

Strengthening Social Rights in a Time of Crisis: rebuilding trust in the European Project

A Call to Action by Eminent European Jurists | Declaration of 9 May 2019

We, the undersigned, jurists from across the European Union, call upon the European Union institutions, the members of the European and national parliaments and governments of the EU Member States to urgently commit to strengthening the position of social rights in the economic governance of the Union.

We take this unprecedented step because we firmly believe that the legitimacy of the Union, and the commitment of its citizens to the shared project of European prosperity, stability, and inclusion is increasingly threatened by the multiple crises facing the Union, its Member States and its peoples. The long-term survival of this shared project is at stake as never before, a fact that is now generally acknowledged in European capitals and within the Institutions themselves.

In a context of political turmoil within and outside the Union, with the emergence of dangerous and destabilizing political forces, the unraveling of the post-war international order, and the underlying and intertwined demographic, environmental and financial crises, it is important to refocus our collective energies on those elements that, by buttressing social cohesion and ensuring decent livelihoods for all, strengthen the legitimacy of the European project for generations to come. It is no longer time for simply “muddling along”, trusting blindly that a strong economic Union will suffice to ensure the survival, if not the flourishing, of our common European destiny.

Europe has reinvented itself on more than one occasion. From the early days of the common market, through the establishment of an economic and monetary union by the Treaty of Maastricht, to the “new economic governance”, the Union has continuously developed its economic policy toolbox. The Union now has powerful instruments to steer the macro-economic policies and budgetary choices of its Member States, breaking down the original division of labor between European economic integration and national social protection. The original compact was that Europe could be an engine of growth while States would retain significant autonomy to pursue strong redistributive policies tailored to counteract the risks posed by economic integration and industrial displacement. This view no longer holds. It is time to rethink social rights in the very different framework resulting from the recent reforms.

The global financial crisis triggered significant changes in the balance between economic and social policy-making. The financial crisis of 2009-2011 soon escalated into an economic crisis and, following the massive bailouts benefiting the financial sector and the need to respond to the rise of unemployment, into a public debt crisis. Faced with this new predicament, European leaders swiftly concluded that fiscal discipline among EU Member States was too weak, and that any collective action to support States facing financial difficulties should be combined with the strengthening of that discipline, as an indispensable guarantee against moral hazard. An impressive set of legislative and treaty revisions followed: the profound reorganization of the Stability and Growth Pact through the adoption of the “six-pack” and “two-pack”, resulting in the establishment of the “European semester”; the adoption and domestic incorporation of the “Fiscal compact” included in the Treaty on Stability, Coordination and Governance (TSCG); the creation of the “enhanced surveillance” procedure for at-risk Member States; and finally, the

establishment of the European Stability Mechanism, as a separate intergovernmental organisation to circumvent the obstacle to the "no bailout" clause of Article 125 of the Treaty on the Functioning of the European Union (TFEU).

What all these momentous institutional, procedural and substantive innovations have in common is a narrow focus on economic and monetary policy priorities, with next to no consideration of social rights. We recognize of course that some provisions inserted into these new tools seek to safeguard collective bargaining and collective action, and that references are made to the need to ensure high employment levels and adequate social protection, as required by Article 9 of the TFEU itself, in both the European Semester and the enhanced surveillance procedures. We also acknowledge that the new economic governance establishes some limited avenues for the participation of national and European parliaments, social partners, and civil society organizations.

We observe however that, in practice, neither the substantive references to social protection and collective bargaining, nor the procedural safeguards allowing the involvement of other actors has had any meaningful effect on the policies prescribed under the different branches of the new economic governance. This is true both where these prescriptions are addressed to Member States facing a crisis and seeking financial support, where urgency and gravity might have played a role, and in the 'ordinary' context of the European semester. Social Impact Assessments are incorporated in the design of Memoranda of Understanding concluded with States receiving financial support, and the European Pillar of Social Rights proclaimed at the Social Summit for Fair Jobs and Growth held in Gothenburg in November 2017 introduced an important corrective to the earlier focus of European economic governance on the control of public deficits. However, neither of these mechanisms ensure that social rights shall be effectively guaranteed under these frameworks: a commitment to take social impacts into consideration is not equivalent to the protection of enforceable social rights.

This imbalance cannot be allowed to persist, if Europe hopes to retain the allegiance of its citizens. As things currently stand, States may still be led to disregard social rights in order to satisfy the requirements of the new economic governance. This situation has been found to be in violation of Member States' international human rights obligations by various human rights mechanisms of the Council of Europe or of the United Nations, including the European Committee of Social Rights, the Independent Expert on foreign debt and human rights of the UN Human Rights Council, and the UN Committee on Economic, Social and Cultural Rights. Indeed, the Court of Justice of the European Union itself has clarified that the institutions of the EU are bound to respect and ensure respect for the Charter of Fundamental Rights, not only when implementing EU policy, but also when acting within organizations established outside of the EU, such as the ESM. This means that when designing, implementing and reviewing Memoranda of Understanding, the Commission and European Central Bank must guarantee that fundamental rights are fully complied with.

These are positive signs. But the European Union should do more, and it should give greater visibility to its commitment towards social rights.

To make progress, there is no need for lengthy and unpredictable negotiations over legislative or treaty changes. Immediate measures can be taken to ensure that the new economic governance of the Union is better aligned with the legal obligations assumed by Member States – under both EU and international law – to respect, protect and fulfil the social rights of all persons subject to their jurisdiction. We put forward four proposals:

1. Under the European Semester, the European Commission should systematically assess the social rights impacts of its country-specific recommendations. Indeed, such systematic review of the impacts on social rights would be expected under the Commission's own Impact Assessment Guidelines. Regulatory Impact Assessments however are not currently based on the normative context of social rights as human rights: the examination of social rights impacts currently is simply part of a broader assessment of the social, economic and environmental impacts, and it is in practice closer to a cost-benefit analysis than to a normative assessment based on social rights as defined in European and international human rights law.

2. The existing mechanisms for the participation of other actors – social partners, EU and national parliaments, and civil society – must be strengthened. Currently, whatever participation takes place is primarily seen as an instrument for improving legitimacy. Yet, such participation is, above all, a mechanism for collective learning, and a corrective device, ensuring that the impacts of certain measures on particular groups or in specific contexts are adequately taken into account. Enhanced participation means not only enabling the consultation and dialogue with these actors in a timely and meaningful manner; it also should imply providing the means for effective participation, and ensuring that the views expressed are effectively taken into account in policy design and implementation.

3. The Member States should be allowed to use to their full extent existing flexibilities provided for under the 'exceptions clauses' in EU law or non-EU treaties – such as the TSCG and the ESM treaty. Such clauses allow for temporary deviations from existing rules on fiscal convergence in 'exceptional circumstances'. But they are currently construed narrowly, as referring to external economic shocks. There is no principled reason, however, why such clauses could not be read in the future as including within the notion of exceptional circumstances the inability for a country to comply with its budgetary targets without compromising its obligations under the social provisions of the Charter of Fundamental Rights, or indeed under international human rights instruments.

4. The EU should avoid imposing on the Member States obligations that are in conflict with their existing international obligations. In recent years, the European Committee of Social Rights found the legislative reforms introduced by Sweden in order to comply with the 2007 Laval decision of the Court of Justice to be in violation with the requirements of the European Social Charter. The failure to take into account the European Social Charter is also the source of tensions that result from the prescriptions addressed to the Euro Area Member States, under the European Semester or for Euro Area Member States under financial assistance: thus, the ECSR has found that a number of measures adopted by Greece following the bailouts of 2010 and 2012 were in violation of that country's undertakings under the European Social Charter.

This should not be allowed. At a minimum, the provisions of the EU Charter of Fundamental Rights that correspond to rights of the European Social Charter should be read in accordance with the interpretation given to this latter instrument by the European Committee of Social Rights, which is specifically tasked with the task of assessing from a legal viewpoint the legislation and policies of the States parties. Beyond that, the process of accession of the EU to the European Social Charter should be initiated. Such accession has been envisaged on various occasions, ever since the "Spinelli" Treaty on the European Union of 1984, and the European Parliament has unequivocally expressed itself in favor. Considering the large number of areas covered by the European Social Charter in which the EU has been attributed

certain powers by the Member States, as well as the potential for further legislative instruments to be adopted in these areas, the EU could accede to the European Social Charter on the basis of Article 216(1) TFEU: the relationship of the EU to this instrument would be very similar to that it has developed with the UN Convention on the Rights of Persons with Disabilities, which the EU acceded to in 2009. Moreover, the objections raised by the Court of Justice of the European Union in Opinion 2/13 concerning the accession of the Union to the European Convention on Human Rights would not apply to the accession to the European Social Charter.

Since the foundation of the European Communities more than sixty years ago, the European Union has been remarkably successful in delivering peace and prosperity to Europe. The increased heterogeneity of Europe, however, following the successive enlargements, combined with the imbalance between the economic and the social constitutions of the European Union – as economic freedoms have been provided a more solid foundation than social rights in the constitutional structure of the Union –, are now growing into a legitimacy crisis: an increasing number of Europeans see the EU as serving the interests of corporations more than those of the population, and they see it as a transmission belt for economic globalization, rather than as a bulwark against the most threatening impacts of such globalization. This can change. Our proposals seek to strengthen the European project, both by further improving the balance between economic and social objectives in the economic and monetary union, thus complementing the objectives of the European Pillar of Social Rights, and by enhancing its legitimacy. Making this a priority of the new legislature would also be the best possible answer to the threats of populism and of euroscepticism.

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