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From Soft Monitoring to Enforceable Action

A Quest for New Legal Approaches in the EU Fight Against Social Exclusion

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ABSTRACT

Which are the legal boundaries of the EU fight against social exclusion? And to what extent has the new Europe 2020 strategy enlarged the legal competences to fight exclusion in Europe? These are the central questions discussed in this paper[2]*. The combat of social exclusion forms one of the integrated guidelines for implementing the Europe 2020 strategy. By tying up social exclusion even more closely with the employment and economic monitoring policies, the fight against social exclusion received a stronger legal enforceability. Nevertheless, the strategy of basing the guideline on social exclusion on the employment chapter also has negative consequences. The scope for enforceable action is narrowed down to employment related recommendations and any action beyond the mere employment framework therefore needs to be supportive of the economic and budgetary balance of the (euro) member states. In this contribution, however, we for a double approach in the further development of the economic and employment guidelines. By respecting the horizontal social clause (article 9 TFEU) and the fundamental social rights on combating social exclusion as laid down in article 34 of the EU fundamental rights charter, the economic and employment guidelines do not need to be at the detriment of social inclusion. Furthermore, in this article we call for a more coherent legal approach when developing legal action in the field of social inclusion. Existing European activities related to the fight against exclusion should be conditioned more clearly in terms of inclusion output. In order to do so, we recommend codifying first what has already been developed in the past forty years on the European level in the field of social exclusion. Finally, we argue for the use of alternative Treaty competences in order to give legal action in the combat of social exclusion a stronger impetus. A potential pathway for this approach would include a further application of the Treaty articles shaping European citizenship in the EU.*

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CONTENTS

Euroforum 2
Abstract 3
1. Introduction 5
2. Competencies in the field of social exclusion (within the EU social policy chapter) 6
   A. Combating social exclusion as objective (article 151 TFEU) 6
   B. Implementing the objective through social exclusion competences (article 153 TFEU) 6
   C. Combating social exclusion through non-legal action: a comparison with the fight against labour exclusion 8
   D. The combat of social exclusion as applied in the "2000 Lisbon Strategy" 9
3. Combating social exclusion as employment guideline: enhancing legal enforceability? 10
   A. Monitoring employment policies (articles 145-150 TFEU) 11
   B. Linking the combat of social exclusion with the employment and the economic guidelines 12
      1. From soft to hard(er) legal enforceability 12
      2. Sanctioning the policy recommendations as applied in the macroeconomic imbalance procedure . 15
      3. Council Recommendations in relation to social exclusion 16
      4. Conclusion to the first part 17
4. What can legally still be done to enhance the combat of social exclusion? 18
   A. Codify and structure what exists on social exclusion 18
   B. Respecting the EU combat of social exclusion (respect what has been done so far) 21
      1. Through the horizontal social clause 22
      2. Through the EU fundamental social right on social exclusion 23
   C. Further conditioning of existing European actions in terms of social exclusion 25
      1. The ESF and social exclusion 26
      2. Is further conditioning limited in its scope by the EU-Treaty? 27
      3. Further conditioning in terms of social exclusion in the proposed ESF-regulations 28
   D. Developing legal measures in the field of social exclusion: finding alternative competence ground(s). 32
      1. Teleological attributions of competence (article 352 TFEU) and social exclusion 32
      2. European citizenship: a partner in combating social exclusion? 33
      3. European citizenship as legal basis for measures in the field of social exclusion? 35
      4. Social provisions only for moving citizens? 36
5. Conclusion 39
6. Main references 41

1. INTRODUCTION

With the Europe 2020 strategy, the European fight against social exclusion received new impetus. Contrary to the Lisbon strategy, the objective of combating social exclusion has been more closely tied up with employment and economic monitoring policies. Concretely, ten integrated guidelines for implementing the Europe 2020 strategy have been adopted: six broad guidelines for the economic policies of the member states and the EU, and four guidelines for employment policies. The guideline on social exclusion is the last one in the employment guidelines.

With this contribution we first assess whether and to what extent this new approach of incorporating social exclusion into economic employment guidelines has legal consequences. In particular, the question is whether the decisions and recommendations that derive from the (10th) social exclusion guideline enjoy stronger enforceability compared to the past, where social exclusion was an integral part of the (non-legal) policy coordination method as established by the social policy chapter of the EU Treaties. The monitoring of economic guidelines includes some sanctioning competences that go beyond the 'naming and blaming' approach, as traditionally applied in European monitoring processes. To what extent can these harder sanctions be extended to the EU activities implementing the 10th guideline on social exclusion?

Apart from mapping the legal consequences of the incorporation of social exclusion into the employment economic guidelines, we also envisage an exploration of the legal possibilities the EU constitutional framework has at its disposal in order to give the objective on social exclusion more legal bite. Given the existing competences within the EU constitutional framework, which opportunities are there to develop the European legal framework around social exclusion? We will mainly focus upon two pathways. Firstly, we will explore opportunities that may arise in linking social exclusion with other European actions, such as funding through EU structural funds. Can these funds become more legally conditioned in terms of combating social exclusion, for example, and thus create alternative legal ways to concretise the fight against social exclusion? Secondly, on the basis of present competencies within the EU-Treaties we try to find other approaches for developing social exclusion legal measures. Particular attention will be given here to the competencies in relation to European citizenship.

Before answering these questions, we first provide an overview of the present competencies in the field of combating social exclusion that are to be found within the Treaty chapter on European social policy (art. 153 ff Treaty Functioning European Union). In the second section of the text the focus will be on the position of 10th guideline that incorporates the fight against social exclusion within the Europe 2020 framework. Here we will mainly assess the legal consequences of this linking of social exclusion with both the economic and employment guidelines in terms of legal enforceability. Does the incorporation into the employment guidelines give more legal bite to the fight against social exclusion, compared to the situation in which the social exclusion action was mainly embedded in the social policy chapter of the Treaty (art. 153 ff TFEU)? In the final part, we will explore alternative approaches, with regard to both enforcement of existing measures and the development of new alternatives. Are there other legal pathways to be found in the existing EU constitutional framework to come to more enforceable measures in the fight against social exclusion?

2. COMPETENCIES IN THE FIELD OF SOCIAL EXCLUSION (WITHIN THE EU SOCIAL POLICY CHAPTER)

The main competences in the fight against social exclusion are to be found in Title X of the Treaty on the Functioning of the European Union (from now on referred to as TFEU). This title groups together the European competences in the field of social policy. In it, reference is made to social exclusion in two dimensions: as a (social) objective and as a competence ground on the basis of which European action can be undertaken. We will address both dimensions, starting first by outlining the meaning of the social exclusion objective to which European actions should correspond, followed by the description of the competence grounds enabling European action in the field of social exclusion.

A. COMBATING SOCIAL EXCLUSION AS OBJECTIVE (ARTICLE 151 TFEU)

Article 151 TFEU explicitly refers to European social objectives including, in addition to the promotion of a proper social protection, the combating of exclusion. Article 151 TFEU does not refer to the concrete competence on the basis of which the listed objectives can be developed. This ground for competence can be found in the other provisions of Title X on Social Policy, and more in particular in article 153 TFEU. Nevertheless, European objectives are crucial in the development of European (legal) measures. They provide the framework within which the concrete competence can be applied. As we can read in article 5 of the Treaty on the European Union (further referred to as TEU), competences are "conferred […] by the member states in the Treaties to attain the objectives set out therein". The EU can thus only make use of its powers if it positions its actions within the realisation of a European objective. In other words, the EU does not so much receive a competence on a certain matter, as the competence to take certain actions in order to realize certain objectives (functional competence).[3]

Article 151 TFEU is an important source for social objectives at the EU level. It is interesting to observe that the objectives are not directly linked to the internal market. Article 151 TFEU is thus setting social objectives for their own merit and not just in correlation with economic objectives. The framework provided by article 151 TFEU is of a social nature; social measures can thus be taken for the sake of the implementation of one or more European social objectives, among which the combat of social exclusion. A reference to the support of the European internal market is not necessary. Questions remain nonetheless: what action can be taken and how far does EU competence reach to allow it to take the necessary social measures. Although objectives are crucial in the competence setting, they are not sufficient as mere ground to develop action. To that purpose, the European institutions still need a concrete mandate from the Treaty.

B. IMPLEMENTING THE OBJECTIVE THROUGH SOCIAL EXCLUSION COMPETENCES (ARTICLE 153 TFEU)

Article 153 TFEU specifies a number of matters on which the European institutions (in principle on the basis of a joint action by the Council of Ministers and the European Parliament) can take action. We refer here only to the wording of the article that is relevant for the combat of social exclusion:

[3] Art. 1 TEU.; for more information about functional competences: K. LENAERTS and P. VAN NUFFEL, *European Union Law,* London, Sweet & Maxwell, 2011, 106.

"*[w]ith a view to achieving the objectives of Article 151"* action can be taken in the following fields:
"(c) social security and social protection of workers; [...]
(h) the integration of persons excluded from the labour market, without prejudice to Article 166; […]
(j) the combating of social exclusion; […]
(k) the modernisation of social protection systems without prejudice to point (c)."

It is important to stress that the EU only has a supportive competence here. Or to put it differently: the member states still maintain the (primary) competence to organize their own social systems. Europe can only intervene in order to support the member states in their organisation of the said systems. Similarly this support can be provided to national systems or measures aimed at combating poverty and social exclusion.

In the second paragraph we read that the European Union can take two kinds of measures: measures designed to encourage policy co-operation and legal measures. With regard to the action field of the latter ones, the European Union may adopt, by means of directives, minimum requirements for gradual implementation. The technique of working by means of minimum rules through directives clearly reflects the general philosophy that the Union only has a supportive role to play here. Although there are no criteria to determine when a provision stops being a 'minimum' requirement, the phrase means that EU legislation in this can never be exclusive nor can the measure be solely of a European nature. It will always build upon national measures.

It should be made clear from the outset that the procedure to be followed is not of a kind that would enable a swift adoption of legal measures. Several limitations have been introduced that deviate from the standard EU procedures of article 294 TFEU (i.e. co-decision Council and Parliament; qualified majority voting Council), especially for the development of legal measures in the field of social security and social protection of workers (article 153, §1, sub c TFEU). Measures in this field are taken by unanimity voting in the Council; the EU Parliament is only to be consulted. The possibility of shifting to qualified majority voting on the basis of a *passerelle* is not provided for this domain on the social security (of workers).

When it comes to social exclusion, the most far reaching restriction is to be found in the scope of action: the combat of social exclusion is not listed in the fields for which article 153, § 2, sub b) empowers the Union to take legal measures; consequently it is to be achieved solely on the basis of non-legal cooperation procedures (article 153, § 2, sub a).

In addition to taking legal measures, the European Union may indeed adopt measures "*designed to encourage cooperation between member states*". This "co-operative procedure" can be applied to all the fields listed in article 153. For social exclusion however, it is the only track to be applied. Concretely, with respect to the fight against social exclusion, the monitoring took place through the open method of policy coordination. Common objectives were formulated, indicators developed to compare social exclusion outcomes and guidelines established to guide the member states in their fight against exclusion (see below, 2.D.). In other words, the mandate here is of a non-legal nature. This restriction is clearly stipulated again at the end of the article 153(2)(a) TFEU where we read that the measures "*may not lead to any harmonisation of the laws and the regulations of the member states"*.

A bypass of this restriction by linking social exclusion to the domain of social security (article 153, §1, sub c) is difficult to defend. Apart from the fact that a considerable number of procedural hurdles have to be surmounted to achieve legal measures in the field of social security, the domain is clearly restricted to the group of workers. When the social policy chapter was developed at the beginning of the 1990s[4], the member states clearly restricted the scope of action: measures should only deal with the social security of the professionally active[5]. From the outset, it excluded or at least limited action in fields in which measures mainly target professionally non-active persons, such as in the fight against social exclusion.

Finally, the scope of envisaged action is also restricted with regard to the effect the social exclusion measures may have. Measures taken on the basis of article 153 TFEU, whether of a legal or of a co-operative nature, shall never affect the right of member states to define the fundamental principles of their own social security and must not significantly affect the financial equilibrium thereof (article 153 (4) TFEU). Looking at all these restrictions, we can only conclude that the mandate to combat social exclusion has been kept rather restricted within the social policy chapter: no legal action can be taken, and the action that is taken on the basis of article 153 TFEU must not have any real effect on the national systems[6].

C. COMBATING SOCIAL EXCLUSION THROUGH NON-LEGAL ACTION: A COMPARISON WITH THE FIGHT AGAINST LABOUR EXCLUSION

In article 153 TFEU reference is also made to combating labour exclusion. Surprisingly, the powers attributed here are not restricted to the technique of non-legal cooperation (article 153, paragraph 1, sub h). Measures aiming at integration into the labour market can be achieved by both the legal and the co-operative approach (article 153, paragraph 2, sub a and sub b). The more general goal of societal inclusion is thus divided into two fields: labour inclusion and social inclusion, each of which have a different outreach in action fields, legal measures for labour inclusion and only non-legal cooperation for social inclusion. Whereas the fight against labour exclusion can be diversified in both policy coordination and legal measures, the social exclusion is restricted to the non-legal monitoring process.

This non-equilibrated approach reflects the EU's view of giving more weight to measures fighting labour exclusion, assuming that in the end such measures will have a positive outcome for the reduction of social exclusion as well. Yet reality is more complex. Having people employed at ridiculously low wages or at impossible hours, for example, can lead to social exclusion. European action developed around work inclusion should thus pay attention to the broader social consequences such activation measures may have. Although this goes beyond the scope of this contribution, it calls for a more equilibrated approach in competence setting. There is no reason whatsoever to have competences in the fight against social exclusion restricted to the non-legal

[4] Originally this was in the Agreement on Social Policy which was attached to the Treaty and to which the UK was no member (see Treaty of Maastricht 1992); in 1997 this Agreement was eventually introduced within the Treaty itself (at the occasion of the Treaty of Amsterdam 1997).

[5] Or even the wage earners when the German and Dutch versions of the treaties are consulted (*Arbeitnehmer*, *werknemers*).

[6] For a similar conclusion: H. VERSCHUEREN, "Union law and the fight against poverty: which legal instruments?", in B. CANTILLON; H. VERSCHUEREN and P. PLOSCAR (eds.), *Social inclusion and the social protection in the EU: Interactions between Law and Policy*, Antwerpen, Intersentia, 2012, (205), 214.

track (just as there is likewise no reason to have it restricted to measures of a mere legal nature either). We can only suggest here that in the future, the EU-Treaties should in the future be revised on this very issue, and come to more equilibrated – legal and non-legal – approach when it comes to competence setting in the European fight against both labour and social exclusion.

D. THE COMBAT OF SOCIAL EXCLUSION AS APPLIED IN THE "2000 LISBON STRATEGY"

The European combat of social exclusion played an important role in the Lisbon Strategy, which was originally launched by the European Council in March 2000[7]. The original Lisbon Strategy laid out a broad, ambitious agenda aimed at making the EU 'the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' by 2010. The original assumption was that economic growth would lead to a reduction in unemployment, itself leading to a diminishing of poverty. The combat of social exclusion would thus follow from the envisaged economic growth. The EU's role in the combat of Under the Lisbon Strategy, the EU monitoring of the national poverty policies lead to a vast machinery of objective setting, poverty measurement and EU suggestions for national policies. Concrete guidelines were fixed for the member states combined with specific timetables for achieving the goals set in the short, medium and long terms. Appropriate quantitative and qualitative indicators, as well as benchmarks – tailored to the needs of different member states and sectors – were developed as a means of comparing best practices. Furthermore, the European guidelines were translated into national and regional policies by setting specific targets and measures, accounting for national and regional differences. Finally, the whole procedure was governed by a periodic monitoring, whereby a systematic evaluation and a peer review were introduced by the Commission and the Social Protection Committee. All these concrete elements contributed to the envisaged mutual learning process on the combat of social exclusion[8].

Probably the most valuable outcome, apart from the fact that a high level debate on combating poverty in Europe was guaranteed, has been the development of concrete tools (indicators) that enabled the EU to measure poverty and social exclusion in a common European way. At least one shortcoming, namely that national poverty figures were not comparable as the underlying methodology diverged (too much) between states, has been countered. Whether the open method of coordination (OMC) process on social exclusion is to be considered a success, apart from this outcome, will not be addressed in this contribution. Others have commented extensively on the pros and cons of the applied policy monitoring process[9]. The fact is that in 2010 the European Union launched a new 10-years Programme labelled "Europe 2020" on the basis of the results of the Lisbon

[7] European Council, The Lisbon Strategy for Sustainable Economic Growth and Jobs in Europe, 23 March 2000.

[8] For an overview, see: P. SCHOUKENS, "How the European Union keeps the social welfare debate on track: a lawyer's view of the EU instruments aimed at combating social exclusion", *European Journal of Social Security*, 2002, Volume 4/2, (117), 136-150; and more extensive: D. NATALI, "The Lisbon strategy, Europe 2020 and the crisis in between", E. MARLIER, D. NATALI, a.o. (eds.), *Europe 2020: Towards a More Social EU*, Brussels, 2010, Peter Lang, 93-113 and M. DALY, "Assessing the EU approach to combating poverty and social exclusion in the last decade", E. MARLIER, D. NATALI, a.o. (eds.), *Europe 2020: Towards a More Social EU*, Brussels, 2010, Peter Lang, 143-146.

[9] For an overview: B. VANHERCKE, "Is 'The Social Dimension of Europe 2020' an Oxymoron"?, paper presented at the CELLS conference on The European Union's economic and social model – still viable in a global crisis? Leeds, 8-9 December 2011.

Strategy. In the words of the European Commission, Europe 2020 is a strategy intended "*to turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion. (…) This is an agenda for all member states, taking into account different needs, different starting points and national specificities so as to promote growth for all"*[10]. In this strategy, the EU monitoring process was revived in a new setting and changed its approach. As will be developed in the following pages, the most striking difference is that the combating of social exclusion became a guideline within the broader economic and employment monitoring process. By doing so the field of action shifted from the social policy chapter to the economic and employment chapters of the European Treaty, giving some leeway for more enforceable action.

3. COMBATING SOCIAL EXCLUSION AS EMPLOYMENT GUIDELINE: ENHANCING LEGAL ENFORCEABILITY?

The Lisbon Strategy was formally concluded in June 2010 with the adoption of the new Europe 2020 Strategy by the European Council. The March 2010 European Council[11] agreed to the European Commission's proposal to launch a new strategy for jobs and growth. This new Strategy is based on enhanced socio-economic policy coordination and is organised into three priorities that are expected to be mutually reinforcing:

1. smart growth, i.e. '*strengthening knowledge and innovation as drivers of our future growth'*;
2. sustainable growth, i.e. '*promoting a more resource efficient, greener and more competitive economy*'; and
3. inclusive growth, i.e. '*fostering a high-employment economy delivering social and territorial cohesion*'. This priority is about '*empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build a cohesive society*'.

The Council adopted ten integrated guidelines for implementing the Europe 2020 strategy: six broad guidelines for the economic policies[12] of the member states and the EU, and four guidelines for the employment policies[13] of the member states. In the final (employment) guideline, reference is made to the social policies of the member states with regard to social exclusion: states should promote social inclusion and aim their policies at combating poverty. No reference whatsoever is made to the modernization of social protection systems, although this was considered to be a crucial element in the development of the inclusive growth in the original EU commission's strategy.

[10] EU Commission, Communication from the Commission 'Europe 2020: A strategy for smart, sustainable and inclusive growth', COM (2010) 2020.

[11] Council Recommendation for a Council Recommendation on broad guidelines for the economic policies of the member states and of the Union, Document 11646/10 of 7 July 2010.

[12] Council Recommendation No. 2010/410/EU, 13 July 2010 on broad guidelines for the economic policies of the member states and the Union, *OJ L,* 23 July 2010.

[13] Council Decision No. 2010/707/EU, 21 October 2010 on guidelines for the employment policies of the member states, *OJ L, 24* November 2010.

The integrated guidelines have been adopted on the basis of article 121 TFEU (part of the EU economic policy chapter) and article 148 TFEU (part of the EU employment chapter), for the six economic guidelines and the four employment guidelines respectively.

Consequently, the tenth guideline, which deals with social exclusion, has not been based on article 153 TFEU but has been integrated into the three employment guidelines that have their legal basis in the employment chapter of the Treaty (i.e. article 148 TFEU). Before we analyse the legal meaning of this approach, we will first briefly introduce the employment chapter of the Treaty.

A. MONITORING EMPLOYMENT POLICIES (ARTICLES 145-150 TFEU)

Due to the structural unemployment levels in Europe, employment has been high on the European agenda for some time now. Nevertheless, article 146 TFEU emphasizes that employment policy is first and foremost a matter to be dealt with by the member states. They should, however, co-operate according to the provisions of article 148 TFEU:

> *"1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.*
>
> *2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, […] shall each year draw up guidelines which the member states shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 121 (2)[14]. […]"*

The 'guidelines' to be adopted by the Council shall not have any legally binding force. However, this does not mean that cooperation is necessarily useless or superfluous.

Article 149 TFEU allows the Council to take 'incentive measures'[15] "*designed to encourage co-operation between member states and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects*". Although these measures go beyond mere advice, the minimal role of the EU in correcting national policies is confirmed in this article. The guidelines may not lead to any kind of legal harmonization whatsoever.

In practice, the employment strategy led in the past to the setting out of guidelines with benchmarks, as well as to a reporting by the member states on the implementation of their employment policies around these guidelines. The guidelines provide a rather wide margin for adaptation at national level. Still, the fact that more quantitative indicators and benchmarks are progressively being introduced, puts more pressure on the member states. The Employment Committee has so far played an important role in setting out the priorities, objectives, and recommendations. As the employment guidelines are not legally enforceable, at least when exclusively based upon article 148 TFEU, sanctions are limited to peer pressure and public opinion.

[14] Concrete reference is made to the economic guidelines of article 121 TFEU; see more about this below.

[15] For more information about these measures: K. LENAERTS and P. VAN NUFFEL, *European Union Law,* London, Sweet & Maxwell, 2011, 106.

Since 2010, however[16], the linkage with the economic guidelines has opened some new perspectives as to the legal follow-up of the guidelines.

B. LINKING THE COMBAT OF SOCIAL EXCLUSION WITH THE EMPLOYMENT AND THE ECONOMIC GUIDELINES

The 10th guideline on the combat of social exclusion has been integrated into the employment guidelines[17]. The legal basis for this guideline is not the social policy chapter (art 153 TFEU) but the employment chapter (art. 146 TFEU); this shift in legal mandate has some consequences. First and foremost, this linking up of social exclusion with employment has consequences for the scope of action: it will be difficult to address social exclusion policies that are not related to employment. In other words, it will be hard to cover social exclusion fields that have nothing to do with employment or integration into the labour market. Vice versa, in my opinion this relation affects the employment guidelines as well: the latter should likewise have no adverse effect on poverty and social exclusion. The 10th guideline is clear on this point when it indicates that national states (and thus the EU also, when monitoring national policies) should promote social inclusion and combat poverty through their employment policies. The implementation of the employment guidelines should thus be assessed on the basis of their compatibility with social inclusion.

When it comes to the legal enforceability of the social exclusion guideline, we should mention yet another "split approach". The ten guidelines are not all based on the same Treaty provisions. The economic guidelines are based on article 121 TFEU, the employment guidelines on 148 TFEU. This distinction triggers the following question: are the employment guidelines, including the 10th guideline on social exclusion, when compared to the economic guidelines, of a different kind when we consider their legal value, in particular when it comes to legal enforceability?

1. FROM SOFT TO HARD(ER) LEGAL ENFORCEABILITY

What happens when a member state does not follow up on the guideline or the recommendations related to its application? Article 148 TFEU does not mention a sanction in such cases, nor did its predecessor article 128 TEC. Until recently, it was generally accepted no real "hard" action could be undertaken, that except for naming and blaming by the Commission (as indicated already above).

Nevertheless, the legal status of the employment guidelines (and their legal enforceability) changed when they became intrinsically connected to the economic guidelines and their related multilateral surveillance procedure (based upon article 121, par. 3, 4 and 6 TFEU). The European Council (Brussels – 22 and 23 March)[18] already announced this structural interconnection in 2005 when its presidency conclusions on the endorsement of the Council Report (ECOFIN of 20 March 2005) on "Improving the implementation of the Stability and Growth Pact" included the following statement

[16] 10th guideline on the combat of social exclusion; see: Council Decision No. 2010/707/EU, 21 October 2010, on guidelines for the employment policies of the Member States, *OJ L,* 24 November 2010.

[17] Council Decision No. 2010/707/EU, 21 October 2010, on guidelines for the employment policies of the Member States, *OJ L,* 24 November 2010.

[18] European Council Presidency conclusions, No 7619/05, 22 and 23 March 2005: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf

on the EU governance process: [19] "[…] *As a general instrument for coordinating economic policies, the Broad Economic Policy Guidelines should continue to embrace the whole range of macroeconomic and microeconomic policies, as well as employment policy insofar as this interacts with these policies […]"*

In other words, the European Council advised a more structural incorporation of the employment (policies) into the European economic monitoring process, which operates alongside the stability and growth pact (SGP). This vision received a legal translation in 2011. The regulatory framework shaping the multilateral surveillance mechanisms for the coordination of the economic policies was adapted in its objective and scope to incorporate more clearly the employment guidelines. In article 1 Regulation 1466/97[20] we now read that the budgetary targets in the stability and convergence programmes should explicitly take into account the measures adopted in line with the broad economic policy guidelines, as well as the guidelines for the employment policies of the member states. The monitoring takes place in a systematic manner through a "European Semester". The European Semester comprises a six-month period during which member states' budgetary policies are examined. It starts each year in March when the European Council identifies the main (economic) challenges and gives strategic advice on policies on the basis of the European Commission Survey on Annual Growth. On the basis of this advice the member states draw up national reform programmes setting out the action they will undertake in areas such as economic policy, but also regarding to employment. At the end of the European Semester and following an assessment of the programmes, the Council sends recommendations to each member state (see below B.3.). Based on the Commission's opinion, the Council publishes its assessments before the member states draw up their final budgets for the following year. For member states of the euro, the semester system is complemented by the "European Two-Pack"[21], which encompasses a stricter budgetary monitoring[22]. Furthermore, the "European Two-Pack" introduces simplified rules for the surveillance of member states that are facing difficulties with regard to their financial stability and simplified rules for the surveillance of the member states that already receive financial assistance or are exiting a financial assistance program.

[19] European Council Presidency conclusions, No. 7619/05, 22 and 23 March 2005: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf

[20] Council Regulation No. 1466/97, 7 July 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ L*, 2 AUGUST 1997.

[21] The European Parliament adopted the following Commission Proposals (the EU Two-Pack) on 12 March 2013: (1) Commission Proposal No. COM(2011) 821 final for a regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the member states in the euro area, and (2) Commission Proposal No. COM(2011) 819 final for a regulation of the European Parliament and the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area.

[22] As soon as the aforementioned "European Two-Pack" enters into force in the autumn of 2013, the member states will submit a draft budgetary plan to the Commission and the Euro group each year before 15 October. The Commission will subsequently adopt an opinion on these draft plans before 30 November. The official budget laws of the member states shall then be adopted and made public no later than 31 December. Lastly, the member states will make public their medium-term fiscal plans no later than 15 April of the following calendar year.

The Commission's reports, in the year following the European semester timeframe, assess how well the advice has been implemented (article 2 sub a Reg. 1466/97). Failure by a member state to act upon the guidance received may result in:

"(a) further recommendations to take specific measures
(b) a warning by the Commission under Article 121(4) TFEU
(c) measures under this Regulation [1466/97], Regulation 1467/97[23] *or Regulation (EU) No 1176/2011*[24]*."*

The measures mentioned in (c) refer to a broad set of actions that the Commission and/or Council can undertake, such as:

- an invitation by the Council to the member state to adjust its stability programme when it does not fulfil the agreed criteria (among which the employment guidelines; see article 5 Reg. 1466/97);
- a warning to the member state in the event that it does not adapt its programme, and in order to prevent the occurrence of an excessive deficit (art. 6 Reg. 1466/97);
- a decision of non-compliance by the Council in the event that a member state does not develop or implement a corrective action plan addressing the macro-economic imbalances (Regulation 1176/2011);
- the instalment of a fine when the member state does not address its excessive deficit (article 126, par. 11 TFEU and Reg. 1467/97); and
- for the states of the Eurozone, the instalment of a fine when the member state is not following up on the recommendations made by the Council to address its macro-economic imbalances (Regulation 1174/2011[25]; see also below 2.2.2.)
- etc.

Due to the connection with the economic guidelines, the scale of legal enforceable measures that can sanction infractions on the employment recommendations has grown. But the connection has also restricted the scope of sanctioning power. Employment guidelines should indeed have enough "economic relevance" for them to fall under the sanctioning scope of the aforementioned Regulations, i.e. in so far as they interact with the economic guidelines. The overview shows that the nature of the sanction is related to the kind of guidelines to be followed: fines can be imposed, for example, when the behaviour of the (euro) state is endangering macro-economic imbalances.

There should thus be at least a connection to the economic balance guidelines before the strong(er) sanctioning tools come into the picture for employment guidelines. As far as they do, use can be made of the stronger sanctioning apparatus.

In order to further illustrate the impact of this double relationship – social exclusion as employment guideline and its meaning for the linking of the employment guidelines to the economic guidelines when it comes to enforceability –, we will first look in more detail into the set-up of the macroeconomic imbalance procedure as a further development of the monitoring of the national economic plans, followed by some examples of Council recommendations that have been enacted on the basis of national reform programmes submitted by the member states in the framework of the more general economic monitoring process.

[23] Council Regulation No. 1467/97 of 7 July 1997, on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ L* 209, 2 AUGUST 1997, 2.

[24] Parliament and Council Regulation No. 1176/2011, 16 November 2011, on the prevention and correction of macroeconomic imbalances, *OJ L 306*, 23 November 2011, 25.

[25] Parliament and Council Regulation No. 1174/2011, 16 November 2011, on enforcement measures to correct excessive macroeconomic imbalances in the euro area, *OJ L* 306, 23 November 2011, 8.

2. SANCTIONING THE POLICY RECOMMENDATIONS AS APPLIED IN THE MACROECONOMIC IMBALANCE PROCEDURE

A concrete application of the connection between employment and economic guidelines can be found in the macroeconomic imbalance procedure (*MIP*) that was introduced on the occasion of the European semester system for all member states.[26] However, only Eurozone member states can potentially be sanctioned by the Council when they do not follow up on specific recommendations (cfr. infra)[27]. The European Union has already had the competence for some time to ask deposits from member states when their budgets do not reach predefined references (in relation to the pact on stability and growth – SGP –, etc). With the introduction of the European semester, the European Union received in addition competences to sanction member states of the Eurozone for non-economic conformity. These competences ensue from the *MIP*, which was introduced in 2011 alongside the semester system, in (the already quoted) Regulation 1176/2011. On the basis of the *MIP* a procedure was established that enables the EU commission to test the macro-economic policies of these member states on the basis of predefined indicators. By using a scoreboard that incorporates a set of indicators, the Commission can check whether the member states (potentially) face macro-economic unbalances. If so, the Commission can insist that member states take corrective measures. These measures are checked in turn by the Council of Ministers. If necessary, the Council can propose concrete recommendations. In the event that the said recommendations are not followed up on by the *Eurozone* member states, a deposit can be asked or even a fine imposed[28]. The list of indicators that the Commission uses to monitor the macro-economic situation of these member states is particularly interesting[29]:

- 3 year backward moving average of the current account balance as percent of GDP, with a threshold of +6% of GDP and -4% of GDP;
- net international investment position as percent of GDP, with a threshold of -35% of GDP;
- 5 years percentage change of export market shares measured in values, with a threshold of -6%;
- 3 years percentage change in nominal unit labour cost, with thresholds of +9% for euro-area countries and +12% for non-euro-area countries;
- 3 years percentage change of the real effective exchange rates based on HICP/CPI deflators, relative to 35 other industrial countries, with thresholds of -/+5% for euro-area countries and -/+11% for non-euro-area countries;
- private sector debt in % of GDP with a threshold of 160%;
- private sector credit flow in % of GDP with a threshold of 15%;
- year-on-year changes in house prices relative to a Eurostat consumption deflator, with a threshold of 6%;
- general government sector debt in % of GDP with a threshold of 60%;
- 3-year backward moving average of unemployment rate, with a threshold of 10%.

An excessively high structural unemployment rate is considered to be an indicator of an unbalanced macro-economic climate. The Commission can check whether the unemployment rate has not

[26] Art. 1 Parliament and Council Regulation No. 1176/2011, 16 November 2011, on the prevention and correction of macroeconomic imbalances, *OJ L 306*, 23 November 2011, 25.

[27] Art. 1, 1 Parliament and Council Regulation No. 1174/2011, 16 November 2011, on enforcement measures to correct excessive macroeconomic imbalances in the euro area, *OJ L* 306, 23 November 2011, 8.

[28] Article 3 Parliament and Council Regulation No. 1174/2011, 16 November 2011, on enforcement measures to correct excessive macroeconomic imbalances in the euro area, *OJ L* 306, 23 November 2011, 8.

[29] See website MIP: http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/mip_scoreboard/index_en.htm

increased beyond the limits during the defined period. National measures that work to the detriment of unemployment rates are closely followed up and can be made subject to recommendations for change. When not followed up by the Eurozone member states, such recommendations referring to the reduction of the unemployment rate[30], can potentially be sanctioned. Yet, the underlying goal is of relevance: long term unemployment is addressed and monitored closely, in so far as it may unbalance the macro-economic climate. This social monitoring supports economic objectives. Combating unemployment for the sake of increasing employment or, more generally, social cohesion is not the first priority here.

So far, no reference is made in the list of indicators to social exclusion. A situation of structural poverty is thus not to be considered as an indicator for macroeconomic imbalance. There should still be a link to (un)employment.

3. COUNCIL RECOMMENDATIONS IN RELATION TO SOCIAL EXCLUSION

In the recommendations on the national reform programmes, we find many examples of the tying up of social inclusion with employment. The (4th) recommendation for Latvia[31], for example, which deals with combating poverty and social exclusion, is instantly followed by a suggestion to "*[e]nsure better targeting and increase incentive to work*". Also in relation to Bulgaria we can observe that the policy suggestions regarding the alleviation of poverty and the quality of social services are kept neatly within the setting of the employment paragraph[32]. The Council recommendation for Lithuania is perhaps the most salient example in this regard when it states "*[i]ncrease work incentives and strengthen the links between social assistance reform and activation measures, in particular for the most vulnerable, to reduce poverty and social exclusion*". In the (4th) recommendation addressed to the UK, the country is called to facilitate the labour market integration and further ensure that *"[p]lanned welfare reforms do not translate into increased child poverty*"; and that "*measures aiming to facilitate access to childcare services*" should be fully implemented[33]. In the introductory observations to this recommendation we notice that a link is made between employment and social inclusion when it is recalled that "*the Government must take measures to ensure that the positive impact of new policies on new employment and incomes will not offset by declining amounts available for benefits, which would risk increase poverty, particularly for families with children*. […] *The Government needs to take steps to ensure that there is sufficient access to childcare, in particular for low earners.*" These recommendations show that the link has two dimensions: the framework for social exclusion might be employment oriented; on the other hand, the restrictive relation between employment and social exclusion also works the other way round: employment activation should not lead to social exclusion. By doing so the recommendation respects the wording of the 10th guideline where it stipulates that through their employment policies states should promote social inclusion and combat poverty. Employment policies with an adverse effect on poverty and social exclusion should be banned. Overall, however, the recommendations also show

[30] As e.g. the ones formulated for Belgium: Council Recommendation No. 11244/12, 6 July 2012, on the National Reform Programme 2012 of Belgium and delivering a Council opinion on the Stability Programme for Belgium for the period 2012-2015.

[31] Council Recommendation No. 11261/12, 6 July 2012, on the National Reform Programme 2012 of Latvia and delivering a Council opinion on the Convergence Programme of Latvia, 2012-2015.

[32] Council Recommendation No. 11245/12, 6 July 2012, on the National Reform Programme 2012 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria 2012-2015.

[33] Council Recommendation No. 11276/12, 6 July 2012, on the National Reform Programme 2012 of the UK and delivering a Council opinion on the Convergence Programme of the UK 2012-2017.

that the Council is very careful when formulating policy advice in relation to social exclusion; in most cases it is done with a reference (direct or indirect) to employment. Recommendations on fighting social exclusion merely for the sake of social inclusion itself are hardly found. The legal mandate of the 10th guideline, which is clearly employment oriented, continues to be respected.

4. CONCLUSION TO THE FIRST PART

The link with the economic and employment guidelines has its legal effect first and foremost when it comes to the scope of action (i.e. in the formulation of the recommendation in combating social exclusion). Taking into account the legal mandate, the suggested actions should in principle be related to employment. The recommendations are exemplary in this respect. Nevertheless, the link with the economic guidelines opens some perspectives for action in the field of social exclusion that goes beyond mere employment, as far as it can claim to support the economic/budgetary balance of the member state and/or of the European Union. Situations of (extreme) social exclusion or poverty can endanger the economic balance of member states. In that respect they can or even should be addressed by removing the elements that lead to extreme exclusion. The *MIP*-procedure is an example of this approach, although so far it is restricted to long-term unemployment as a possible indicator of economic imbalance. However, actions or recommendations that support the fight against exclusion merely for the sake of social inclusion or cohesion are still beyond the mandate. The recommendations in the field of social exclusion still need justification from the larger economic/budgetary perspective. Actions that go beyond this scope do not belong to the economic-employment monitoring process; they may fall within the (non-legal) scope of the social policy chapter (art. 153 ff TFEU).

When it comes to to the issue of enforceability, the relationship with the economic guidelines comes again to the foreground. Recommendations can be sanctioned if their contents are related to the economic guidelines, especially in relation to the budgetary requirements for the Euro member states. If there is no such a relationship, the enforceability of the recommendations remains mainly in the sphere of “naming and blaming”. The recommendations formulated in the national reforms programmes often refer to national actions that should be undertaken in order to safeguard the national economy and/or budget. Some of these actions relate to the social field, among them reforms that have to be undertaken or further implemented in relation to pensions, health care or poverty schemes. The emphasis here is on the efficiency and effectiveness of the schemes in order not to overburden the economy or budget of the country. The social exclusion recommendations are here to be understood as an integral part of the economic guidelines.

Finally, there is the question to what extent the economic guidelines can work to the detriment of social inclusion. National economic-financing measures may have a detrimental effect on (structural) unemployment and can result in social exclusion. What if such measures were adopted in the application of European recommendations? What if economic guidelines or the recommendations that follow from these guidelines work to the detriment of social inclusion in the member states? Article 121 TFEU does not give an indication how this relationship should be interpreted. However, if we want to ascribe a useful meaning to the linking of the economic and social-employment guidelines, the relation should be two-way: by linking the socio-employment guidelines to the economic ones, the latter should also be tested for their (negative) effect on the employment and social exclusion outcomes. Such an interpretation would at least respect the horizontal social clause

(article 9 TFEU) and would also pay the necessary respect to EU fundamental rights on social security, in particular article 34 of the Charter on social exclusion: two fundamental European clauses, of which the meaning for social exclusion will be further developed in the next section. It may also be considered as a concrete answer to the invitation of the EU-Parliament in its 2012 Resolution[34] on Social Investment, where it calls the Council and the Commission to have the actual macroeconomic and budgetary surveillance in the EU supplemented by "*improved monitoring of employment and social policies*".

4. WHAT CAN LEGALLY STILL BE DONE TO ENHANCE THE COMBAT OF SOCIAL EXCLUSION?

From the *status questionis* in our first two sections we have learned that the EU has only limited competencies to act legally within the field of combating social exclusion. Likewise, the sanctioning powers to enforce what is recommended are restricted. Although some perspectives were opened due to the embedding of the 10th guideline in the employment and economic guidelines, the recommendations for which this stronger sanctioning may be applied, are limited. Nevertheless, by making effective use of these limited means, one should be able to obtain results: *Adde parvum parvo magnus acervus erit.* In my opinion, a three-dimensional approach needs to be applied:

- First, there is a call to legally respect the combat of social exclusion: respect what has been done so far.
- Secondly, the application of other European programmes can be made conditional in terms of combating social exclusion: introduce more social exclusion conditioning in existing actions.
- Thirdly, the existing general Treaty competencies should be applied in a more extensive manner in the field of social exclusion: develop legal action on the basis of existing European competences outside the traditional social exclusion area.

Each of these steps will be addressed separately. Before we embark upon this, we first highlight the added value of a codification of what has been done already at the European level in the field of combating social exclusion. Indeed, it is not only a question of implementing whatever is already within the European competencies, it is also about doing so in a coherent and efficient manner.

A. CODIFY AND STRUCTURE WHAT EXISTS ON SOCIAL EXCLUSION

By focusing mainly on competencies and sanctioning powers, one might forget that quite a number of European initiatives and measures have already been deployed in combating social exclusion. Elements of a European concerted action against social exclusion can be found as early as the 1970s across the Commission poverty programmes[35], the European Social Fund projects and the European labour market projects. While the poverty programmes focused mainly on research and mutual information development, the two other programmes were mainly aimed at improving employment opportunities for disadvantaged groups. The Social Fund projects were specific in the way that they

[34] Resolution European Parliament, 20 November 2012 on a *Social Investment Pack* (15).

[35] One of the first programmes was in application of the Council Resolution 1974 on a social action programme and was concretely developed in Council Decisions nr. 75/458 and nr. 77/779.

targeted categories of socially excluded people on the basis of regional programmes (see also further below).

At the end of 1980s, the European member states agreed upon a Community Charter of the Fundamental Social Rights of Workers[36], referring also to the fight against social exclusion. Although the – legally non enforceable – Charter mainly targets the social protection of workers, a reference is made to social exclusion in which it is stipulated under point 10 that member states should provide sufficient resources and social assistance to individuals "who have been unable either to enter or re-enter the labour market and have no means of subsistence". Council Decision N° 89/457 established "a medium-term Community action programme concerning the economic and social integration of the economically and socially less privileged groups in society", among other things, to implement the social exclusion clause of this Charter[37].

In the more recent Charter of Fundamental Rights of the European Union[38], a general (i.e. beyond the category of workers) reference to social exclusion is to be found in article 34: "[…] 3. *In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*" For the meaning of the article reference is made to the European Social Charter of the Council of Europe. In its revised version of 1996, the Charter refers to protection against poverty and social exclusion (in its article 30). In the explanatory report to the Revised Social Charter, we can read that "[t]he term social exclusion refers to persons who find themselves in a position of extreme poverty through an accumulation of disadvantages, who suffer from degrading situations or events or from exclusion, whose rights to benefit may have expired a long time ago or for reasons of concurring circumstances. Social exclusion also strikes or risks to strike persons who without being poor are denied access to certain rights or services as a result of long periods of illness, the breakdown of their families, violence, release from prison or marginal behaviour as a result for example of alcoholism or drug addiction". What is interesting here is that less emphasis is placed on labour activation measures, while the focus is more on (passive) poverty measures. We thus have to understand the references made to minimum subsistence and access to crucial society services in this respect.

A similar approach is to be found in the EC Recommendation (1992) on "common criteria concerning sufficient resources and social assistance in social protection systems". Here, the fight against social exclusion is to be regarded as "*an important part of the social dimension of the internal market*". It should be conducted "*in a spirit of solidarity*". The implementation of such a right is to be organised

[36] Community Charter of the Fundamental Social Rights of Workers, adopted in Strasbourg on 9 December 1989 by the member states of the EC. The text has been published by the Commission in 1990.

[37] Council Decision No. 89/457, 18 July 1989 establishing a medium-term Community action programme concerning the economic and social integration of the economically and socially less privileged groups in society, *OJ L* 2 August 1989, 224, 10.

[38] Charter of Fundamental Rights of the European Union No. 2000/C 364/01, *OJ L* 18 December 2000, 364, 8.: Originally, the Charter was a merely a political declaration through which the three main European institutions indicated their commitment to respect human rights to the best of their abilities. With the Lisbon Treaty in 2009 the Charter remained a separate document, but the Charter was given the same legal value as the EU Treaty and the Treaty on the Functioning of the EU (article 6, subsection 1, paragraph 1 TEU states).

by fixing the amount of resources considered sufficient to cover essential needs with regard to respect for human dignity, taking account of living standards and price levels in the member state concerned, for different types and sizes of household. In 2008, the EU Commission launched a (somewhat more employment-oriented) recommendation on the active inclusion of excluded people[39]. In addition to a call for effective labour inclusion policies, the Commission asked member states to invest in adequate income support and to provide access to quality services. What is to be considered as "sufficient" or as "adequate" in these soft-legal measures remains unclear, as no concrete figures were suggested for the level at which to set such a guaranteed income.

However, in the more recent monitoring process on social exclusion we find keys that provide concrete meaning to these vague concepts, at least if one wants to read the recommendations together with the outputs of the open method of coordination (OMC). The measures taken within the OMC on social exclusion enable us to give the rather general concepts used in the Charter and the 1992 Recommendation a more concrete meaning. In 2001, the EU developed common indicators allowing it to establish a European methodology for the interpretation of the national action plans in the field of social exclusion that were to submitted annually by the member states. The Social Protection Committee produced its first report on common indicators[40], which were accepted by the Council during the *Laken* Summit (December 2001)[41]. The indicators focus on social outcomes rather than on the means by which they are to be achieved. Placing them in three categories, we have to distinguish:

- primary indicators[42], being the lead indicators that "cover the broad fields that have been considered the most important elements in leading to social exclusion";
- secondary indicators[43] that support the lead indicators by describing "other dimensions of the problem"
- third level indicators that member states themselves decide to include in their national action plans, in order to "highlight specificities in particular areas, and to help interpret the primary and secondary indicators".

From this overview we can conclude that the EU strategy for combating social exclusion is not of a recent nature. We find references in different kinds of legal instruments, ranging from Charter(s), through Council recommendations, Council decisions and Commission recommendations, to non-legal documents. Most of these documents lack real legal bite, as most of the time they are of a recommendatory nature. Yet their potential force lies elsewhere, as they can inspire judges and

[39] Recommendation Commission EU, 3 October 2008 on the active inclusion of people excluded from the labour market, *OJ L* 18 November 2008, issue 307, 11ff.

[40] Social Protection Committee, *Report on Indicators in the field of poverty and social exclusion*, October 2001, 8p.

[41] Social Protection Committee, *Report on Indicators in the field of poverty and social exclusion*, October 2001, 8p. Online: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/DOC.68841.pdf

[42] Are primary indicators: low income rate after transfers, distribution of income (income quintile rate), persistence of low income (based on 60% of median income), median low income gap, regional cohesion, long term unemployment rate, amount of people living in jobless households, number of early school-leavers, life expectancy at birth, self-perceived health status.

[43] Are secondary indicators: dispersion around the low income threshold, low income rate anchored at a point in time, low income rate before transfers, distribution of income (Gini coefficient), persistence of low income (based on 50% of median income), long term unemployment share, very long term unemployment rate, persons with low educational attainment.

decision makers in defining better general rights (such as the right of protection against social exclusion) or establishing a better balance between the development of the internal market and the more general social Europe. This is only possible when more clarity is created in the existing morass of social exclusion measures. In order that European institutions and judges would start to make use of social exclusion in a more efficient manner, it should be made clear from the outset, for example in communication, what it stands for as (legal) concept (what action does it encompass?), how it can be measured (what are the indicators used?) and what is the legal relevance (how is legally sanctioned, and does the level of enforceability differs depending the nature of the measure?). It can give a useful impetus to the three staged suggestions that will be introduced in the next three chapters, for example when the realization of the funding from the European Social Fund is to be made conditional in terms of concrete achievements in the field of social exclusion.

B. RESPECTING THE EU COMBAT OF SOCIAL EXCLUSION (RESPECT WHAT HAS BEEN DONE SO FAR)

A first layer in strengthening the EU social exclusion legal framework is to have the fight against social exclusion respected by the EU institutions themselves. It is difficult to demand a follow-up of the EU social exclusion framework from the member states, when the EU itself takes measures or develops polices that go against the recommendations and guidelines, or at least against the objective of combating social exclusion.

The fact that respect for the fight against social exclusion is not always guaranteed can be seen from the European action against the financial and economic crisis, not the least by the joined EC-ECB-IMF adjustment programmes installing restrictive measures in the field of health care, pensions and social assistance. For Greece and Portugal these programmes imposed the restriction of public health expenditure as one of the main targets[44], materializing in measures such as the reduction of public spending on pharmaceuticals to 1% of the gross domestic product (GDP). Similarly, in Greece, the goal to reduce increases in pension spending address the public pensions in the first instance, the increase of which should remain below 2.5 percentage points of GDP in the time span to 2060[45]. Likewise, one should be aware that in the more recent Council recommendations on national reform programmes, the economic-financial recommendations and (for the Euro-states) the budgetary recommendations may have negative outcomes for employment and social exclusion (see also above). Taken on their own, and thus without any consideration for their socio-employment effects, these recommendations may have a counterproductive effect on poverty and social exclusion. For Lithuania, for example, "*the labour legislation with regard to flexible contract arrangements, dismissal provisions and flexible working time arrangements*" should be amended in order to improve labour market flexibility and to facilitate short-term employment[46]. Although the recommendation definitely aims at a better employment level, it can lead to a growing number of working poor (itself leading to social exclusion) as detrimental side-effect. These guidelines and recommendations should be systematically checked for their compatibility with the EU social exclusion framework, either in general terms or by indicating that cuts and limitations should not be at the detriment of the poor(est) in society. Nor do budget restriction measures only have to address

[44] For Greece below 6% of GDP.

[45] http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp87_en.pdf

[46] Council Recommendation No. 11262/12, 6 July 2012, the National Reform Programme 2012 of Lithuania and delivering a Council opinion on the Convergence Programme of Lithuania, 2012-2015, 3.

public schemes, as these traditionally cover weaker groups in society more than the privately run protection schemes do.

In my opinion, this respect for social exclusion also has a legal component in the horizontal social clause of the Treaty (article 9) and in article 34 of the EU Charter on Fundamental Rights.

1. THROUGH THE HORIZONTAL SOCIAL CLAUSE

With the latest Treaty change (Lisbon), a so-called horizontal social clause was introduced in the European constitutional framework. Article 9 TFEU reads as follows: in defining and implementing its policies and activities, the Union shall also *"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 "social" implications of any planned action, including legislation, policies and programmes, have to be assessed in all areas and at all levels. Indeed, every major policy initiative that the European Commission undertakes must be accompanied by a thorough and integrated impact assessment that explains the economic, social and environmental consequences the policy initiative is likely to have[47]. Crucial in this regard are also the aspects of anti-discrimination and the fight against social exclusion. In addition to the protection of these social fields, the idea is also to come to a better quality of European legislation[48].

Article 9 TFEU is in essence a concrete translation in the Treaty of an administrative method of good governance that not only the Commission, but also the Council and the Parliament should respect as legislative bodies of the EU. Although the article does not give direct competence to the EU to take legal action, the main relevance of the clause lies in the control of European measures on their (too) adverse effect on the fight against social exclusion. Although the Treaty speaks in broad terms about all EU actions, it is generally understood that the article mainly aims at controlling legislative measures on their possible adverse effects on the social acquis. European measures with a too adverse effect on social exclusion should thus be prohibited or at least kept to a detrimental minimum in proportion to the goal aimed at. When a measure does have a detrimental effect, the institution should explain why the measure is necessary and how the effect is to be kept to a proportional minimum. Taking into account the general wording, one could advocate having the same horizontal testing applied to actions that go beyond legislative measures, such as guidelines developed in the socio-economic monitoring processes[49].

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[47] For more information, see the Commission Impact Assessment Guidelines of 2009 which are available on the following website: http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm.

[48] See e.g. EUROPEAN COMMISSION, "Action plan 'Simplifying and improving the regulatory environment", COM (2002) 278, 5 June 2002, 7.

[49] The European Economic and Social Committee (EESC) shares the view of applying this test to "[…] all relevant Union policies and activities, including economic ones, by both the EU institutions and individual Member States.": Opinion of the European Economic and Social Committee No. Soc/407, 26 October 2011, on Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU.

2. THROUGH THE EU FUNDAMENTAL SOCIAL RIGHT ON SOCIAL EXCLUSION[50]

In addition the horizontal social clause, the EU Charter also urges us to respect the fight against exclusion. Reference can be made in this regard to article 34 of the Charter:

> *"1. [t]he Union recognises and respects the entitlement to social security benefits and social services providing protection […]*
>
> *3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices."*

Article 34 of the Charter of Fundamental Rights of the European Union highlights that the European Union is also an organization that should be characterized by due and careful consideration for social objectives and measures.

But what is the concrete legal meaning of this article for social exclusion? In essence it is about the member states and EU institutions respecting the European social measures when developing and/or applying European measures.

Originally the Charter was launched as a document of its own, having a political rather than a legal nature. In a way, it was considered as a legacy with respect to the fundamental human rights and fundamental principles that are at the basis of the European construction[51]. The Charter of Fundamental Rights of the European Union was ultimately proclaimed by the presidents of the Commission, the Council and the Parliament during the European Council of Nice at the end of 2000. Although the Charter was published in the Official Journal of the European Communities, it was originally not more than a political document, i.e. a political declaration through which the three main European institutions indicated their commitment to respecting human rights to the best of their abilities. However, the advocates-general to the European Court of Justice did not hesitate to mention the Charter in their opinions. The Court itself started to make references to the Charter in its judgements in 2006. The Charter became thus an authoritative legal text, despite the fact that it did not contain legally enforceable rights and obligations[52].

In order to give it more legal panache, the Charter was eventually incorporated in the EU Treaties. Contrary to the original idea of having the text integrated into the Treaties, the drafters of the Lisbon Treaty decided differently: the Charter of Fundamental Rights of the European Union remained a separate document. However, the Charter received the same legal value as the EU Treaty and the

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[50] For more information about the EU Charter on Fundamental Rights, the adoption and legal status: K. LENAERTS and P. VAN NUFFEL, *European Union Law,* London, Sweet & Maxwell, 2011, 831- 851.

[51] A. DEFOSSEZ, "La consécration de la Charte des droits fondamentaux", *Rev. Dr.* ULg, 2008, (233), 236; M. DESOMER, "Het Handvest van de grondrechten van de Europese Unie", *T.B.P.*, 2001, 671-687; S. DEWULF, "Europese grondrechten: De plaats van fundamentele rechten en vrijheden in de vernieuwde Europese Unie", *R.W.*, 2008-2009, (1522), 1523.

[52] A. DEFOSSEZ, "La consécration de la Charte des droits fondamentaux", *Rev. Dr. ULg*, 2008, 237-240; K. MORTELMANS, "Het Handvest van grondrechten van de EU in de Europese en Nederlands rechtspraak", in T. BARKHUYSEN, M. VAN EMMERIK and J. LOOF (ed.), *Geschakeld recht. Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van prof. Mr. E.A. Alkema*, Deventer, Kluwer, 2009, 379-397.

Treaty on the Functioning of the EU, as article 6, subsection 1, paragraph 1 of the EU Treaty makes clear[53].

Similarly to the horizontal social clause, the Charter is not to be considered as a competence ground[54]. The Charter is about "respect" towards fundamental rights. When developing and/or implementing European measures and actions, the European institutions have to pay respect to the European fundamental rights, just as the member states have to respect the Charter. What the eventual legal effect will be of the European Charter remains to be seen. The European Court of Justice is considered capable of acting as the invigilator of the EU Charter by judging whether national or European action sufficiently respects the rights of the fundamental Charter. How far this legal control can reach is open for discussion. Whether the Court will go as far as stating that EU institutions do not respect article 34 when, in their economic guidelines, they force states to infringe upon their fight against social exclusion and consequently push people below acceptable levels of minimum subsistence, remains to be seen. The Court is not supposed to apply concrete testing on matters for which the EU is not competent. Hence it remains to be seen whether the Court will go as far to have the concept of competence interpreted so far that it encompasses fields restricted to non-legal action (such as social exclusion), even when the legal value of the concerned raised considerably by having it linked recently to economic-employment guidelines.

Although the full legal effect of the Charter is still not clear in this respect, we find examples in the case law of the European Court of Justice where the Court refers to the Fundamental Rights Charter to outbalance (too) negative outcomes of a strict application of the European economic freedoms[55], at least when dealing with the traditional fundamental civil rights (such as the protection of privacy and the voting right). When it comes to fundamental social rights, the Court shows more reticence, giving priority to full respect of the economic freedoms over the protection of the social rights[56]. So

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[53] This intention is expressed in the following manner: *"The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states."*

[54] So we can read in article 51: *"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."*

[55] See in this respect, before the introduction of the Charter in the Treaty: ECJ, 12 June 2003, Schmidberger, case C 112/00, *ECR* 2003, I-05659. ECJ, 14 October 2014, Omega, case C- 36/02, *ECR* 2004, I-09609; and after the introduction of the Charter: ECJ, 22 December 2010, Sayn-Wittgenstein, case C- 208/09, *ECR* 2010, I-13693.

[56] See in this respect: before the introduction of the Charter: ECJ, 11 December 2007, Viking, case C-438/05, *ECR* 2007, I-10779; ECJ, 18 December 2007, Laval, case C-341/05, *ECR* 2007, I-11767. After the introduction of the Charter: ECJ, 15 July 2010, Commission v. Germany, case C-271/08, *ECR* 2011, I-23364. See for a more detailed analysis of this double-sided approach by the ECJ: A. de VRIES, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice", *Utrecht Law Review* 2013, 169-192 and M. SCHLACHTER, "Reconciliation between fundamental social rights and economic freedoms", presentation paper for the 2011 social rights and economic freedoms conference in Brussels: online: ec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6923%26langId%3Den&ei=x9pJUe3SFMS30QXO54DAB w&usg=AFQjCNHlhlxMSoSmLMAr4QW8S75n4-a7lA&bvm=bv.44011176,d.d2k.

far, no clear justification has been provided by the Court for its distinguishing policy in relation to the nature of the fundamental rights (civil/social); we can only call upon the ECJ to change its policy with regard to the fundamental social rights, including the respect for the objective of social exclusion when confronted with a (too) negative impact of the economic monitoring process on the fight against exclusion[57].

C. FURTHER CONDITIONING OF EXISTING EUROPEAN ACTIONS IN TERMS OF SOCIAL EXCLUSION

The fight against social exclusion can get more legal bite when it is made conditional upon other European action. This approach should, according to many, be put into practice by the further conditioning of the structural funds' grants in terms of combating social exclusion. EU objectives, which include combating social exclusion, should be reflected in EU territorial subsidy programmes. Or as VANHERCKE put it: "obtaining EU Structural Funds should be made conditional on meeting the objectives of the Social OMC. As the saying goes: put your money where your mouth is". Along similar lines, we read in recital 15 of the already quoted recommendation on the Integrated Guidelines that "cohesion policy and its structural funds are amongst a number of important delivery mechanisms to achieve the priorities of smart, sustainable and inclusive growth in the member states and the regions". We will restrict ourselves here to the European Social Fund (ESF) since it already introduced the criterion of combating social exclusion into fund delivery in the past. However, what is mentioned within this framework can also serve as inspiration for the other structural funds.

As will become clearer below, further conditioning in terms social exclusion should not remain restricted to a general reference to the objective of the fight against exclusion alone. When an effective application of further conditioning is envisaged, concrete indicators measuring progress in combating exclusion can play an important rule. The social exclusion indicators developed by the Social Protection Committee can have an added value here. States should not only promise that the action they will fund fits within the general objective on the fight against exclusion, they should also make it concrete in their proposals as well as in the eventual outcomes of the subsidized actions. Before we reach this part (4.C.3.), we first introduce the ESF and its relation to social exclusion (4.C.1.) and the limits the EU-Treaties possibly impose on this connection between ESF-actions and further conditioning with regard to social exclusion (4.C.2.).

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[57] In this respect the collective complaints against Greece lodged by several pension organisations to the European committee of social rights are of interest as they refer to the national measures cutting down pension entitlements due to the financial and economic problems the country is facing (collective complaints Nos 76-80/2012). The organisations allege that the pension reductions taken in application of the international and European support programmes to tackle the country's financial problems, are inappropriate as to their objective and not sufficiently justified to be in line with article 12, § 3 of the European Social Charter (maintenance and progressive development of a social security system). Although not dealing with social exclusion as such, the outcome of the decision can have an impact for article 34 of the EU Fundamental Charter, the contents of which is heavily depending upon the (revised) European Social Charter as well, in particular on article 30 (social exclusion).

1. THE ESF AND SOCIAL EXCLUSION

The Social Fund was originally conceived as a supportive instrument for the realisation of freedom of movement for workers. The Social Fund had to improve employment within the EU through improving mobility of labour, thus directing the labour force to the member states or regions where it was most needed. Later, when all the member states where facing mass unemployment, this seemed a rather unrealistic objective. The objectives laid down in article 146 TFEU, however, are of a kind that allows a smooth adaptation of the Social Fund's objectives to the changing economic situation. The Social Fund started out as a shock absorber for the consequences that economic integration brought about in the social field, such as the transition of agricultural labour to skilled labour in the secondary and tertiary sector. From the 1970s onwards, when the effects of the crisis became apparent in unemployment rates, the Social Fund developed into an instrument for proactive employment policy. Nowadays the activities of the Fund mainly concern training and retraining of workers and the creation of employment. Special attention is paid to those categories of workers that have a weak position on the labour market, such as young people, women, handicapped persons, etc. Special attention is also paid to regions within the EU that face particular structural labour market problems, such as Ireland, the south of Italy, the French oversees departments, the new member states, etc.

The Commission is inclined to follow this further conditioning of ESF activities in terms of social inclusion performances, at least when we look at the new proposal for a Regulation on the ESF (see below) and at the recent communication on the Social Investment Pack[58] and the implementation of the ESF for 2014-2020[59].

In the explanatory memorandum to the proposal we read that "*the ESF supports policies and priorities aiming to promote [… among other things] social inclusion, thereby contributing to economic, social and territorial cohesion*". In terms of scope, the draft ESF-Regulation for 2014-2020 proposes to target the ESF on four thematic objectives throughout the European Union, among which "*social inclusion and combating poverty*"[60]. Each thematic objective is translated into intervention categories or investment priorities. Furthermore, concentration of funding is required to achieve a sufficient and demonstrable impact. In order to ensure this concentration, it is proposed among other things, that at least 20% of the ESF allocation should be dedicated to "*promoting social inclusion and combating poverty*"[61].

[58] Addressing the EU Parliament Resolution on the Social Investment Pack, 20 January 2012.

[59] Commission Communication No. COM(2013) 83 final, 22 February 2013, toward Social Investment for Growth and Cohesion – Including implementing the European Social Fund 2014-2020.

[60] Art. 3§1 Commission Proposal No. (2011) 615 final, 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[61] Art. 4§2 Commission Proposal No. (2011) 615 final, 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development

In its recent communication on the Social Investment Pack the Commission advocates having the ESF-activities even more attuned to the monitoring process as applied so far in the field of social exclusion. The implementation of the ESF is linked to a more targeted and conditional social investment. The Commission will have to target national activation and enabling policies in the framework of the European Semester system whereby policy recommendations[62] will become the key elements to be taken into account when identifying the development needs, choice of thematic objectives, investment priorities and financial allocations for the specific member states[63]. The underlying assumption is that the fight against social inclusion is to gain importance on the program me of the ESF.

2. IS FURTHER CONDITIONING LIMITED IN ITS SCOPE BY THE EU-TREATY?

The potential scope of the listed objectives remains problematic, however. The legal basis of the ESF is article 162 TFEU, which has a clear employment and mobility (of workers) orientation. Does this mean that the objective of combating social exclusion is (again) narrowed down to the range of employment? Is an ESF approach towards subsidising national action beyond employment feasible? There is reason to believe so. First and foremost, article 162 TFEU also refers to a more general goal to which the improvement of employment opportunities should lead: the raising of standards of living. The ESF should in the end be supportive towards an overall increase of the living standards within the EU, the improvement of labour opportunities being a supportive sub-goal to this end. Whatever the interpretation may be, the proposal for Regulation refers yet to another goal that is enshrined in the Treaty. Indeed, it states that the thematic ESF objective with regard to combating social exclusion should in the end contribute to economic, social and territorial cohesion. In doing so, it refers to articles 174 ff. of the TFEU. In strengthening this cohesion "*the Union shall aim to reduce disparities between the levels of development of these various regions and the backwardness of the least-favoured regions*" (art. 174 par. 2 TFEU). Without any doubt combating social exclusion is an effective tool to achieve this cohesion goal. In article 175 TFEU we can read that the structural funds (thus also the ESF) are to play a major role in this regard. A further support for this broad approach can be found in the horizontal social clause of the Treaty (article 9 TFEU): "[*i*]*n 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*, […]". In other words, funding through the ESF, even when restricted to employment related activities, should be also of a supportive nature towards the fight against social exclusion.

Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[62] Labelled as country specific recommendations.

[63] Commission Staff Working Document No. SWD(2013) 44 final, 20 February 2013, Social Investment through the European Social Fund.

3. FURTHER CONDITIONING IN TERMS OF SOCIAL EXCLUSION IN THE PROPOSED ESF-REGULATIONS

EXISTING LEGAL FRAMEWORK: REGULATIONS OF 5 AND 11 JULY 2006

At this moment, two European regulations are of interest for the functioning of the European Social Fund (ESF). The first is the Council Regulation of 11 July 2006[64] containing general provisions about the European Regional Development Fund, the European Social Fund and the Cohesion Fund. This Regulation offers a general framework for these three structural funds. It contains common definitions, general objectives of the funds, the financial framework, rules about the procedures of the operational programs and monitoring, evaluation and correction rules.

Although it is a general framework for the funds, this Regulation also contains some detailed, mostly ex-post, procedures that allow the Commission to monitor and evaluate the use of the funds by the member states. The member states are to set up management and control systems[65]. Each member state must therefore establish a managing authority, a certifying authority and an audit authority. The managing authority is to send an annual report to the Commission each year by the end of June[66]. The Commission will evaluate this report and give advice to the managing authority. When a member state breaches its obligation to establish the said management and control systems or if there are serious irregularities relating to expenditures that have not been corrected, the Commission can suspend [67] and even, partly, cancel[68] the contributions to this operational programs.

For the 2007-2013 period, each member state has established a national strategic reference framework (NSRF)[69]. This document has to ensure that assistance from the structural funds will be consistent with the Community priorities and the national reform programmes of the member states.

The second regulation of interest for the operation of the ESF is the Council Regulation of 5 July 2006[70], which complements the Regulation of 11 July 2006 with specific provisions for the ESF. This –

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[64] Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[65] Art. 58 Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[66] Art. 67 Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[67] Art. 91 Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[68] Art. 99 Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[69] Art. 27 Council Regulation No. 1083/2006, 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, *Pb. L.* 31 July 2006, 25.

[70] Council Regulation No. 1081/2006, 5 July 2006 on the European Social Fund and repealing (EC) No 1784/1999, *Pb. L* 31 July 2006, 12.

rather short – Regulation defines the specific tasks of the ESF. It focuses on adaptability of workers and enterprises, enhancing access to employment, reinforcing the social inclusion of disadvantaged people, enhancing human capital and promoting partnerships (e.g. partnerships with social partners). Furthermore, the member states always have to pay attention in their operational programmes to gender equality (and equal opportunities) and innovation[71]. The Regulation also contains a list with ESF-specific actions to which the annual reports compiled by the member states have to refer[72]. These actions are for instance: increasing the participation of migrants in employment and thereby strengthening their social integration, strengthening the integration in employment and thereby improving the social inclusion of minorities, strengthening the integration in employment and social inclusion of other disadvantaged groups including people with disabilities, gender mainstreaming, innovative activities and transnational and/or interregional actions.

PROPOSED REGULATIONS: TAKING THE OPPORTUNITY TO ENHANCE CONDITIONING IN TERMS OF SOCIAL EXCLUSION

The two Council Regulations will be repealed in 2014 and replaced by new regulations that adapt the operation of these structural funds to the needs of the Europe 2020 strategy. Therefore, the Commission has prepared two proposals related to the ESF, which will enter into force on 1 January 2014[73]. The proposals already refer more to social exclusion, although this could still be developed further.

The first proposal, which will replace the Regulation of 11 July 2006, introduces some common novelties in the global framework of the three structural funds. An important innovation at Union level is the creation of a Common Strategic Framework (CSF)[74]. This framework, which will be composed by the Commission, is an overarching, strategic guidance for the 2014-2020 period. At national level, so-called partnership contracts will be introduced that all the member states have to compose for the same period. These partnership contracts between the Commission and the member states will set out the commitments of individual member states and their supporting partners at national and regional level and will replace the National Strategic Reference Framework (NSRF) used today[75]. These contracts will be linked to the Europe 2020 strategy and will at minimum

[71] Art. 6 and 7 Council Regulation No. 1081/2006, 5 July 2006 on the European Social Fund and repealing (EC) No 1784/1999, *Pb. L* 31 July 2006, 12.

[72] Art. 10 Council Regulation No. 1081/2006, 5 July 2006 on the European Social Fund and repealing (EC) No 1784/1999, *Pb. L* 31 July 2006, 12.

[73] Commission Proposal No. (2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[74] Art. 10 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[75] Art. 13 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework

contain the following elements: arrangements to ensure alignment with the Union strategy for smart, sustainable and inclusive growth, an integrated approach to territorial development, an integrated approach to address the specific needs of the geographical areas most affected by poverty and arrangements to ensure effective and efficient implementation.

Moreover, ex-ante conditions will have to be introduced for each structural fund[76]. Member states will have to set out the detailed actions relating to the fulfilment of these conditions. Here, the criteria and indicators developed so far within the European monitoring framework around social exclusion can be used in a more tangible way. Similarly as is being done in the field of education, allocated grants will have to align with pre-existing national strategies. Furthermore, criteria will have to concretely indicate any possible outcomes of the (proposed) national activities. The exclusion indicators as they were originally designed for the OMC purpose, could have an added value here. They could be used to measure any progress made in the field, and thus monitor the appropriateness of granted funds. In order to be used effectively in the regulatory process, a clear codification of indicators could pay of here (see 4.A.).

Another novelty is the performance reserve of 5%[77]. Five percent of the budget of the relevant fund will be set aside at the beginning of the programme and shall only be allocated to member states whose programmes have met their milestones. Here also social exclusion indicators could be applied in the (measurement of these) milestones.

Furthermore, the commission will start working with macroeconomic conditionalities for the partnership contracts and operational programmes[78]. Therefore, the Commission can request a member state to review its partnership contract or operational programmes when this is necessary to implement Council Recommendations or measures that are adopted in accordance with the following articles: art. 121 (2) TFEU (broad guidelines of the economic policies of the member states), art. 148 (4) TFEU (recommendations about the employment situation in member states), art. 136 (1) TFEU (measures to ensure the proper functioning of the economic and monetary union), art.

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and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[76] Art. 17 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[77] Art. 18 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[78] Art. 21 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

126 (7) TFEU (recommendations about excessive government deficits) and article 7 (2) of the Regulation on the prevention and correction of macroeconomic imbalances[79] (recommendations establishing the existence of an excessive imbalance). When the Commission requests a member state to review its partnership contract or operational programme, the member state has one month to amend these documents. If it fails to do so, the Commission can suspend a number or all of the payments and commitments for the programmes concerned. Furthermore, if the Council decides that a member state has not taken actions to correct the existing situation according to the aforementioned Recommendations, the Commission will react in the same way.

This proposal also induces ex-ante evaluations[80] and the use of two major intermediate evaluations[81] (in 2017 and 2019). Strangely enough, in the reference to Treaty, the relevant articles in relation to social exclusion are left aside. There is no reason, however, not to have the partnership contracts or operational programmes connected with (the outcomes of) article 153 TFEU. The existing (national) recommendations on social exclusion should play a role here. Hence, they could become more than mere reference texts with no legal enforcement whatsoever.

The second proposal[82], which will replace the Regulation of 5 July 2006, adapts the operation of the ESF to the new Europe 2020 strategy. Therefore the scope of action of the ESF has changed somewhat. The ESF will focus more on promoting employment, supporting labour mobility, investing in education, skills and life-long learning, promoting social inclusion, combating poverty and enhancing institutional capacity and efficient public administration[83]. At least 20% of the ESF budget is to be allocated for promoting social inclusion[84]. This minimum percentage to be allocated to social inclusion is probably the best illustration that the Commission is willing to have more interplay between the ESF-activities and the fight against social exclusion. Nevertheless, as we have seen from the previous sections, this general percentage will only be made effective when social exclusion targets and indicators can come to the foreground in a more concrete manner, both in ex-ante and in ex-post evaluations.

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[79] Art. 7 Parliament and Council Regulation No. 1176/2011, 16 November 2011, on the prevention and correction of Macroeconomic imbalances, *OJ L,* 23 November 2011, 306.

[80] Art. 48 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[81] Art. 19 and 46 Com(2011) 615 final 14 March 2012, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 and Commission Proposal nr. Com (2011) 607 final on the European Social Fund and repealing Regulation (EC) No 1081/2006.

[82] Commission Proposal No. (2011) 607 final, 14 march 2012, on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

[83] Art. 3 Commission Proposal No. (2011) 607 final, 14 march 2012, on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

[84] Art. 4 Commission Proposal No. (2011) 607 final, 14 march 2012, on the European Social Fund and repealing Council Regulation (EC) No 1081/2006.

D. DEVELOPING LEGAL MEASURES IN THE FIELD OF SOCIAL EXCLUSION: FINDING ALTERNATIVE COMPETENCE GROUND(S)

The EU has not been granted the mandate to develop legal measures in the field of social exclusion, at least not within the ambit of the social policy chapter (chapter X TFEU; see part I). The question remains whether no alternative competence ground can be found in other parts of the Treaty. In order to answer this question, we will focus on legal competences that allow legal measures to be taken that address in their own respect the fight against social exclusion. Hence, we will not deal here with social exclusion measures that are developed as a side-element in another (thematic) competence ground (such as the employment chapter of the Treaty: see in this regard the proposal for a framework directive on minimum income[85]). Nor do we touch upon competence grounds that give power to take measures with a view to support economic objectives (such as the further development of the internal market, as, for example, in article 115).

Two sorts of legal grounds are of interest in this perspective. First of all, the so-called "open" competence ground, i.e. the legal ground that is open in its scope to take whatever measure necessary as long as it can be legitimized on the basis of one or more European objectives (article 352 TFEU). This will be dealt with in a first point under the heading of "teleological attributions of competence". In a second point, the legal boundaries of European citizenship will be tested (art. 18 TFEU ff). We will begin by trying to determine the extent to which a relationship exists between the fight against social exclusion and European citizenship. Next, the question will be to what extent the legal ground(s), on the basis of which measures can be developed to shape citizenship, can be invoked for the sake of social integration of European citizens.

1. TELEOLOGICAL ATTRIBUTIONS OF COMPETENCE (ARTICLE 352 TFEU) AND SOCIAL EXCLUSION

There is a broad consensus that the Council may rely on article 352 TFEU each time the Treaty grants EU competence but either no express legislative power or only insufficient legislative power. In the legislative practice of the EU, it appears that article 352 TFEU can be used whenever unanimity between the member states can be found. The clause has been used to broaden the scope of EU legislation on numerous occasions. In the past, it has been an important ground upon which to base European social security legislation. This was, for example, the case with the equal treatment Directive 79/7 in matters related to statutory social security, with the extension of the scope of co-ordination Regulation 1408/71 (current 88/2004) to self-employed persons, but it also played a crucial role in having the Recommendation (1992) on social assistance (as quoted above) legally grounded. In the field of social security, the Court of Justice has so far not found the Council acting *ultra vires* in its use of article 352 TFEU. The condition that all measures based on it should fall within the EU objectives, finally, will not cause many limitations on its use. As we have indicated before, the EU objectives are very broad, even in the fields of social policy and social security (see article 153 TFEU).

[85] A. VAN LANCKER, *Working document on a framework directive on minimum income*, European Anti-Poverty Network, Brussels, 2010, 22p. See for an overall overview of how social exclusion could be addressed as side-element in the other competence grounds, in particular the ones related to free movement of professional active persons: H. VERSCHUEREN, "Union law and the fight against poverty: which legal instruments", *l.c.*, Antwerpen, Intersentia, 2012, 205ff.

However, beginning with the Treaty of Nice (2000), the scope of action of article 352 TFEU has been seriously narrowed down. A new paragraph has been added, stating that "*measures based on this article shall not entail harmonisation of member states' laws or regulations in cases where the Treaties exclude such harmonization*". Such a legal reserve with respect to harmonisation can be found in article 153 TFEU as it states that the measures of cooperation for the modernisation of social protection and for combating social exclusion may never lead to any harmonisation of laws and regulations. Since the introduction of this paragraph, article 352 TFEU cannot be used (anymore) as a legal basis for developing European legal measures in the field of social exclusion.

Thus, the pathway to develop legal European legal measures in the field of social exclusion on the basis of the flexibility clause (article 352 TFE) is quite seriously blocked. For the development of legal measures, other competencies will need to be found. In what will follows, we will concentrate on this goal in looking at the articles dealing with European citizenship.

2. EUROPEAN CITIZENSHIP: A PARTNER IN COMBATING SOCIAL EXCLUSION?

At first glance, European citizenship and the fight against social exclusion do not have much in common. Article 18ff TFEU shapes the boundaries of the general "principle of European citizenship", entailing rights that are attributed to citizens of EU member states. Non-discrimination of EU citizens is one of the essential cornerstones of this principle; but also the right to move and reside freely within the EU. Nevertheless, these elements of citizenship have slowly started to touch upon the boundaries of social exclusion, especially when they relate to the access European citizens may have to social provisions abroad (in another member state). Not surprisingly, it has been mainly the European Court of Justice (ECJ) that has brought both European fields closer together, especially in cases where moving citizens started to claim minimum subsistence benefits in the state of (temporary) residence. From the *Sala*-case[86] onwards, the ECJ has introduced the principle of the non-discrimination, as the centrepiece guarantee of European citizenship, into the field of social security: states should not discriminate citizens from other member states with regard to access to social security benefits. Whereas this case still dealt with family benefits, the Court started to apply this principle to social assistance and social welfare schemes in follow-up cases[87]. However, in these cases it ultimately came face to face with the limits of its own approach, especially when it had to deal with benefits that fall outside the scope of the EU regulations coordinating social security[88]. The Court acknowledged that the application of European citizenship has some limits that come to the fore in the philosophy underlying the residence directives[89]: non-economically active persons (such as students, pensioners or, in general, persons not having any link with labour) cannot depend upon the social welfare regimes of the states to which they move (temporarily). In other words, they should not become a burden on the social assistance and health care schemes of the host country. In

[86] ECJ, 12 May 1998, Sala, case C-85/96, *ECR*, 1998, I-2691.

[87] ECJ, 20 September 2001, Grzelczyk, case C-184/99, *ECR*, 2001, I-6193; ECJ, 23 March 2004, Collins, case C-138/02, *ECR*, 205; ECJ, 7 September 2004, Trojani, case C-456/02, *ECR*, 2004, I-7573; ECJ, 15 March 2005, Bidar, case C-209/03, *ECR*, 2005, I-2119, and others.

[88] Regulations 883/2004 and 987/2009. In essence social assistance benefits that are general of nature (and thus cannot be linked to one of the enumerated traditional social risks in article 3 of the mentioned regulations) are not covered by the coordination rules.

[89] See Directive 90/364 of 28 June 1990, Directive 90/365 of 28 June 1990 and Directive 93/96 of 23 October 1993; these three directives have eventually been incorporated into the general residence directive 2004/83, 29 April 2004, *OJ L*, 30 April 2004, issue 158/77.

the end, European citizenship should not entail social tourism, the latter indicating the inappropriate access to welfare and social assistance benefits in other member states.

In its case law the European Court made an attempt to reconcile the non-discrimination principle with the legal restrictions on social tourism. The Court refined its case law in the first instance by stating that only comparable groups can be compared when applying the non-discrimination principle of article 18 ff. TFEU. Consequently, the Court came to the conclusion that equal access to social benefits and services to EU citizens of other member states can be made conditional upon a prior stay, sufficiently long to show the person's integration in the host country. As an example it referred to a period of three years, yet the Court stated clearly that the period should be in proportion to the claimed benefit[90]. Secondly, the Court stated that the mere fact that a person claims a benefit cannot automatically lead to the lifting of the legal permit to stay in the country. If it becomes evident after investigation that the person in question will become a structural burden to the welfare regime, states are allowed to stop the prolongation of the permit.

States face problems when applying this reasoning in practice, as became clear recently in the much mediatised expulsion of Roma people (mainly with EU nationality) from the national territories of some EU member states. Beyond these cases (where apart from citizenship alleged racism is also at stake), however, local social centres do not always feel confident when applying the legal (European) rules to non-active (foreign) European citizens who are staying (temporarily) on their territory. Assessing whether a person has been staying long enough in the territory of the state, so that he can be considered sufficiently integrated, is not an easy task. Indeed, the situation of a young student who spent a long period of his secondary studies in the host state cannot be compared to the situation of an adult student who only stayed for one year in the state in order to finalise his MBA. In between, there is huge variety of cases. Moreover, the criterion whether the benefit a person applies for is proportional to the period he or she has stayed in the territory, is difficult to assess. Much will depend on the level of requested solidarity at stake: this solidarity is in its turn related to the level of the requested benefit and the perspective of (length of) stay. An application for a full minimum subsistence benefit may be considered demanding, yet when it is only requested for a short period[91] the pressure on the system can be considered reasonable. In reality, however, it is difficult to determine how this pressure should be measured. But also the consequence of the approach – if access to benefit can be rightly denied – is awkward, if not to say a little cynical: the host state can lift the permit to stay and hence oblige the person to return to his or her state of origin. Once there, he or she can launch another claim for support. In such an instance, however, he or she may face similar hindrances to acquiring access to social assistance as he or she was not taking part in society in the period preceding the claim.

The approach developed by the ECJ may be serving European law logics, but it does not offer satisfaction when applied in legal practice. This, in part, is because the approach starts from EU principles that are not refined enough to handle the legal practicalities of social assistance. Furthermore, it does not properly address the fundamental questions at stake: which state is to be addressed in the end for taking care of the person, in granting the rights and the associated duties in order to become integrated? And what is the minimum level of this protection to be guaranteed? In

[90] ECJ, 15 March 2005, Bidar, case C-209/03, *ECR*, 2005, I-2119 and ECJ, 18 november 2008, Fôrster, case C-158/07, *ECR* 2008, I-08057.

[91] E.g. one year as in the quoted case *Grzelczyk*.

order to properly address the legal uncertainty surrounding the EU citizenship case law on access to social assistance, the EU could develop rules that formally assign the competent scheme to which the (mobile) citizen can be directed. These rules could codify the principles lying behind the aforementioned case law, yet at the same time they should be sufficiently coherent in technical terms for them to be applied in everyday cases[92]. In this way they would complement the existing regulation 883/2004 coordinating social security for mobile persons, which is (still) not applicable to the general social assistance schemes. However, one could go one step further and give social content to European citizenship, by indicating, for example, the requirements for a cross-European minimum subsistence to be guaranteed in the member states. Here we go beyond mere coordination; it is about shaping the contents of a social citizenship based upon a minimum subsistence to be respected by the member states. Yet is it competent[93] to do so on the basis of the citizenship articles?

3. EUROPEAN CITIZENSHIP AS LEGAL BASIS FOR MEASURES IN THE FIELD OF SOCIAL EXCLUSION?

In the chapter on citizenship of the Treaty, article 21 TFEU is the most likely clause to be invoked as competence ground. It reads:

> *"1. [e]very citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect[94].*
>
> *2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*
>
> *3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament."*

This article is traditionally understood to provide the necessary competences to coordinate social security of EU citizens in order to support the freedom of movement enshrined in paragraph 1. To that end, it can be considered as the competence ground complementary to article 48 TFEU, the latter being restricted however to the coordination of social security for the professionally active persons (i.e. employees and the self-employed, moving between the EU member states). Article 21

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[92] See as well in this sense: F. VAN OVERMEIREN, *Additionele welvaartsrechten door het Burgerschap van de Unie*, Gent, Faculty of Law, 2011, 489ff.

[93] Apart from the question as to where this is legally possible, there is also the question as to where this approach is to be defended from a policy point of view: see F. SCHARPF, *The asymmetry of European integration or why the EU cannot be a "Social Market Economy*, Working paper in Kolleg-Forschergruppe (ed.), *The Transformative Power of Europe*, 2009, N° 6, 35p.

[94] Limitation on grounds of public policy, public security or public health; furthermore Union law may make the exercise of the right of residence subject to still other conditions, provided that they can be reconciled with the free movement principle. K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 1584-185.

differs on some points from the traditional coordination competence ground (article 48 TFEU). In article 21, the Council still has to act unanimously, as opposed to qualified majority voting in article 48 TFEU. Moreover, the role of the European Parliament is much more limited: instead of a real co-decision maker, the European Parliament is only to be consulted. On the other hand, the article has a broader scope than article 48 TFEU. Article 21 refers explicitly to social security *and* social protection, while article 48 only refers to social security. This broader reference could mean that social assistance and welfare schemes can be addressed by article 21, contrary to what is believed to be the case in article 48 TFEU where social security would refer to the more traditional social insurance risks (including only social assistance related to these traditional social risks; and thus not the general subsistence schemes nor social welfare schemes).

Moreover, article 21 is not restricted to coordination measures. It refers to all measures concerning social security and social protection that could be useful for the implementation of EU citizenship and can go beyond mere technical coordination. The measure could include guidance or standards, for example, as to the (minimum) contents of social (assistance) rights for citizens moving across the EU territory. Mere coordination would not suffice where levels of social (assistance) protection vary too much across member states. By assigning only the competent scheme, one cannot solve this problem. It has already been advocated on other occasions that the free movement principles be accompanied by minimum standards, in the event that the schemes provide a far too different protection[95]: the principles of free movement do not exclude measures of social correction. In this respect, the EU could set minimum standards with regard to poverty schemes, or even introduce a European minimum guarantee for mobile citizens. In so doing, it can address the mobility restrictions of the EU directives (i.e. the proof of sufficient means and health care coverage) that are at odds with the principle of European citizenship. True citizenship in Europe can only occur when Europe itself guarantees a minimum of protection: by doing so it can enable the following observation made by the ECJ" *[…] the right of residence for non-economically active citizens of the Union implies the existence of a certain degree of financial solidarity between nationals of a host member state and nationals of other member states"*[96]. The time may be right now to give concrete contents to this solidarity necessary to have a true citizenship.

4. SOCIAL PROVISIONS ONLY FOR MOVING CITIZENS?

An argument in favour of extending the scope of protection beyond the mere coordination of social schemes is the range of protected persons. By setting minima alongside the technical coordination rules, the European measure can reach out to a larger group of citizens than only mobile citizens. The question remains whether article 21 TFEU allows such a far-reaching approach. Is it in the end not about the citizens who have the right to move, thus excluding the non-moving citizen? There are arguments in favour of a broader definition. European citizenship is not only about granting rights to mobile citizens. Article 21 TFEU speaks about the right to move (to another state), but also the right to reside freely within the Union, suggesting that this may include one's own state. A situation of impoverishment, caused by insufficient access to social protection, could make this freedom

[95] See in this regard the movement of self-employed persons and the need for a minimum of harmonization of their social security: P. SCHOUKENS, De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht: de impact van het vrije verkeer van zelfstandigen, Leuven, Acco, 2000, 561ff.

[96] Case C-184/99, *Grzelczyk* [2001] *ECR* I-06193, paras 37-46. ,

meaningless. European citizenship can also be understood in this way as a component of article 34 of the EU Charter and the included right to social assistance ensuring a decent existence for all those who lack sufficient resources.

Although the boundaries of the citizenship articles are still very much debated[97], the ECJ is inclined to adhere to a broader interpretation of the citizenship concept, touching even upon intra-state situations that do not relate to movement between states. This approach can be discerned from recent cases such as *Rottman*[98], *Zambrano*[99] and *Mc Carthy*[100]. And although these cases were mainly dealing with nationality issues, they are considered to have a broader application[101]. In order to give a clear image of this new, still developing, theory on EU citizenship, we briefly highlight the relevant decisions that we find in the aforementioned cases.

In the *Rottman* case[102], the ECJ focused on the status of the citizen of the Union rather than on the free movement principle. The Court underlined that citizenship of the Union is intended to be the fundamental status of nationals of the member states. Even when there is no cross-border movement, a purely national decision that can cause 'denaturalization of the EU citizenship' will fall under the treaty provisions of the EU citizenship.

In the *Zambrano* case[103], the Court decided that article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. The refusal to grant a right of residence to a third national with children, who are EU citizens, has such a depriving effect on the children.

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[97] H. VERSCHUEREN, "Union law and the fight against poverty: which legal instruments", *l.c.*, Antwerpen, Intersentia, 2012, (205), 224-225 and F. VAN OVERMEIREN, *Additionele welvaartsrechten door het Burgerschap van de Unie*, Gent, Faculty of Law, 2011, 525ff.

[98] Case C-135/08, *Rottman* [2010] *ECR* I-01449.

[99] Case C-34/09, *Ruiz Zambrano* [2011].

[100] Case C-434/09, *McCarthy* [2011].

[101] K. LENAERTS, '*Civis europaeus sum'*: van grensoverschrijdende aanknoping naar status van burger van de Unie", *SEW*, 2012, 2-13.

[102] The *Rottman* case is about an Austrian national, Doctor Rottman, who moved to Germany while being prosecuted in Austria. Rottman acquired the German nationality and hence lost his Austrian nationality. However, the German government later on deprived Rottman from the German nationality because he could not disclose that he was being prosecuted in Austria. Moreover, Rottman could not recover his Austrian nationality because he could not deliver a clean criminal record. This caused Rottman to become stateless and therefore lose his EU citizenship.

[103] The *Zambrano* case concerned the right of residence and work of a third non-EU national, Zambrano, whose children were EU citizens. Zambrano, a Colombian asylum seeker, did not succeed in regularizing his situation and could hence not benefit from the provisions of Belgian Law since his children with the Belgian nationality only acquired this nationality because they were not registered in Columbia. The main question for the Court was whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State. One of the most important factors in this case was that the children of Zambrano, who were EU citizens, did never make use of their right of free movement since they always stayed in Belgium.

Finally, in the *McCarthy* case[104], the ECJ made it clear that, in order to be able to speak of a *depriving effect*, the national measure has to cause a *de facto loss* of the most important rights derived from the status of citizen of the Union[105]. In other words, a citizen who has not used his or her right of freedom of movement, can only appeal to the citizenship of the Union when a national measure causes this *de facto loss* of the most important rights linked to the status of citizen of the Union.

Remains then the question what we should understand by such important rights attributed to European citizenship, that they should also be respected internally within the member states? This is indeed open to further discussion, but in addition to the right to stay in the country (as dealt with in the three cases) one can argue that it also encompasses the protection of a person in his fundamental subsistence, so that he or she can remain integrated in society.

Many elements of such an extensive approach are still open to further discussion, especially when applied to social (minimum) rights, not the least on how far European action can reach: does it only relate to the general subsistence schemes? Which persons can be targeted? Is the action to be limited to the assignment of the responsible state(s) or can it go beyond this mere coordination by establishing minima or even guaranteeing benefits itself? However, on the basis of the cases describe above, it becomes clear that actions based on the chapter on citizenship will almost by nature affect all citizens of the EU, especially when they touch upon the fundamental rights and values that are experienced in practice by the citizen in Europe. When the minimum subsistence of European citizens is addressed in this action, a concrete relationship is to be found between EU citizenship on the one hand, and the fight against social exclusion on the other.

[104] The facts are as follow: : miss McCarthy, who was national of the UK and Ireland married a Jamaican, thus third country national, in 2002. In 2004, McCarthy and her husband applied to the Secretary of State in the UK for a residence permit under EU Law (respectively, a Union citizen and the spouse of a Union citizen). The application was refused because McCarthy was not a worker, self-employed person or self-sufficient person. McCarthy appealed against this decision. The ECJ, which had received some preliminary questions of the UK Supreme Court, decided that the refusal by the UK to grant a residence permit did not have a depriving effect on the genuine enjoyment of the substance of the rights conferred by virtue of her status as citizen of the Union because the national measure in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union.

[105] K. LENAERTS, "*Civis europaeus sum:* van grensoverschrijdende aanknoping naar status van burger van de Unie', *Tijdschrift voor Europees en Economisch recht* 2012, 11.

5. CONCLUSION

On the question whether the legal enforceability of measures against social exclusion has increased due to the new approach developed by Europe 2020, in which social exclusion has been linked up with economic-employment guidelines, the answer can be affirmative. The sanctioning tools developed for the economic monitoring process come within the reach of the activities combating social exclusion. This could potentially mean that states would be fined when they persistently do not follow the EU recommendations. However, these evolutions should not be overestimated. The extension holds only insofar as the social exclusion action and the economic guidelines are sufficiently connected. The social exclusion recommendations should have enough economic-financial meaning before we can speak about sanctions that go beyond mere "naming and blaming". So we come to a second answer to our question: the scope of action with regard to social exclusion is now being determined more by the economic-employment monitoring process. Social exclusion is thus understood in the first place as a fight against (structural) unemployment; it should serve in the end the macroeconomic imbalance procedures. Social exclusion actions that go beyond this scope are of course still possible, but from a legal point of view they have a very limited if not non-existent value.

However, when dealing with the scope, one should also keep in mind that the connection between social exclusion and the employment-economic guidelines is intrinsically a double-sided relationship. As social exclusion became an intrinsic part of the Europe 2020 strategy, the employment-economic guidelines should at least be consistent with the objective of combating social exclusion. Employment, economic and/or financial recommendations should not be at odds with the fight against poverty and exclusion. The same goes for the national measures implementing the European recommendations. It is up to the European institutions to adopt such a consistent, double-sided approach when developing the connected socio-economic guidelines. In the same line of thought, one can expect, for the future, a further integration of social exclusion elements in the monitoring tools, such as the MIP or the sanctioning tools enforcing the economic monitoring process. The horizontal social clause (art 9 TEU) and the EU fundamental social right on social exclusion (article 34) demand such a respect. The least one can expect is that EU institutions honour these fundamental clauses within the development of their own actions.

In order to enable this process, it is also advised to codify and structure what already has been developed the last forty years on the European level in the field of social exclusion across legal and non-legal documents. In order to enforce its position, it should be made clear what social exclusion on the European level concretely stands for, how it is measured, and what the existing obligations (already) are. A codification will facilitate the concrete use of social exclusion (measurement) tools in other existing European actions, such as the structural funds. The idea of further conditioning the activities of the ESF in terms of social exclusion is an idea worthy of support, and within the actual exercise of reshaping the European procedures, a compelling idea. But it will only be successful if social exclusion conditions can be made operational, and thus are formulated in concrete (ex-ante and ex-post) terms. Rather than developing new documents or papers, the suggestion is to rely upon the actual *European acquis* in the field of social exclusion.

Developing (new) legal measures in the field of social exclusion is difficult, if not impossible. The legal pathway to do so has been slowly but firmly closed in recent years. Nevertheless, the EU is an

evolving institution, not in the least through the fundamental European principles that function as its backbone. A principle that has been developing rather fundamentally in the last few years is related to the guarantee of European citizenship. It turns out that one of the missing elements to have the principle completed has to do with access to social (minimum) subsistence benefits and thus indirectly with the fight against social exclusion. If Europe is serious about the final development of a true EU citizenship, it should envisage measures regarding access to social minimum subsistence for all Europeans. In doing so, the articles on European citizenship granting competence in the field of social security (art. 21 TFEU) could be used as a concrete tool for the development of legal measures in the field of social exclusion.

With this contribution we have focused on possible legal pathways to strengthen the fight against social exclusion at European level. We remained within the current competences that have been granted so far to the EU. It remains to be seen whether effective use will be made of these alternatives. It depends upon political will and finding sufficient consensus among the European partners. With a financial-economic crisis that is pushing states to the limits of their capabilities in fighting poverty, the sense of urgency to act is present. Hopefully, this contribution may stimulate genuine action in the fight against social exclusion.

6. MAIN REFERENCES

CANTILLON, B., VERSCHUEREN, H. and PLOSCAR, P., *Social inclusion and social protection in the EU: Interactions between law and policy,* Antwerpen, Intersentia, 2012, 234p.;

DEFOSSEZ, A., "La consécration de la Charte des droits fondamentaux", *Rev. Dr. ULg*, 2008, 233-248;

DESOMER, M.,, "Het Handvest van de grondrechten van de Europese Unie", *T.B.P.*, 2001, 671-687;

DEWULF, S., "Europese grondrechten: De plaats van fundamentele rechten en vrijheden in de vernieuwde Europese Unie", *R.W.*, 2008-2009, 1522-1540;

LENAERTS, K., "*Civis europaeus sum:* van grensoverschrijdende aanknoping naar status van burger van de Unie', *Tijdschrift voor Europees en Economisch recht,* 2012, 2-13;

LENAERTS, K. and VAN NUFFEL, P., *European Union Law,* London, Sweet & Maxwell, 2011, 1334p;.

NATALI, D., "The Lisbon strategy, Europe 2020 and the crisis in between", E. MARLIER, D. NATALI, a.o. (eds.), *Europe 2020: Towards a More Social EU*, Brussels, 2010, Peter Lang, 93-113;

SCHOUKENS, P., "How the European Union keeps the social welfare debate on track: a lawyer's view of the EU instruments aimed at combating social exclusion", *European Journal of Social Security*, 2002, Volume 4/2, 136-150;

VANHERCKE, B., "Is 'The Social Dimension of Europe 2020' an Oxymoron"?, paper presented at the CELLS conference on The European Union's economic and social model – still viable in a global crisis? Leeds, 8-9 December 2011;

VAN OVERMEIREN, F., *Additionele Welvaartsrechten door het Burgerschap van de Unie*, Gent, Faculteit Rechtsgeleerdheid, 2010-2011, 732p.