu-social-partners-new-start-work-life-balance#.Vsc8B2f2bUM

European Commission (2006) Communication from the Commission - Implementing the Community Lisbon programme: social services of general interest in the European Union, COM(2006) 177 final, 26 April 2006. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0177:FIN:EN:PDF

European Commission (2010) Communication from the Commission - Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, 19 October 2010. http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf

European Commission (2011) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region - A quality framework for Services of General Interest in Europe, COM(2011) 900 final, 20 December 2011. http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf

European Commission (2012a) Communication from the Commission - A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final/2, 30 November 2012. http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf

European Commission (2012b) Labour market developments in Europe, 2012. http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-5_en.pdf

European Parliament (2014) EU regulatory fitness and subsidiarity and proportionality - better law-making. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0061+0+DOC+XML+V0//EN

European Commission (2016) Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final, 8 March 2016. http://eur-lex.europa.eu/resource.html?uri=cellar:bc4bab37-e5f2-11e5-8a50-01aa75ed71a1.0004.02/DOC_1&format=PDF

European Union Agency for Fundamental Rights and European Court of Human Rights (2011) Handbook on European non-discrimination law, Luxembourg, Publications Office of the European Union. http://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG_01.pdf

Fischer-Lescano A. (2016) Internationalrechtliche Regulierung des Whistleblowing – Anpassungsbedarf im dt. Recht – Teil 1, Arbeit und Recht, 64 (1) 4-9.

Fischer-Lescano A. (2016) Internationalrechtliche Regulierung des Whistleblowing – Anpassungsbedarf im dt. Recht – Teil 2, Arbeit und Recht, 64 (2) 48-56.

Frazer H. and Marlier E. (2013) Assessment of the implementation of the European Commission Recommendation on active inclusion: a study of national policies. http://ec.europa.eu/social/BlobServlet?docId=9782&langId=en

ILO (2004) General Survey concerning the Employment Policy Convention, 1964 (No. 122), and the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), and aspects relating to the promotion of full, productive and freely chosen employment of the Human Resources Development Convention, 1975 (No. 142), and of the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), ILC.92/III (1B). http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282004-92-1B%29166.pdf

ILO (2005) General Survey of the reports concerning the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), ILC.93/III (1B). http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282005-93-1B%29139.pdf

ILO (2006) General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133), ILC.95/III (1B). http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282006%291B.pdf

ILO (2007) General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), ILC.96/III (1B). http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iii-1b.pdf

ILO (2009) General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981, ILC.98/III (1B). http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103485.pdf

ILO (2012a) Eurozone job crisis: trends and policy responses. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_184965.pdf

ILO (2012b) General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, ILC.101/III (1B). http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

ILO (2014) General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), ILC.103/III (1B). http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_235287.pdf

ILO (2016) Building a social pillar for European convergence. http://ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488466.pdf

Jacobs A. (2013) Article 11 ECHR: the right to bargain collectively under Article 11 ECHR, in Dorssemont F., Lörcher K. and Schömann I. (eds.) European Convention on Human Rights and the employment relation, Oxford, Hart Publishing, 309-332.

Jacobs A. (2014) Decentralisation of labour law standard setting and the financial crisis, in Bruun N., Lörcher K. and Schömann I. (eds.) The economic crisis and financial crisis and collective labour law in Europe, Oxford, Hart publishing, 171-192.

Keune M. (2007) Not balanced and hardly new: the European Commission's quest for flexicurity, Brussels, ETUI. http://www.etui.org/Publications2/Working-Papers/Not-balanced-and-hardly-new-the-European-Commission-s-quest-for-flexicurity

Koukiadaki A., Távora I. and Martinez Lucio M. (2016) Joint regulation and labour market policy in Europe during the crisis, Brussels, ETUI.

Lörcher K. (2012) Social competences, in Bruun N., Lörcher K. and Schömann I. (eds.) The Lisbon Treaty and social Europe, Oxford, Hart Publishing, 165-234.

Schömann I. (2015) EU REFIT machinery 'cutting red tape' at the cost of the acquis communautaire, Policy Brief 5/2015, Brussels, ETUI. http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/EU-REFIT-machinery-cutting-red-tape-at-the-cost-of-the-acquis-communautaire

Supiot A. (2016) Au-delà de l'emploi, Paris, Flammarion.

Tangian A. (2010) Not for bad weather: macroanalysis of flexicurity with regard to the crisis, Working Paper 2010.06, Brussels, ETUI. http://www.etui.org/Publications2/Working-Papers/Not-for-bad-weather-macroanalysis-of-flexicurity-with-regard-to-the-crisis

Van den Abele E. (2015) 'Better regulation': a bureaucratic simplification with a political agenda, Working paper 2015.04, Brussels, ETUI. http://www.etui.org/Publications2/Working-Papers/Better-regulation-a-bureaucratic-simplification-with-a-political-agenda

Van Hiel I. (2013) The right to form and join trade unions protected by Article 11 ECHR, in Dorssemont F., Lörcher K. and Schömann I. (eds.) European Convention on Human Rights and the employment relation, Oxford, Hart Publishing, 287-308.

Vogel L. (2010) Better regulation: a critical assessment, Report 113, Brussels, ETUI. http://www.etui.org/Publications2/Reports/Better-regulation-a-critical-assessment

Voorhoof D. and Humblet P. (2013) The right to freedom of expression in the workplace under Article 10 ECHR, in Dorssemont F., Lörcher K. and Schömann I. (eds.) European Convention on Human Rights and the employment relation, Oxford, Hart Publishing, 237-286.

All links were checked on 15.06.2016

Detailed table of contents