THE CHARTER OF FUNDAMENTAL RIGHTS AS A SOCIAL RIGHTS CHARTER

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ABSTRACT

The promotion and protection of social rights within the legal order of the European Union was always considered with suspicion, not only because of the doubts concerning the status of such rights -- and in particular concerning their justiciability --, but also because of the potential impacts of the recognition of social rights at EU level on the allocation of competences between the EU and its Member States, and because of the original understanding of European integration in the 1957 Treaty of Rome establishing the European Economic Community, which to a large extent was premised on the decoupling between the economic and the social spheres in the European project. This paper examines the impacts on this debate of the proclamation in 2000 of the Charter of Fundamental Rights, and of the later incorporation of the Charter in the European Treaties.

The Charter recognizes social rights as part of the fundamental rights acquis of the Union. But the status of social rights in the Charter also reflects the fears that have always imposed limitations to such recognition. In order to illustrate how, this paper replaces the social provisions of the Charter of Fundamental Rights within the broader context of social provisions in the constitutional architecture of the EU, in order to assess its added value. It first recalls the conditions under which the Charter of Fundamental Rights was drafted, and how the social provisions of the Charter were inspired by the existing acquis of social rights, both in EU law and in regional or international human rights instruments (2). Next, it assesses the impact of the Charter on the working methods of the European Commission and the Council of the EU (3). It then turns to the implications of the constitutionalization of the Charter by the Treaty of Lisbon (4). It examines in this regard a number of questions that are crucial to assess the contribution of the Charter to Social Europe: they include the distinction between 'rights' and 'principles' presupposed in the amended version of the Charter; the positive duties that may be imposed on the basis of the Charter; or the role of the Charter in influencing the exercise by the institutions of the EU of the competences they have been attributed. A brief conclusion is offered (5).

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1. Introduction

The integration of social rights in the constitutional structure of the European Union faces three challenges. First, social rights are generally perceived to be different from civil and political rights, in that they would impose on States positive obligations -- obligations to take measures -- and would be particularly costly to realize. The idea was already present in the Universal Declaration of Human Rights, which the United Nations General Assembly adopted in 1948, placing the promotion and protection of human rights at the heart of the post-Second World War reconstruction: the UDHR anticipated that the realization of economic and social rights was to be achieved "through national effort and international cooperation and in accordance with the organization and resources of each State", suggesting therefore that, in contrast to other human rights, social rights did not impose "immediate" obligations, and therefore could not be enforced through normal judicial means.[1] This approach was further confirmed when, in 1966, the International Covenant on Economic, Social and Cultural Rights was adopted to implement in the form of a binding international treaty the promises of the Declaration.[2] The Covenant commited the States parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [...] Covenant by all appropriate means, including particularly the adoption of legislative measures".[3] To many commentators, this simply confirmed the marginalization of social rights: Brownlie, a leading international law publicist, described the Covenant as "programmatic and promotional" in the third edition of his *Principles of Public International Law*, published in 1979[4]; a law and development scholar writing in 1984 remarked that though the International Covenant on Economic, Social and Cultural Rights "speaks in the language of rights, [it] refers to the realities of programs"[5]; and jurists such as the Belgian Mark Bossuyt or the Dutch E.W. Vierdag voiced their scepticism as regards the ability of courts to supervise compliance with economic, social and cultural rights, which they saw as of a fundamentally distinct nature than civil and political rights.[6]

On the European continent, this downgrading of social rights was expressed by the parallel adoption of the European Convention on Human Rights in 1950 and, ten years later, of a European Social Charter -- subject not to supervision by an international court, but by a weak form of monitoring through independent experts whose views were to be filtered by representatives of governments. Sixty years later, we have still not fully moved beyond this initial suspicion that social rights are not fully enforceable rights[7]: the EU Charter of Fundamental Rights itself, for all its claims to be a "modern"

[1] These carefully crafted terms appear in Article 22 of the Declaration, which defines the right to social security as the first of the social rights it lists. See GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948) (Art. 22).
[2] G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.
[3] Art. 2(1) of the International Covenant on Economic, Social and Cultural Rights.
[4] Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1979), at 572-573.
[5] David Trubek, "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984): 205-271, at 231.
[6] Mark Bossuyt, "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels", *Revue des droits de l'homme*, vol. 9 (1978): 69; E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, vol. 9 (1978): 69-105. There were exceptions, of course: G.J.H. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views", in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Netherlands Institute of Human Rights (SIM), Dordrecht: Martinus Nijhoff Publ., 1984): 97-110.
[7] See the Report of the Special Rapporteur on extreme poverty and human rights, Mr Philip Alston, to the 32nd session of the Human Rights Council (A/HRC/32/31) (28 April 2016) (highlighting how, in practice, economic, social and cultural rights have been marginalized in comparison to civil and political rights, and proposing a recognition, institutionalization and accountability (RIA) framework -- focusing primary attention on ensuring recognition of the rights, institutional support for

instrument at the vanguard of human rights instruments, still embodies the view that, to the extent that social rights require from States that they do certain things -- that they guarantee access to certain goods or provide certain services in the areas of education, housing, healthcare or social protection --, they cannot be treated as rights that merely impose on States that they abstain from certain interferences.

The two other challenges are specific to the construction of the European Union. First, if we see social rights as imposing on States certain positive duties, does it not follow that, by committing the EU to comply with such rights, we would in fact be transferring further powers to the EU? This fear -- that the pledge to comply with social rights would lead to an expansion of the competences of the EU "through the back door" -- played a major role in the negotiations that led to the adoption of the Charter of Fundamental Rights. Second, the original understanding of European integration in the 1957 Treaty of Rome establishing the European Economic Community was premised on the *decoupling* between the economic and the social spheres in the European project. The European Union was tasked with establishing an internal market, characterized by the protection of economic freedoms and the prohibition of distortions of competition: these areas were thus removed from politics, to be made supranational. The protection of social rights, however (the Welfare State) remained in the hands of the Member States, and thus subject to political contests within at the national level: 'Europe was conceived according to principles of a dual polity. Its 'economic constitution' was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational raison d'être. Social policy was treated as a categorically distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national'.[8]

For all these reasons, social rights only could penetrate the legal order of the EU late, once it became clear that the project of the establishment of the internal market would lose its legitimacy unless it comprised a "social dimension"; and they did so only under strict conditions, to ensure they would not disrupt the project of European integration. The aim of this chapter is to show how the Charter of Fundamental Rights both recognizes social rights as part of the fundamental rights *acquis* of the Union, and betrays the fears that have always imposed limitations to such recognition. It replaces the social provisions of the Charter within the broader context of social provisions in the constitutional architecture of the EU, in order to assess the added value of the Charter. It first recalls the conditions under which the Charter of Fundamental Rights was drafted, and how the social provisions of the Charter were inspired by the existing *acquis* of social rights, both in EU law and in regional or international human rights instruments (2). Next, it assesses the impact of the Charter on the working methods of the European Commission and the Council of the EU (3). It then turns to the implications of the constitutionalization of the Charter by the Treaty of Lisbon (4). It examines in this regard a number of questions that are crucial to assess the contribution of the Charter to Social Europe: they include the distinction between 'rights' and 'principles' presupposed in the amended version of the Charter; the positive duties that may be imposed on the basis of the Charter; or the role of the Charter in influencing the exercise by the institutions of the EU of the competences they have been attributed. A brief conclusion is offered (5).

2. The genesis of fundamental social rights in the Charter of Fundamental Rights

2.1. The antecedents

The adoption of the European Union Charter of Fundamental Rights at the Nice Summit of December 2000 marked the conclusion of a process which was at least ten years in the making. A first significant step towards a Bill of Rights for the EU was taken by the European Parliament in 1989. Building on the new legitimacy it had acquired after it was first elected through universal suffrage in 1979 – something which had already emboldened it to adopt the proposal for a Draft Treaty establishing the European

their promotion and accountability mechanisms for their implementation -- as a means to overcome the neglect of economic, social and cultural rights as human rights).

[8] Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', *European Law Journal*, vol. 15, n° 1 (2009), p 1-19, at p. 5.

Union in 1984, at the initiative in particular of the European federalist Altiero Spinelli –, the European Parliament adopted on 12 April 1989 a non-binding Declaration of Fundamental Rights and Freedoms which, pending the adoption of a binding instrument, it presented as a restatement of 'the legal principles already accepted by the Community'.[9] The document was seen as supplementing the Draft Treaty establishing the European Union. But is was also, more importantly, a message about the need to strengthen the legitimacy of the further steps towards European integration, at a time when (following the adoption of the Single European Act in 1986) a significant effort was pursued to "complete" the single market by the deadline of 31 December 1992.

The Declaration it adopted in 1989 contained a full list of fundamental rights, including not only the classic civil and political rights listed in the European Convention on Human Rights, but also economic and social rights such as the freedom to choose an occupation (article 12), the right to just working conditions and to health and safety in the workplace as well as 'a level of remuneration which makes it possible to lead a decent life' (article 13), the right to collective action and to collective bargaining (article 14), and the right to education (article 16). It included a provision on 'social welfare' recognizing the right of everyone to 'benefit from all measures enabling them to enjoy the best possible state of health', the right to social security, the right to social and medical assistance, and for 'those who, through no fault of their own, are unable to house themselves adequately', 'the right to assistance in this respect from the appropriate public authorities' (article 15). It also made reference to the need for Community policy to take into account 'the preservation, protection and improvement of the quality of the environment', and 'the protection of consumers and users against the risks of damage to their health and safety and against unfair commercial transactions', two objectives for the attainment of which the Community institutions were required to adopt all the necessary measures (article 24). A provision on the field of application of the Declaration stated that the rights and freedoms it listed were to 'afford protection for every citizen in the field of application of Community law' (article 25).

Altogether, the Declaration of Fundamental Rights and Freedoms was a solid document, written in clear and precise language, and providing a generally sound summary of the *acquis* of the European Community in the field of fundamental rights. The European Parliament failed, however, to convince the Council of Ministers and the European Commission to join in adopting the Declaration or pledging to abide by the rights it listed. The lack of enthusiasm of the European Commission may be attributable to the fact that the Declaration was adopted by the European Parliament at the time the Commission was preparing a text that would be presented to the Strasbourg European Council of December 1989, under the name of the Community Charter of Fundamental Social Rights for Workers : a first draft of this 'Charter of Fundamental Social Rights', as it was initially called, was presented on 30 May 1989, only weeks after the Parliament's vote on its Declaration of Fundamental Rights and Freedoms.[10] The European Commission presented this document as a follow-up to the June 1988 Hanover Summit, where the European Council had affirmed the importance of the social aspects of the single market. It is likely that, at a time when the Commission was pressing for the adoption of a large number of measures to the adopted in order to achieve the single European market by the deadline of 31 December 1992, it considered that securing agreement on the Charter on Fundamental Social Rights should be the priority, and that the proposal of the European Parliament for a broader Declaration on Fundamental Rights and Freedoms was an unnecessary distraction from that objective. It may also be assumed that (even apart from the resistance of the United Kingdom, at the time, to any initiative that might strengthen the federal nature of the European Community) the governments of the Member States were not particularly keen to endorse a text which they had neither requested nor called for, since this would have created the impression that the European Parliament now was to define the speed and direction of integration. None of these reactions were based on the content of the Declaration of Fundamental Rights and Freedoms itself, or on an assessment of its quality as a legal document. But they were sufficient to delay, by ten years, the adoption of a Bill of Rights specific to the European Union.

The issue of a catalogue of fundamental rights was again placed on the European agenda in the late

[9] OJ C 120 of 16.5.1989, p. 51.
[10] Community Charter of Fundamental Social Rights. Preliminary Draft, COM (89) 248 final, 30 May 1989.

1990s, this time primarily at the initiative of the European Commission, although the European Council played a major role to give the process of preparation of the document, at an early stage, the political legitimacy it required. In early 1995, immediately after Delors left the presidency of the European Commission, the Directorate-General for Employment, Industrial Relations and Social Affairs of the European Commission appointed a Comité des Sages to prepare a report on the future of the protection of fundamental rights in the European Union. The Comité was headed by Maria de Lourdes Pintasilgo, a former Prime Minister of Portugal in 1979-1980 – the only woman to have held this post – and member of the European Parliament in 1987-1989, who had earned a high reputation in the defence of the Welfare State and social rights. The rapporteur to the group was Jean-Baptiste de Foucauld, Commissaire au Plan in France until 1995, a longtime collaborator of Jacques Delors, and a specialist of questions related to social solidarity and unemployment. The composition of the group reflected the intent behind its appointment : the hope of the Commission was that the Comité des Sages would help to provide a new foundation to the protection of social rights in the EU. The final report, which the Comité des Sages presented in March 1996, concluded that a series of fundamental civil, political and social rights should be proclaimed at EU level, and incorporated into the European Treaties.[11] It treated social rights as an integral component of the catalogue of rights to be adopted by the EU, recognizing the interdependence and indivisibility of all fundamental rights.

Initially, nothing came out of these proposals: indeed, they were studiously ignored in the intergovermental conference launched on 29 March 1996, which led to the adoption of the Treaty of Amsterdam, signed on 2 October 1997. In February 1999 however, just weeks before the Treaty of Amsterdam entered into force, an Expert Group on Fundamental Rights published a report called "Affirming fundamental rights in the European Union - Time to act". The report had been commissioned by the European Commission's General Directorate on Employment, Industrial Relations and Social Affairs, as a follow-up to the 1996 report of the Comité des Sages. It was the result of the work of a group of academic experts chaired by professor Spiros Simitis, a Greek professor of law teaching at Frankfurt University and a specialist of employment law. The mandate of the group was to review the status of fundamental social rights in the treaties, following the adoption of the Treaty of Amsterdam, and to identify possible lacunae, giving special consideration to the possible inclusion of a Bill of Rights in the next revision of the Treaties.

The German presidency of the Union seized the opportunity. After all, it was the German Federal Constitutional Court (*Bundesverfassungsgericht*) that had been insisting on the need for the EU to adopt a catalogue of rights in order to confirm the case-law of the Court of Justice in the area of fundamental rights and thus ensure there would be no retreat from that case-law; and the Greens, who were then in a coalition with the Social-democrats under Chancelor Schröder, had made this one of their priorities in their electoral program. The Cologne European Council of 3-4 June 1999 provided the opportunity. There, the Heads of State and Governments took the view that, "at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident".[12] Annex IV of the Conclusions presented the modalities according to which the Charter should be drafted. It specified that: "In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union". The stage was set for the debate that would take place between December 1999 and September 2000, within the body (soon renamed "Convention") tasked with preparing the Charter.

2.2. Social rights in the Charter

What were these social rights that "do not merely establish objectives for action by the Union", as

[11] For a Europe of civic and social rights *report, Brussels, October 1995-February 1996*, by the Comité des sages chaired by Maria de Lourdes Pintasilgo ; rapporteur Jean-Baptiste de Foucauld, Luxembourg, Office for the Official Publications of the European Union, 1996**.**

[12] Cologne European Council, 3-4 June 1999, Conclusions of the Presidency, para. 44.

specified in the mandate of the European Council? Of all the questions the members of the Convention faced during the preparation of the Charter, that was both the most divisive and, from the technical point of view, the most delicate.[13] The employers organisations, arguing that social rights required positive action from governments, vehemently opposed the inclusion of such rights in the Charter.[14] Lord Goldsmith, the Attorney General of the UK Government who was representing the British executive in the Convention, was openly sceptic. For the members of the Convention who were in favor of an ambitious approach to social rights, the challenge was to convince the other members that social rights could be more than purely "programmatic" provisions, even where the objectives they were setting were too vague to be expressed as self-standing "rights" that courts could guarantee in the absence of any implementation measure.

It is Guy Braibant, a member of the French Conseil d'Etat who represented the French Executive in the Convention, who formulated the compromise solution that allowed to overcome the reservations expressed by some members of the Convention concerning the inclusion of social rights in the document. In a first "contribution on social rights" of 2 May 2000, Braibant had requested that the Charter refer to the right to information of workers, in particular in cases of collective dismissals, to the right of collective bargaining, to the right to a weekly holiday and to paid holidays, to the right to strike, to the right to housing, to rights linked to the protection of the environment and to the protection of consumers, and to the right to services of general economic interest.[15] He referred to a decision of the French Constitutional Council adopted on 19 January 1995, which -- on the basis of the right to human dignity -- had recognized "the possibility for every person to have a decent housing" as as an "objective of constitutional nature", finding that "it falls to both the legislator and the government to determine, consistent with their respective competences, the modalities of implementation of this objective". On 19 May, a second contribution of Guy Braibant reaffirmed the nature of economic and social rights as "fundamental rights", "even though the concrete implementation of some of these rights often requires the intervention of an intermediary text".[16] Although a right such as the right to housing or the right to a healthy environment could require implementation measures to be given concrete meaning, he noted, it can "be opposed to an action that would directly run counter [to such a right]"; it can be relied on by a court "when it must combine different fundamental rights between them"; finally, "when concrete implementation measures have been adopted, the right can be opposed to acts that would challenge the core content of such measures". The significance of social rights thus understood is thus that, though the full implications can only be defined by further implementing acts, they allow the judge to oppose measures that are clearly inconsistent with the general objective that they set; and that, once certain measures of implementation have been taken, they can be relied upon to oppose retrogressive actions challenging such measures.

The approach of social rights in terms of "normative justiciability" as proposed by G. Braibant convinced another influential member of the Convention, Jürgen Meyer, a representative within the German Bundestag: the text they presented jointly in June 2000 was decisive in shifting the balance of forces within the Convention.[17] In September 2000, as the Convention was finalizing its work, the European Economic and Social Committee adopted an opinion summarizing in the following terms the consensus that had been reached[18]: "the affirmation of fundamental social rights in the EU Charter of Fundamental Rights", it stated, "does not prejudge the identity of the issuer of the act - whether European Union

[13] For general discussions on the work of the Convention, see G. de Burca, "The Drafting of the European Union Charter of Fundamental Rights", (2001) 26 European Law Review 126; G. de Kerchove and Cl. Ladenburger, "Le point de vue d'acteurs de la Convention", in J.-Y. Carlier and O. De Schutter (eds), La Charte des droits fondamentaux (Bruxelles, Bruylant, 2002); Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", 2001 Common Market Law Review 1201.
[14] CBI submission to the Convention on the Charter (12 April 2000), CHARTE 4226/00 CONTRIB 101.
[15] CHARTE 4280/00, CONTRIB 153 (2 May 2000).
[16] CHARTE 4322/00, CONTRIB 188 (19 May 2000).
[17] The text was referred to informally as the "Braibant-Meyer compromise" -- a rather strange expression since, as noted by G. Braibant in his short personal account of the drafting of the Charter, the position in fact expressed a complete agreement between Mr Meyer and himself, rather than a "compromise" (G. Braibant, *La Charte des droits fondamentaux de l'Union européenne* (Paris, Seuil, 2001), p. 45).
[18] Opinion of the Economic and Social Committee on "Towards an EU Charter of Fundamental Rights", CES 1005/200, SOC/013 (20 September 2000).

institution or State authority - against which claims for enjoyment of a right or respect of a principle may be lodged":

> The inclusion of social rights and principles in the European Union Charter of Fundamental Rights - in accordance with the Cologne mandate - does not in any way invest the European Community or the European Union with responsibilities which it did not already hold. It simply signifies that acts issued by the EU institutions or State acts adopted within the scope of Community law must :
> − respect the social rights set out in the Charter;
> − not constitute measures which would lessen the degree to which principles have already been put into effect;
> − and in particular respect the requirement for non-discrimination, particularly with regard to the implementation of social rights.[19]

When, during the Convention on the Future of Europe chaired by the former French President V. Giscard d'Estaing, various "adaptations" were introduced in the Charter in order to allow for its inclusion in the Treaties, Article 52 of the Charter was completed to include a paragraph 5 to clarify that:

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

This paragraph correctly confirms the consensus that was arrived at when the Charter was drafted, during the Summer of 2000. Therefore, it may be going too far to state that the insertion of Article 52(5) in the Charter "represents an attempt to re-open the substance of the Charter as agreed by the previous Convention by consensus",[20] except of course insofar as the "consensus" in question included an agreement to remain vague about the exact implications of certain social rights and, in particular, about the conditions according to which it could be invoked before courts. Before examining under which conditions the Charter was constitutionalized, however, and how such constitutionalization may affect the position of social rights in the European Union's legal order, we must turn our attention to the immediate consequences of the initial proclamation of the Charter in December 2000.

3. The impact of the Charter on the practice of the institutions

3.1. The European Commission

Two immediate consequences followed the proclamation of the Charter in the practice of the European Commission. First, shortly after the Charter of Fundamental Rights was proclaimed, the Commission pledged to systematically verify the compatibility of its legislative proposals with the Charter at an early stage.[21] Later, in 2005, it clarified the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.[22] In 2009, it published a Report containing an appraisal of this methodology and announcing a range of improvements.[23] Although the approach of

[19] Id., para. 3.1.3.
[20] G. de Burca, "Fundamental Rights and Citizenship", in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, Florence, 2003, pp. 11-44, at p. 24.
[21] SEC(2001) 380/3.
[22] Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*, COM(2005) 172 final of 27.4.2005.
[23] See Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, COM(2009) 205 final of 29.4.2009.

the Commission could be further strengthened,[24] it already may serve to reassure the Court of Justice that all precautions have been taken to ensure an adequate assessment of the compatibility of legislative proposals with the requirements of the Charter of Fundamental Rights, so that the Court may content itself with a relatively low level of scrutiny.[25]

A second consequence of the proclamation of the Charter was to influence the practice of impact assessments accompanying the legislative proposals of the Commission. In the area of social rights, such impact assessments on the basis of the rights of the Charter may be an even more important tool than compatibility reviews. Indeed, if properly implemented, impact assessments should allow to assess whether a particular initiative shall support the fulfilment or full realization of the fundamental rights affected, or instead create obstacles to such fulfilment. Such an assessment however should not necessarily lead to the conclusion that, in the latter situation, the right is violated: not any measure that may be seen as retrogressive is a violation of EU law. Rather, impact assessments serve to guide the decision-maker (in the ordinary legislative procedure, the Parliament and the Council) as to the full range of impacts the legislative proposal submitted may entail. They are distinct from the strictly legal examination of whether or not a legislative proposal complies with the Charter. They do, however, serve to improve accountability, and to ensure that social impacts are systematically taken into account in law- and policy-making.

Impact assessments is a standard practice since 2002.[26] They were improved in recent years in order to better take into account the requirements of fundamental rights. The guidelines for the preparation of impact assessments presented in 2005 already paid greater attention to the potential effects of different policy options on the guarantees listed in the Charter.[27] The inclusion of fundamental rights in impact assessments, however, did not lead to modify the basic structure of such assessments, which still rely on a division between economic, social and environmental impacts. Despite requests expressed in this regard by the Parliament,[28] the Commission has repeatedly stated that it was unwilling to perform *separate* human rights impact assessments, distinct from the assessment of economic, social and environmental impacts. This so-called "integrated" approach allows fundamental rights impacts to be factored into a broader set of considerations, making it possible to compensate certain negative impacts (such as, for instance, a narrowing down of civil liberties or of the provision of certain public services) by positive impacts at other levels (including, e.g., on economic growth and social cohesion), in the overall assessment presented to decision-makers. This is a defensible position, however it also is a strong argument for not allowing impact assessments, thus understood, to become a substitute for rigorous compatibility checks based on legal analysis. The Commission notes in this regard, correctly in the view of this author, that 'Impact Assessment does not, and cannot, operate as the fundamental rights check. It cannot be a substitute for legal control. In the end result, fundamental rights proofing can only be performed via a legal assessment based on a crystallised draft legislative text. However, while not being, in itself, the legal control for fundamental rights compliance, the Commission recognises that the Impact

[24] See Israel de Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission', *European Law Review*, vol. 37, Issue 4 (2012), pp. 397-418.

[25] See, for instance**,** judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, EU:C:2010:662, C-92/09 and C-93/09**,** esp. para. 81 (in which the Court concludes that the interference with private life was disproportionate, primarily on the basis that in adopting the challenged regulation, it did not appear that 'the Council and the Commission *took into consideration methods of publishing information on the beneficiaries concerned* which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular').

[26] Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

[27] See SEC(2005)791, 15.6.2005.

[28] European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring (2005/2169(INI)), OP 11 (where the Parliament 'Calls on the Commission to think over its decision to divide its considerations on fundamental rights into the current three categories in its impact assessment - economic, social and environmental effects - and to create a specific category entitled 'Effects on fundamental rights', to ensure that all aspects of fundamental rights are considered').

Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals'.[29]

The role of fundamental rights in impact assessments as practiced by the Commission has been gradually enhanced. In 2009 and 2011, successive Staff Working Papers of the Commission have made the role of fundamental rights in impact assessments increasingly more explicit.[30] The guidance provided to the Commission services by these documents applies only to the legislative proposals submitted by the Commission. In contrast, the tools developed as part of the "Better Regulation" agenda apply to all initiatives, whether legislative or regulatory or whether they consist in the introduction of new policies or in amendments to existing policies. Fundamental rights are now better integrated in these tools. They are explicitly taken into account in the Better Regulation "Toolbox",[31] in which they constitute tool # 28,[32] which itself complements the above-mentioned operational guidance on taking account of Fundamental Rights in Commission IAs.[33] The methodology described in the Toolbox should ensure that a series of questions are asked concerning the nature of the rights at stake (whether they are absolute rights or rights subject to limitations), the acceptability of certain restrictions (whether they pursue a legitimate aim by means that are both necessary and proportionate), and the need to reconcile conflicting fundamental rights. Moreover, since not all services of the Commission can be expected to be fully knowledgeable about fundamental rights issues and thus to be equipped to answer these questions in the more complex cases, the guidelines explicitly suggest to seek advice from the Legal Service of the Commission (SJ) or from DG Justice and Consumers (JUST) (or DG Employment, Social Affairs and Inclusion (EMPL) as regards the rights of persons with disabilities).

The specific position of the Legal Service of the Commission may be underlined in this regard. When Mr Clemens Ladenburger -- then, as now, a member of the Legal Service -- was called to answer questions from the United Kingdom's House of Lords European Union Committee concerning the "human rights proofing" of EU legislation, he went at great lengths to reassure the Lords that the Legal Service of the Commission, the main administration in charge of such "proofing", does possess a certain degree of independence: "while it is, of course, an internal service placed under the authority of the President, [the Legal Service] does perform a special role within the Commission. It is not a political service, it is an independent service and it is its task, though in purely internal dealings and, of course, not through its advice given in public to function as an independent reviser of fundamental rights questions."[34] Thus, while the College of Commissioners still takes final political responsibility for the text of legislative proposals, the Commission's Legal Service is requested to provide a legal assessment untainted by considerations of political expediency, providing an important safeguard against the risk that fundamental rights will be ignored or their requirements downplayed where competing considerations are seen to have a greater weight. The same could be said of the Legal Services of the Council the institution we now turn to.

3.2. The Council of the EU

The Council was slower to draw the full implications from the proclamation of the Charter in December 2000. Only after the Charter formally acquired constitutional rank did the Council adopt guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies: the original guidelines were approved by the Committee of Permanent Representatives in May

[29] Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, cited above, p. 6.
[30] See, respectively, SEC(2009) 92 of 15.1.2009 and SEC(2011) 567 final of 6.5.2011. The latter document is a Commission Staff Working Paper providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.
[31] See https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en (last consulted on June 22nd, 2018).
[32] See https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-28_en_0.pdf (last consulted on June 22nd, 2018).
[33] See the 2011 Commission Staff Working Paper providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, mentioned above, fn. 29.

2011[35] following a request of the Justice and Home Affairs Council that "short but pragmatic and methodological guidelines" be prepared to guide the Council bodies in the negotiation of legislative proposals.[36] The guidelines were updated in 2014 under the responsibility of the Council's Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons.[37] The new version of the guidelines appropriately warn that, in order to take into account the case-law of the Court of Justice, the Council and its preparatory bodies (working groups) 'shall carefully consider any possible interference with fundamental rights and freedoms and shall be able to demonstrate that they have explored alternative ways to attain the pursued objective which would be less restrictive of the right or freedom in question'.[38] They include a "fundamental rights check-list" almost indistinguishable from the checklist relied on by the Commission.

It is also perhaps noteworthy that, recognizing that it may be difficult in some cases to assess whether a particular amendment to a legislative proposal is compatible with the requirements of the Charter, the guidelines recall the need to use the expertise of the Fundamental Rights Agency, which is authorized under its Founding Regulation to formulate and publish conclusions and opinions on specific thematic topics, *inter alia* at the request of the Council.[39] This is in line with the Conclusions adopted by the European Council at its meeting of 26 and 27 June 2014, where it noted that, among other measures, greater reliance on Eurojust and on the Agency for Fundamental Rights could support "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States", by further enhancing "mutual trust in one another's justice systems".[40] It is odd however, that whereas the suggestion that the Fundamental Rights Agency's expertise could be relied on more systematically is referred to in the methodology to assess whether a particular proposal or amendment is compatible with the Charter of Fundamental Rights (in part III of the methodology), the Agency is not referred to where steps are suggested 'in case of doubt' (in part IV): there, reference is made only the Legal Service of the Council, to the experts at national level, or to the FREMP Working Party of the Council or other preparatory bodies of the Council specializing in certain fundamental rights.

4. The constitutionalization of the Charter

4.1. The hesitations of the Court of Justice

Despite the strong legitimacy of the Charter of Fundamental Rights and its subsequent constitutionalization by the Treaty of Lisbon, the Court of Justice has been hesitant to give full effect to the provisions included in the "Solidarity" title of the Charter. Its uneasiness was illustrated early on by its attempt to craft an intermediate category to overcome an excessively rigid distinction between social "rights" and "principles". A first indicator of this approach was provided in the case of *Dominguez*, on which the Court delivered a judgment on 24 January 2012. The Court was asked by the French Court of Cassation whether Article 7(1) of the Working Time Directive (Directive 2003/88, codifying what was initially Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time[41]) precluded national provisions or practices, such as those of the French Labour Code, which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period. The Court of Justice answered in the affirmative, noting that "the entitlement of every worker to paid annual leave

[35] Council of the EU doc. 10140/11.
[36] Justice and Home Affairs Council, Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union adopted at the meeting of 24-25 February 2011.
[37] For the revised guidelines, see Council of the EU doc. 16957/14 (16 Dec. 2014) (FREMP 228, JAI 1018, COHOM 182, JURINFO 58, JUSTCIV 327), reissued as doc. 5377/15.
[38] Id., p. 4.
[39] See Art. 4(1)(d) of Council Regulation (EC) No. 168/2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1
[40] EUCO 79/14, para. 11 of the Conclusions.
[41] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9), codifying Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

must be regarded as *a particularly important principle of European Union social law* from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by [the Working Time Directive]" (emphasis added).[42] It is striking that, although the Charter of Fundamental Rights contains an explicit provision on paid leave (Article 31(2) of the Charter provides that 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'), which Advocate General Verica Trstenjak discussed at some length in her opinion (though excluding that this right could apply directly in inter-individual relationships)[43], the Court prefers simply to reiterate the formula which appeared in 2001 in the case of *BECTU*[44]-- referring to the right to paid leave as a "particularly important principle of European Union social law", rather than as a fundamental right --, without even citing the Charter. The facts of the case, of course, which took place in 2003-2005, pre-dated the entry into force of the Treaty of Lisbon, but this should not have been a decisive argument against using the Charter as an aid in the interpretation of the requirements of the requirements of the Working Time Directive: as AG Trstenjak noted, and as has been the practice of the Court of Justice since 2007,[45] the Charter could have been used at least "as an aid to interpretation, especially as it reinforces those rights that are enshrined in many legal instruments and derive from constitutional traditions common to the Member States, so that they can ultimately be considered an expression of the European scale of values".[46] This, the Court of Justice was obviously reluctant to do.

The case of *European Commission v. Guido Strack* provides another illustration. This case concerned a former official of the Commission who complained that he had been unable to carry over to 2005 38.5 days of leave not taken in 2004 when he was on sick leave. The Court took the view that "the entitlement of every worker to paid annual leave must be regarded as *a particularly important principle of European Union social law*, affirmed by Article 31(2) of the Charter, which the first subparagraph of Article 6(1) TEU recognises as having the same legal value as the Treaties" (emphasis added): it found that the General Court had erred by failing to interpret the Staff Regulations so as to ensure they would be consistent with "the right to paid annual leave as *a principle of the social law of the European Union* now affirmed by Article 31(2) of the Charter" (same).[47] The precise implications of the right to paid annual leave cannot be identified on the basis of Article 31(2) of the Charter alone. The Court however notes that, in accordance with the Explanations to the Charter, this provision should be read in accordance with the Working Time Directive which in part inspired the formulation of that right in the Charter[48]; and that the "principle of European Union social law" embodied in that provision of the Charter may therefore serve to interpret the Staff Regulations at issue. The reluctance of the Court to discuss the implications of the right to an annual paid leave as a fundamental right are perhaps even more striking here, since (in contrast to *Dominguez*) the Charter of Fundamental Rights is explicitly referred to.

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[42] Judgment of 24 January 2012, *Dominguez*, C-282/10 (EU:C:2011:559), para. 16.
[43] See paras. 71-83 of the opinion delivered on 8 September 2011.
[44] See Case C-173/99 [2001] ECR I-4881, para. 43.
[45] The Court of Justice referred to the Charter of Fundamental Rights for the first time in a judgment of 27 June 2006, concerning an action for annulment filed by the European Parliament against the 2003 Directive on the right to family reunification (Directive 2003/86/EC): see Case C-540/03 Parliament v Council [2006] I-5769, para. 38. However, the reference to the Charter in that case still has a rather ambiguous status, since the Charter was referred to by the Preamble of the instrument (the Family Reunification Directive), against which the application was filed. It is only in 2007 that the Court referred to the Charter of Fundamental Rights in other situations, ie, even in the absence of any explicit reference to the Charter in secondary legislation: see Case C-432/03 Ubinet [2007] ECR I-2271 [37]; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 [43]–[44]; Case C-341/05, *Laval un Partneri* [2007] ECR I-11767, paras. 90-91; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351, para. 335.
[46] Para. 73 of the opinion.
[47] Case C-579/12 RX-II, *European Commission v. Strack*, judgment of 19 September 2013 (EU:C:2013:570), paras. 26 and 46.
[48] See Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). Although the explanations to the Charter mention that Article 31(2) of the Charter is based on Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), Directive 2003/88/EC in effect codifies Directive 93/104/EC: the Court notes that "Article 7 of Directive 2003/88 concerning the right to paid annual leave reproduces the terms of Article 7 of Directive 93/104 exactly" (para. 28).

4.2. Social rights and "principles": the "Solidarity rights" title

These hesitations are understandable: they reflect the conflicting messages that were sent when the Charter of Fundamental Rights was initially drafted, and subsequently "adapted" in order to be integrated as part of the European treaties. It has already been mentioned above that, as part of the compromise allowing for the integration of the Charter of Fundamental Rights in the EU Treaty -- a compromise struck during the constitutional convention of 2002-2003 and confirmed in the intergovernmental conference that led to the adoption of the Treaty of Lisbon --, article 52 of the Charter was amended in order to explicitly describe the specific form of justiciability attached to the "principles" contained in the Charter. The compromise, it was recalled, merely made explicit what had hitherto remained implicit, confirming the approach proposed by G. Braibant during the drafting of the Charter. For the future life of social rights included in the Charter, a more serious challenge has its source in Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, appended to the Treaty of Lisbon.[49] This so-called "opt-out" protocol (branded as such when it sold the public opinion both in the UK and in Poland), is of course not an "opt-out" in any meaningful sense of the expression: no EU Member State can be considered to be exempt from applying the Charter.[50] Indeed, Article 1(1) of the protocol, its key operative provision, states:

> The Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Contrary to what an 'opt-out' protocol would entail, the said protocol in fact does not exempt British or Polish courts from applying fundamental rights, as recognized in the EU legal order -- including the rights, freedoms and principles listed in the Charter --, to the cases presented before them that fall under the scope of application of EU law. The protocol simply restates that the Charter extends neither the scope of application of Union law (and therefore that of the Charter), nor (therefore) the jurisdiction of the Court of Justice or the competence of domestic courts to apply the Charter, beyond the existing scope of application of Union law. In other terms, the Charter is without effect on the reach of Union law: it only shall apply to the extent that Union law already applies to any particular situation. However, far from establishing a derogation in favor of Poland and the United Kingdom, this is already what the Charter itself says: the protocol is, in that measure at least, redundant, and crafted for domestic political purposes only.[51]

Article 1(2) of Protocol No. 30 is more troubling, however. It states that "*for the avoidance of doubt*, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom

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[49] OJ 2010 C 83, p. 313.

[50] For a good overview, see Steve Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights', *Human Rights Law Review*, vol. 12 (2)(2012), pp. 375-389.

[51] Indeed, the Preamble of the Protocol refers to "the wish of Poland and the United Kingdom to *clarify* certain aspects of the application of the Charter" (emphasis added), thus clearly recognizing that the Protocol does not bring about any change to the situations of Poland or the United Kingdom. When requested to explain their position before the House of Lords' EU Select Committee, the British government confirmed the view that the Protocol should be seen "as an interpretation guide rather than an opt-out", stating that: "The UK Protocol does not constitute an 'opt-out'. It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law" (Conclusions of House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, 2007-8, HL Paper 62, para. 5.86). This point was further emphasized by Mr Jack Straw, Secretary of State for Justice under the Blair government at the time the Lisbon Treaty was negotiated (id., para. 5.96), and by Lord Goldsmith (Speech by the Rt Hon Lord Goldsmith QC to the British Institute for International and Comparative Law, 15 January 2008: "The Charter of Fundamental Rights", quoted id., para. 5.98). These statements confirm the view that the Protocol simply confirms the scope of application of the Charter as agreed by all Member States; any suggestion that Poland of the UK would be placed in a specific position vis-à-vis the Charter as a result of the Protocol is based on a mistaken reading of the instrument -- both in its letter and in its intention. This debate is, is any case, largely moot since the Court of Justice delivered its judgment in the Joined Cases C-411/10 and C-493/10, in which the Court confirmed beyond any doubt that " Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland" (Judgment of 21 December 2011, *N.S. and M.E. and Others*, C-411/10 and C-493/10 (EU:C:2011:865), para. 119).

except in so far as Poland or the United Kingdom has provided for such rights in its national law". This clause was inserted at the request of the United Kingdom -- Poland was less interested in inserting that formulation[52]--. It is a deeply problematic provision, since it suggests, wrongly, that there is a perfect overlap between the "principles" and the social rights listed in Title IV ("Solidarity") of the Charter, creating the impression that none of the provisions of this title include justiciable rights. The clause presents itself as a mere restatement of what the Charter requires. But this is an entirely implausible reading of the Charter: the Explanations to the Charter note, for instance, that some provisions of the Charter 'may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34', although Articles 33 and 34, which refer to 'Family and professional life' and to 'Social security and social assistance' respectively, are both located in Title IV of the Charter of Fundamental Rights.

However, if the mere fact that a certain provision is listed under title IV ("Solidarity") of the Charter of Fundamental Rights does not, in itself, suffice to dismiss it as a mere "principle", and thus to limit the conditions in which it may be invoked, then what criterion should be chosen? Advocate General Trstenjak proposes an approach based on the wording that appears in the Charter: where the Charter refers to a "right", rather than to a mere objective to be pursued, it should be treated as such, rather than as a mere "principle". Thus, for instance, the Charter clearly refers in article 31(2) to a *right* to a paid annual leave:

> 76. In fact, the very wording of this provision immediately suggests the conclusion that entitlement to paid annual leave was designed to be a 'fundamental right', whereupon inclusion in the 'principles' referred to in Article 51(1) of the Charter, which do not create any direct subjective rights and indeed need to be given expression by the entities to which it is addressed, can instantly be ruled out. Article 31(2) of the Charter declares that: 'Every worker has the *right* to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. The human rights concept of a guarantee is clearly expressed here, especially as prominence is given in this article to human dignity in working life. It therefore clearly differs from other provisions in Title IV of the Charter ('Solidarity'), which are worded more like a guarantee of objective law in that the rights granted there are 'recognised' or 'respected'. These differences in wording are evidence of a graduated intensity of protection according to the legal right concerned.
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> 77. In line with this graduated system of protection, those provisions that merely contain 'principles' and under the first sentence of Article 52(5) of the Charter are primarily binding on the legislature in the course of implementation also often state that protection is granted only 'in accordance with EU law or national law and practice'. One significant feature of principles is that their application often requires implementing measures to be adopted, which can also only happen in accordance with the division of competence stipulated in the Treaties and in harmony with the principle of subsidiarity. The fact that, in order to take effect, principles require legislative, organisational and practical measures on the part of the European Union and its Member States is also given expression by the phrase 'promote the application thereof' in the second sentence of Article 51(1) of the Charter, which also applies to them.
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> 78. However, this is not the case with Article 31(2) of the Charter, which is conceived in this respect as an individual requirement. The fact that Article 31(1) of the Charter, in which reference is made to 'the right to working conditions which respect his or her health, safety and dignity', is couched in fairly abstract terms and is not expressed in a more concrete manner until subparagraph 2 cannot be invoked as an argument for classifying this entire provision as a

[52] Comp. with Declaration (No. 62) by Poland concerning the Protocol, in which the Polish government 'declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter ...' This provides an indication as to the intention of the Polish government, which was primarily concerned about the potential impacts on family law issues of a broad reading of the Charter, that might influence areas which, hitherto, remain the sole competence of the EU Member States.

> 'principle' within the meaning of Article 51(1) of the Charter, particularly as rules on fundamental rights can basically be worded in a legally abstract fashion, particularly in order to take account of political and social changes. This certainly applies to social rights, which are often designed to be fleshed out, not least of all because of the associated costs that can ultimately make realisation of such rights contingent upon the de facto economic possibilities of the State.[53]

This view is not unanimously shared, however. In the case of *IPSO v. ECB*, the General Court took the view that Article 27 of the Charter could not be directly invoked by employees of the ECB. Although that provision of the Charter refers in its heading to "Workers' *right* to information and consultation within the undertaking", its content ("Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time *in the cases and under the conditions provided for by Union law and national laws and practices*" (emphasis added)) would exclude the possibility of its invocation in the absence of further implementing measures:

> 85 ... according to the actual wording of Article 27 of the Charter of Fundamental Rights, the exercise of the rights laid down in that article is confined to the cases and conditions provided for by European Union law and national laws and practices (judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 45, and order of 11 November 2014, *Bergallou* v *Parliament and Council*, T-22/14, not published, EU:T:2014:954, paragraph 33).
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> 86 It follows that Article 27 of the Charter of Fundamental Rights, which does not lay down any directly applicable rule of law, is not in itself sufficient to confer on individuals an individual right to consultation and information which they may invoke as such (see, to that effect, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).[54]

The stakes of this discussion should not be underestimated. Its importance shall appear immediately once we relate the debate concerning the distinction between "rights" and "principles" to the question of positive duties implied by the Charter of Fundamental Rights.

4.3. Social rights and positive duties

In general human rights law, human rights impose not only duties of abstention (negative duties not to adopt measures that could infringe on human rights, unless certain conditions are complied with), but also duties of action (positive duties to take measures that protect and fulfil human rights). In other terms, a commitment to human rights goes beyond accepting a prohibition: it also involves a duty to contribute the realization of human rights, by exercising certain powers so as to maximize the enjoyment of human rights by the rights-holders. Contrary to a widely held view, this dual function of human rights is fully compatible with the principle of conferral, according to which the EU institutions are attributed certain limited powers by the EU Member States, the "masters" of the treaties (Article 5(1) and (2) TEU); and it is fully compatible with the principle of subsidiarity, according to which, in areas of shared competences, the EU should only take action if and in so far as the action envisaged "cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU).

The Charter of Fundamental Rights is not merely a set of prohibitions. It also should serve as a tool to guide action, ensuring that the institutions of the Union exercise their competences with a view to fulfilling the provisions of the Charter. Article 51(1) of the Charter states that the institutions of the

[53] See paras. 76-78 of the opinion delivered on 8 September 2011 in the case of *Dominguez*, cited above. See also AG Trstenjak's opinion of 24 January 2008 in the Joined Cases of *Schultz-Hoff and Others* (C-350/06 and C-520/06 [2009] ECR I-179), para. 38.

[54] General Court, *International and European Public Services Organisation in the Federal Republic of Germany (IPSO) v. European Central Bank (ECB)*, T-713/14, judgment of 13 December 2016 (EU:T:2016:727), paras. 85-86.

Union shall "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" (emphasis added). Of course, para. 2 of Article 51 adds that "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". That does not imply, however, that no positive obligations (duties to take action) can follow from the Charter. The Explanations accompanying the Charter clarify that "an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers". But that is not to say no such obligation exists: it is simply to recall that any such obligation as might arise would be limited to the exercise of the powers that the institutions have been attributed.

Yet, despite some nudges from its advocate generals,[55] the Court of Justice has refrained until now from imposing positive obligations on the EU institutions on the basis of the Charter of Fundamental Rights. When, invoking in particular the Convention on the Rights of Child, the European Parliament sought to have the 2003 Family Reunification Directive[56] annulled, the Court rejected the action of the Parliament, essentially on the ground that the legislator cannot be considered to act in violation of fundamental rights simply because it leaves a broad margin of appreciation to the EU Member States in the implementation of European legislation: though it acknowledged that 'a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights', [57] the Court stated that 'while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.[58] In other terms, it is not required that the EU legislation itself protects fundamental rights: it is sufficient that it does not impose on the EU member States that they adopt measures, or refrain from adopting certain measures, in violation of such requirements.[59]

More recently, in *Glatzel*, the Court of Justice was requested by a German administrative court (the Administrative Court of Appeals (*Verwaltungsgerichtshof*) of the state of Bayern) whether Mr Glatzel could be refused a driving licence for adapted vans and trucks (vehicles in categories C1 and C1E, as

[55] See in particular Adovate General P. Cruz Villalón in the case of *Association de médiation sociale*: "The European Union and the Member States are under an obligation to 'promote' the 'principles' set out in the Charter (Article 51(1)), and for that purpose are to adopt those 'implementing' measures which are necessary to ensure that such promotion is effective. In spite of the use of the word 'may', it is clear that this is not an absolute discretionary power, but a possibility subject, as has just been noted, to a clear obligation in Article 51(1) of the Charter, requiring the European Union and the Member States to 'promote' the 'principles'. It is clear that such promotion will be possible only through the 'implementing' acts to which Article 52 subsequently refers." (conclusion of 18 July 2013, in Case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT, et al.*, para. 60).

[56] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

[57] Judgment of 27 June 2006, *European Parliament v. Council of the European Union*, C-540/03, EU:C:2006:429, para. 23.

[58] Id., para. 104.

[59] The Opinion of Advocate-General Kokott delivered on 8 September 2005 went further. Rejecting the view of the Council that the action for annulment of the European Parliament should be considered inadmissible because, in essence, it sought the challenge the compatibility with fundamental rights of the measures adopted by the national authorities implementing the Family Reunification Directive rather than the Directive itself, she stated that by putting forward this argument: 'the Council has failed to recognise that endorsement by Community law of specific options for maintaining in force or introducing provisions of national law constitutes a measure which may itself, in certain circumstances, infringe Community law. First, the options potentially restrict the scope of the entitlement to family reunification conferred by the Directive. Secondly, they formally establish that the provisions in question are compatible with Community law. If provisions establishing such a fact are not challenged in time by means of an action for annulment, the Community will be precluded from taking action itself against national measures which simply take full advantage of the various options contemplated' (ibid., para. 45). This is unconvincing. Even a measure adopted by national authorities that complies fully with the terms of the Directive could be in violation of EU law if it were adopted in violation of fundamental rights, as general principles of EU law that are binding on the member States whenever they act in the field of application of EU law. The fact that the Family Reunification Directive would not have explicitly prohibited the adoption of such national measures by no means would have precluded the filing of infringment proceedings against the Member State concerned.

defined by Directive 2006/126[60]), on the ground that the visual acuity in his worse eye did not reach the minimum level required by that directive.[61] Mr Glatzel complained that the refusal to grant him a drivers' license violated Articles 20, 21(1) and 26 of the Charter of Fundamental Rights. Articles 20 and 21(1) relate to the requirements of equal treatment before the law and of non-discrimination, *inter alia*, on grounds of disability. Article 26 of the Charter, titled 'Integration of persons with disabilities', is the last article of title III of the Charter ('Equality'). It provides that: "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". Might this provision impose on the European legislator certain duties to draft legislation taking into account the need to ensure the integration of persons with disabilities? The Court believes not. In its judgment of 22 May 2014, it first recalls that, 'as is clear from Article 52(5) and (7) of the Charter and the Explanations relating to the Charter of Fundamental Rights concerning Articles 26 and 52(5) of the Charter, ... reliance on Article 26 thereof before the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities'.[62] In other terms, it treats Article 26 of the Charter as expressing a 'principle', rather than a 'right', so that its invocability is limited to situations in which it is combined with another instrument implementing (or violating) the said principle. It then continues:

> 75 As regards the implementation of that principle by Directive 2006/126, it is clear in particular from the wording of recital 14 in the preamble thereto that '[s]pecific provisions should be adopted to make it easier for physically disabled persons to drive vehicles'. Likewise, Article 5(2) of that directive refers to the conditions for the issue of driving licences to drivers with disabilities, in particular as regards the authorisation to drive adapted vehicles.
>
> 76 Thus, in so far as Directive 2006/126 is a legislative act of the European Union implementing the principle contained in Article 26 of the Charter, the latter provision is intended to be applied to the case in the main proceedings.
>
> 77 Furthermore, by virtue of the second sentence of Article 51(1) of the Charter, the EU legislature is to observe and promote the application of the principles laid down in it. As regards the principle of the integration of persons with disabilities, Article 26 of the Charter states that the Union is to recognise and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.
>
> 78 Therefore, although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, *the principle enshrined by that article does not require the EU legislature to adopt any specific measure*. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such (see, to that effect, as regards Article 27 of the Charter, Case C-176/12 *Association de mediation sociale* EU:C:2014:2, paragraphs 45 and 47).
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> 79 Having regard to all of the foregoing considerations, it must be held that the consideration of the question has not revealed any information capable of affecting the validity of Annex III, paragraph 6.4 of Directive 2006/126 [defining the conditions according to which a driver's license

[60] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ 2006 L 403, p. 18 and corrigendum OJ 2009 L 19, p. 67), as amended by Commission Directive 2009/113/EC of 25 August 2009 (OJ 2009 L 223).
[61] More precisely, the visual acuity of Mr Glatzel did not meet the requirements stipulated in point 6.4 of Annex III to Directive 2006/126/EC.
[62] Judgment of 22 May 2014, *Wolfgang Glatzel v. Freistaat Bayern*, C-356/12 (EU:C:2014:350), para. 74.

may be granted, taking into account the visual acuity of the claimant] in the light of Article 26 of the Charter.

In other terms, since the integration of persons with disabilities stipulated in article 26 of the Charter is a mere 'principle', it does not require any specific measure to be adopted by the legislator of the Union; and this in turn would justify a particularly lenient assessment of whatever measure is adopted, recognizing the broad margin of appreciation of the legislature in this regard. The Court thus not only considers that 'principles' cannot be invoked in the absence of implementation measures, but also that such implementation measures can hardly be assessed against the requirements of such principles, since the latter are not self-executing. This comes dangerously close to denying any effective role for principles, beyond their political importance as guides to legislative action.[63]

This is especially unfortunate, since as regards the provisions of the Charter that have been recognized the status of 'rights', the Court has recently come to accept that certain positive obligations could be imposed on the EU legislator, for instance in the preparation of directives (which should be sufficiently detailed to ensure that fundamental rights shall not be violated by the Member States in the adoption of implementation measures[64]). The same logic has led the Court to find that the requirement to "promote the application" of the Charter[65] may imply a duty on the Commission to proactively take into account fundamental rights in the design of memoranda of understanding with States being provided with financial assistance.[66] If however the logic of *Glatzel* remains unchallenged, this promising jurisprudence might not extend to the 'principles' embodied in the Charter, which therefore might be degraded to purely programmatic objectives, of purely political (rather than legal) significance.

4.4. Setting the legislative and policy agenda of the Union

Are the 'principles' stipulated in the Charter, at least, effective guides to law- and policy-making? If they cannot be invoked before courts under the same conditions as 'rights' might, can they at least serve to influence the legislative and political agenda of the EU institutions, and the exercise by the Commission of its power to initiate legislation in particular? There are situations where the effective protection of fundamental rights in the legal order of the Union, and of social rights in particular, may require that certain legislative or policy initiatives be proposed at EU level. This may be the case, for instance, in order to avoid a situation in which economic freedoms, such as the free movement of goods, freedom of establishment or the freedom to provide services across borders, would lead national lawmakers, in the absence of harmonization measures at Union level, to reduce the level of protection of certain rights such as the right to health or the right to education.[67]

Yet, the system of protection of fundamental rights in the Union still lacks a mechanism that would allow to systematically screen developments in the Union in order to identify the need to take action at

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[63] See also the critiques expressed by A. Bailleux and I. Hachez towards *Glatzel*: A. Bailleux and I. Hachez, 'Another look at *Glatzel*', in E. Brems and E. Desmet (eds), *Integrated Human Rights in Practice. Rewriting Human Rights* (Edward Elgar Publ., Cheltenham, 2017, pp. 351-377; and A. Bailleux, "Droits de l'homme à l'est de Vosges, valeurs à l'ouest? Les récits judiciaires de l'Europe au prisme de l'article 52 de la Charte", *Rev. trim. dr. h.*, n° 115 (2018), pp. 583-592, esp. pp. 591-592.

[64] See *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, EU:C:2014:238, para. 65 (where the Court concludes that "Directive 2006/24 [providing for the retention of data in electronic communications] does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary").

[65] Art. 51(1) of the Charter of Fundamental Rights.

[66] *Ledra Advertising Ltd, et al.*, Joined Cases C-8/15 P to C-10/15 P, judgment of 21 September 2016, EU:C:2016:701, para. 59 and 67.

[67] See for an elaboration on this theme, Olivier De Schutter, 'Fundamental Rights and the Transformation of Governance in the European Union', *Cambridge Yearbook on European Legal Studies*, 2007, pp. 133-175; or Olivier De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?*, Bruxelles, Bruylant, 2005, pp. 279-343.

EU level in order to protect and fulfil the rights, freedoms and principles of the Charter, where an initiative of the Union institutions may be required to avoid the Charter's values being threatened by the decentralized and uncoordinated action of the EU Member States. Such a mechanism, it may be recalled, had been proposed by the European Commission, when it adopted its 2003 communication on the values on which the Union is founded[68] -- values which are now listed in Article 2 TEU: democracy, the rule of law and fundamental rights.[69] The Commission referred in that communication to the work of the EU Network of independent experts on fundamental rights, a group of experts established in September 2002 at the request of the European Parliament's LIBE Committee in order to support its task of monitoring fundamental rights in the EU.[70] Using the Charter of Fundamental Rights as its benchmark, the network proceeded through comparisons across the EU Member States, systematically comparing how the Member States addressed certain challenges facing the implementation of fundamental rights. The Commission took the view that, apart from supporting the institutions' roles under Article 7 EU (which sets up a political mechanism may be triggered where a Member State adopts measures that may be inconsistent with the values on which the Union is founded), the monitoring-by-comparison function assumed by the network

> has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.[71]

The comparative analyses of the network, in order terms, were seen as favouring the emergence of a proactive fundamental rights policy, one that would allow the Union institutions to be alerted to the need to take initiatives in areas where divergences appeared between the Member States, that could lead to undermine the integration project -- resulting in new barriers within the internal market, creating obstacles to cooperation between national authorities in the area of freedom, security and justice, or leading to undermine the ability for the EU Member States to improve the protection of fundamental rights within their jurisdiction. Such a monitoring might be particularly important in the area of fundamental social rights, since regulatory competition between the EU Member States (and the fear they may have to impose too heavy burdens on the companies operating under their jurisdiction) is a major disincentive to increase the level of protection of workers' rights as well as to improve social protection or to raise taxes on corporate profits.

When it was put forward in late 2003, however, the proposal of the European Commission to establish such a monitoring mechanism as a permanent part of the institutional landscape of the European Union, however, was ill-timed: because it was presented a few months before the enlargement of the EU to 10 new Member States, including 8 States of Central and Eastern Europe which had been democratized only recently, the signal the establishment of such a mechanism would have sent might have been misinterpreted. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 TEU, the Parliament insisted in a resolution of 20 April 2004 that the use of Article 7 TEU should be based on four principles, including the principle of confidence,

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[68] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

[69] More precisely, Article 2 of the Treaty on the European Union lists the values on which the Union is founded as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

[70] Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), para. 9. The EU Network of Independent Experts on Fundamental Rights worked for a period of four years, delivering its final opinions and reports in September 2006. It presented reports on an annual basis on the situation of fundamental rights in the EU and in the EU Member States; it adopted in-depth studies on certain emerging issues related to the protection of fundamental rights in the EU, in the form of so-called "Thematic Comments", focusing for instance on the rights of minorities in the EU or on the balance to be achieved between security and civil liberties in the fight against terrorism; and it adopted "opinions", at the request of the European Parliament's LIBE Committee or of the European Commission.

[71] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, cited above, para. 2.1., p. 10.

which it explained thus:

> The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:
>
> - the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
> - the authority of the European Court of Justice and of the European Court of Human Rights.
>
> Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and *may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union*. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.[72]

In effect, the insistence of the European Parliament on the "principle of confidence" excluded the establishment of a mechanism for the permanent monitoring of fundamental rights within the EU Member States, which by its very nature might instead be interpreted as a sign of distrust. Only at the very end of the 2004-2009 legislature did the Parliament revert to its practice of adopting regular reports on the situation of fundamental rights in the Union, [73] requesting in a resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 that the EU institutions "establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty".[74] In effect, the European Parliament was reviving the very monitoring mechanism it had seen as undesirable on the eve on the 'big bang' of enlargement.

In order for the social provisions of the Charter of Fundamental Rights to effectively guide the legislative and policy agenda of the EU, it appears indeed essential that the progress achieved by the EU Member States in the area of fundamental social rights (or the lack of progress) be adequately monitored, to allow the EU institutions (the Commission in particular) to react in the presence of widening gaps between the EU Member States -- as such gaps may result in distorting competition between the Member States and in leading to a downwards spiral detrimental to social progress. Such a monitoring system would allow to identify trends that might justify the introduction of new policy or legislative initiatives to strengthen the protection of fundamental rights in the EU. As such, it should contribute to a fundamental rights policy of the Union that sees fundamental rights not only as an external constraint, restricting how the institutions of the EU may act or which measures the EU Member States may take in the scope of application of Union law, but also as a guide for the exercise of the competences that have been attributed to the institutions. Indeed, although the Union does not have a general competence to promote and protect fundamental rights and though it is not, in that sense, a "human rights organisation", it has been attributed competences in a number of areas, including areas directly linked to the implementation of social rights, that it could use more proactively in order to improve the protection of fundamental rights in the Member States.[75]

It is on this premise, for instance, that -- in the name of the promotion of the right ot health -- the adoption of directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco

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[72] European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12 (emphasis added).

[73] See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5.12.2008).

[74] Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), operational paragraphs 3 and 5.

[75] For developments on this idea, see Olivier De Schutter, "The Implementation of Fundamental Rights through the Open Method of Coordination", in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?* (Bruxelles, Bruylant, 2005), pp. 279-343; Olivier De Schutter, "The New Architecture of Fundamental Rights Policy in the EU", *European Yearbook of Human Rights*, 2011, pp. 107-143.

products was justified:[76] when asked to confirm whether Article 95 EC (now Article 114 TFEU) could constitute an adequate legislative basis for the adoption of such instruments, the European Court of Justice agreed with the argument that a failure to act by the Union could result either in obstacles in the internal market, or in the absence of an adequate protection of the right to health through State regulation:

> having regard to the fact that the public is increasingly conscious of the dangers to health posed by consuming tobacco products, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and intended more effectively to discourage consumption of those products by means of warnings and information appearing on their packaging or to reduce the harmful effects of tobacco products by introducing new rules governing their composition.[77]

On the surface, the Tobacco Manufacture and Advertising Directives aimed at product standardisation in the internal market; in reality, their objective was to contribute to the protection of health, an objective which could not be achieved by the Member States acting individually. The need for the adoption of these directives was made clear by comparing trends across EU Member States, and the growing divergences between States that were more protective of consumers' health and States that provided a lower level of protection. As noted above, this -- the identification of such emerging divergences, that may call for initiatives to approximate legislation or to harmonize -- was already described by the Commission as one of the main contributions a permanent fundamental rights monitoring mechanism (for which the EU Network of independent experts on fundamental rights provided a model) might make in the future.[78]

5. Conclusion

The Charter of Fundamental Rights has until now been thought of as a shield: a set of guarantees that neither the Union, nor the EU Member States when they act in the scope of application of Union law, may ignore. It is this role of the Charter which has guided the inclusion of fundamental rights in the legislative process and in impact assessments, and it is this role that the Court of Justice has hitherto been most attentive to. In the area of social rights however, the Charter can and should achieve more. It can become a sword: a tool to dynamize the exercise by the European Commission, and by the EU institutions more generally, of their competences in the social field, so as to ensure that neither the establishment of the internal market, nor cross-border competition -- and the regulatory competition this may lead to between the Member States -- operate at the expense of social progress.

The European Pillar of Social Rights (EPSR) may be seen as an opportunity in this regard. The initiative to establish a European Pillar of Social Rights was initially announced on 9 September 2015, in the State of the Union address of the President of the European Commission. It was then presented as a means to

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[76] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194 , 18.7.2001, p. 26); Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

[77] Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, [2002] ECR I-11453, at para. 67. This position was confirmed in two judgments of 14 December 2004: Case C-434/02, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, [2004] ECR I-11825; Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893. Comp. with Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-2247 (where the Court annuled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9) since that Directive did not ensure free movement of products which are in conformity with its provisions, and therefore could not be said to contribute to the establishment of the internal market as required for Article 95 EC (then Article 100a of the EC Treaty) to be relied upon as a legal basis).

[78] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

encourage a move towards a "deeper and fairer Economic and Monetary Union",[79] and to complement macroeconomic convergence with greater convergence in three broad areas -- equal opportunities and labour market participation, fair working conditions, adequate and sustainable social protection and access to high quality essential services --, covering in total 20 policy domains. The EPSR was later endorsed by the European Parliament, the Council and the Commission on 17 November 2017, at the Social Summit for Fair Jobs and Growth held in Gothenburg.

The EPSR is now entering the implementation phase. On 13 March 2018, a communication from the Commission described how implementation of the EPSR would be monitored. This monitoring includes a regular assessment of the employment and social performances of the EU Member States on the basis of a Social Scoreboard, comprised of 35 social, educational and employment indicators, broken down by age, gender and education, grouped into three dimensions corresponding to the broad areas covered by the EPSR (equal opportunities and access to the labour market; dynamic labour markets and fair working conditions; and public support, social protection and inclusion).

Two aspects of this new Social Scoreboard are particularly interesting. First, these indicators go beyond measuring outcomes, or symptoms, as do classic socio-economic indicators: indeed, the indicators by which the Scoreboard intends to assess the "impact of public policies on reducing poverty" focus on the efforts invested by States -- they are, in the structural-process-outcomes tripartite typology of human rights indicators well known to human rights activists, "process" indicators.[80] This is a source of accountability, since poor outcomes can more directly be traced to a failure by the State to improve social support or to match macroeconomic choices with its commitment to poverty reduction. Second, and relatedly, the Social Scoreboard shall gradually influence the orientation of the macroeconomic policies in EU Member States: it is aimed at "supporting the broader process of upward convergence".[81] The Scoreboard should, in particular, influence the annual Joint Employment Report and the Country Reports presented as part of the European Semester, which seeks to promote macro-economic convergence in the EU.[82]

It is the adoption of the European Pillar of Social Rights and its associated Social Scoreboard, perhaps, that shall allow the social provisions of the Charter to deploy their full effects on the establishment of Social Europe: political commitment, once again, proves essential if the law's promises are to be kept.

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[79] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Launching a consultation on a European Pillar of Social Rights*, COM(2016) 127final of 8.3.2016, para. 2.1.

[80] Human rights-based indicators are indeed distinct from macro-economic indicators or development indicators that simply register socio-economic facts. Human rights-based indicators include indicators referring to the *commitments* made by the State, or to the legal, institutional and policy frameworks that the State establishes (*structural indicators*); indicators referring to the *efforts* made by the State to ensure that the commitments are effectively implemented, i.e., translated into the adoption of concrete measures and policies (*process indicators*); and finally, indicators relating to the *results* achieved (*outcome indicators*) (see in particular, introducing this framework, the Report by the Office of the United Nations High Commissioner for Human Rights on Indicators for Promoting and Monitoring the Implementation of Human Rights (HRI/MC/2008/3 (6 June 2008)) (explaining in para. 8 that the human rights indicators framework proposed in the report "opted for using a configuration of structural-process-outcome indicators, reflecting the need to capture a duty-bearer's commitment, efforts and results, respectively. In other words, by identifying structural-process-outcome indicators for each attribute of a human right, it becomes possible to bring to the fore an assessment of steps taken by the States parties in meeting their human rights obligations"). These three categories of indicators are interdependent and mutually supportive: the structural indicators ensure that the beneficiaries of measures adopted by the State shall have access to remedies (both judicial and non-judicial), and that the States' performances shall be adequately monitored, in particular, by independent bodies (including national human rights institutions); the process indicators ensure that States shall effectively deliver on their promises, in particular by making the required budgetary investments; and the outcome indicators, which present the closest resemblance to development indicators, serve to ensure the policies actually make a difference -- that they are having an impact --, so that misguided or ineffective policies can be revised and improved.

[81] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final of 13.3.2018,

[82] See Proposal for a Council Decision on guidelines for the employment policies of the Member States, COM(2017) 677 final of 22.11.2017.