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SAVING EUROPE 'UNDER STRICT CONDITIONALITY': A THREAT FOR EU SOCIAL DIMENSION?

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The underlying idea is that implementing forms of "civilized" politics is desirable as well as feasible. And, as far as the Italian political system is concerned, it is also urgently needed, since the system appears to be poorly prepared to deal with the challenges emerging in many policy areas: from welfare state reform to the governance of immigration, from the selection criteria in education and in public administration to the regulation of ethically sensitive issues.
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Keywords

Conditionality, EU social dimension, social rights,
competences, sovereign debt crisis

ABSTRACT

SAVING EUROPE 'UNDER STRICT CONDITIONALITY': A THREAT FOR EU SOCIAL DIMENSION?

This paper looks at the compatibility of EU anti-crisis measures with some key elements of the EU legal system. In particular, it focuses on the financial assistance programmes devised to rescue some EU Member States that, due to their unsustainably high public debts, came under severe pressure from the financial markets. In all these cases, recipient States have been invariably required to adopt draconian austerity measures in order to have access to the financial help. This paper argues that some of the conditions attached to the assistance packages raise doubts as to their compatibility with a number of basic social principles and objectives that represent the foundations of the EU social dimension. This is the case with regard to the social objectives enshrined in the Treaties, the allocation of competences between the EU and Member States in the social field and, lastly, some of the social rights contained in the Charter of Fundamental Rights.

SAVING EUROPE 'UNDER STRICT CONDITIONALITY': A THREAT FOR EU SOCIAL DIMENSION?

1. INTRODUCTION

The crisis of sovereign debts in the Euro area is rightly considered as a threat not just for the future of the common currency, but also for the whole European integration process. The problem is that the anti-crisis strategy adopted by the EU and its Member States is equally threatening, albeit for different reasons. EU decision-makers are seemingly convinced that the need to find a swift and efficient response to the unprecedented challenges posed by the crisis may justify the recourse to measures that are potentially incompatible with fundamental aspects of the EU legal framework. This approach, which is fairly common in 'emergency times', raises doubts as to its legitimacy and, far from helping the EU out of the crisis, it may end up damaging the prospects of the European integration process.

This is the case, for instance, with financial assistance measures devised to assist EU States that, due to their high public debt, came under severe pressure by financial markets. One of the prominent features of these packages is the policy conditionality attached to them. In order to receive the financial help, recipient States are required to adopt a set of fiscal consolidation measures aimed at halting the deterioration in their public finance position. Adjustment programmes invariably rest upon draconian austerity measures, aiming at the reduction of States' debt primarily through severe cuts to public spending and, in particular, through drastic reductions to social expenditure. In this context, restoring financial stability seems to be considered as an absolute priority, to be achieved even at the expenses of any other competing objective, such as social ones.

This paper aims to assess the compatibility of this approach with a number of basic social principles and objectives that represent the foundations of the EU social dimension. The paper looks, first of all, at the conditionality instruments used in the context of the financial assistance packages for EU countries, trying to shed some light on the relevant legal framework. Subsequently, it analyses the content of conditionality, by taking into account the cases of Greece, Ireland and Portugal. Lastly, it seeks to assess the compatibility of these measures with three elements

that, especially after the entry into force of the Treaty of Lisbon, can be taken as key pillars of the EU social dimension.

2. Conditionality in Financial Assistance Packages to Assist EU Countries

Conditionality represents a prominent feature in all the financial assistance packages and mechanisms that have been put in place to respond to the needs of those EU Member States that suffered most from the economic crisis. This was the case already with earlier balance-of-payments assistance programmes[1] used to rescue non-Euro States, such as Hungary, Latvia and Romania, as well as with regard to the financial package hastily arranged to save Greece in 2010. Likewise, conditionality constitutes a foundational element of all the financial mechanisms that have been created after the eruption of the crisis. The *European Financial Stabilization Mechanism* (EFSM),[2] created in 2010 and used to provide relief to Portugal and Ireland, the *European Financial Stability Facility* (EFSF),[3] established in 2010 as a temporary mechanism to provide financial help to Euro area Member States, and the *European Stability Mechanism* (ESM),[4] which is set to replace the EFSF on a permanent basis, all make the granting of financial assistance subject to the respect of certain policy conditions by the beneficiary State. Lastly, conditionality is set play a pivotal role also in the context of the *Outright Monetary Transactions*[5] to be undertaken by the European Central Bank (ECB) with the aim of, in the words of the ECB Governing Council, "ensuring an effective transmission of the Eurosystem's monetary policy and, thereby, […] securing the conditions for an effective conduct of the single monetary policy within the euro area, with a view to achieving its primary objective of maintaining price stability".[6]

In this context, conditionality is a preventative remedy that serves different purposes. First, it aims to reduce moral hazard and to ensure that resources are actually used to solve the beneficiary State's problems. Moreover, conditionality is also meant to protect the whole Eurozone against possible negative spill overs (the

[1] Council Regulation (EC) No. 332/2002 of 18 February 2002, *establishing a facility providing medium-term assistance for Member States' balance of payments*, OJ L 53 of 23.02.2002, p. 1 amended by Council Regulation (EC) No. 1360/2008 of 2 December 2008 and Council Regulation (EC) No. 431/2009 of 18 May 2009.

[2] Council Regulation (EU) No. 407/2010 of 11 May 2010, *establishing a European financial stabilization mechanism*, OJ L 118 of 12.05.2010, p. 1.

[3] The creation of the EFSF was envisaged in the Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, ECOFIN, Brussels, 9 May 2010. Note of the General Secretariat of the Council No. 9614/10 [http://register.consilium.europa.eu/pdf/en/10/st09/st09614.en10.pdf].

[4] The Treaty establishing the European Stability Mechanism (ESM Treaty) was signed in March 2012. The ESM was inaugurated on 8 October 2012.

[5] Purchases by the ECB on secondary markets for sovereign bonds of bonds issued by Eurozone Member States.

[6] ECB, *Monthly Bulletin*, October 2012, p. 7 [http://www.ecb.int/pub/mb/html/index.en.html].

so-called 'contagion effect') by safeguarding its long-term financial stability. Lastly, tying financial support to the adoption of austerity measures is also meant to send a reassuring message to financial markets, by showing concerned States' resolve in trying to address the root causes of the problem.

The choice to make financial assistance conditional on the respect by the beneficiary State of a macro-adjustment programme owes much to the influence exercised by the International Monetary Fund (IMF) in shaping the EU response to the sovereign debt crisis.[7] Indeed, despite being the "region with the best developed regional institutions, including a common currency and elaborate regional surveillance mechanism, [it] was not sufficiently equipped to deal with a major financial emergency among one of its member governments"[8] and, albeit quite reluctantly at first, it had to rely upon IMF expertise. However, conditionality cannot be seen only as an external imposition, since the need to make financial assistance subject to the respect of strict policy requirements has been a firm request put forward by some EU Member States and by EU institutions alike. The emphasis put on conditionality in the context of financial assistance programmes has even led the EU to grant it full recognition at Treaty level. Indeed, in 2011 a new paragraph was added to Article 136 of the Treaty on the Functioning on the European Union (TFEU), so to (allegedly) allow the establishment of the European Stability Mechanism, which mandates to make "the granting of any required financial assistance under the mechanism […] subject to strict conditionality".[9]

So far, procedural rules for the definition, approval and monitoring of the conditions attached to the financial assistance packages are not uniform, although they have several elements in common. In the case of Greece,[10] the adjustment programme has been negotiated by the Greek authorities with the European Commission, acting in liaison with the ECB and the IMF (the so-called 'Troika'), as previously established by Euro area Member States.[11] These conditions have then been included in a *Memorandum of Economic and Financial Policies*, in a *Memorandum of Understanding on Specific Economic Policy Conditionality* and in a *Technical Memorandum of Understanding*.[12] Subsequently, they have been further specified in a series of

[7] F. Seitz and T. Jost, *The Role of the IMF in the European Debt Crisis*, HAW im Dialog – Weidener Diskussionpapiere No. 32, January 2012.

[8] C.R. Henning, *Coordinating Regional and Multilateral Financial Institutions*, Peterson Institute for International Economics, WP 11-9, March 2011, p. 6.

[9] B. De Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, SIEPS European Policy Analysis No. 6, June 2011, pp. 5-8. The doubts raised as to the necessity of this amendment.

[10] On the Greek case see K. Featherstone, "The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime", *Journal of Common Market Studies*, 49, 2011, pp. 193-217; A. Viterbo and R. Cisotta, "La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione Europea", *Il Diritto dell'Unione Europea*, 2010, pp. 963-994.

[11] Statement on the Support to Greece by Euro Area Member States, Brussels, 11 April 2010 [http://www.consilium.europa.eu/press/press-releases/latest-press-releases/newsroomloadbook?target=2010&infotarget=&max=255&bid=76&lang=en].

[12] These memoranda have been first concluded on 3 May 2010.

decisions adopted by the Council in the context of the excessive deficit procedure within the Stability and Growth Pact.[13]

A different procedure has been followed with regard to Ireland and Portugal in the context of the EFSM. Indeed, Article 3 of Regulation (EU) no. 407/2010 establishes that the State seeking financial assistance is to submit an adjustment programme to the Commission and to the Economic and Financial Committee. This programme is, then, to be approved by the Council, on a proposal by the Commission, with the adoption of a decision that contains the "general economic policy conditions which are attached to the Union financial assistance". Lastly, these conditions are to be further detailed in a Memorandum of Understanding (MoU) concluded by the recipient State and the Commission. Article 4 entrusts the Commission with the task of regularly verifying whether Members State's policies accord with the adjustment programme and, accordingly, to decide the release of further instalments.

The EFSF Framework Agreement establishes that the conditions attached to the financial assistance are to be included in a MoU negotiated by the beneficiary State with the Commission, acting together with the ECB and the IMF. Once the MoU has been approved by the Eurogroup Working Group, the Commission can sign the MoU on behalf of the Euro area States. A slightly different procedure has been codified in the ESM Treaty. Indeed, Article 13.3 establishes that the ESM Board of Governors, after having decided to grant stability support to a Member State, entrusts the Commission, in liaison with the ECB and "wherever possible" together with the IMF,[14] to negotiate a MoU detailing the conditionality attached to the package. The MoU, once approved by the Board of Governors, is then to be signed by the Commission on behalf of the ESM. The Commission—together with the ECB and, "wherever possible", the IMF—is also entrusted with the task of regularly monitoring compliance with the conditions detailed by the MoU, on which it depends the release of subsequent instalments.

In November 2011, the Commission presented a Proposal for a Regulation ('Budget Surveillance Proposal') that, if adopted, would introduce a single conditionality instrument that should apply whenever a Member State whose currency is the Euro requests or receives financial assistance from "one or several other States, the IMF, the EFSF or the ESM".[15] As for the procedure, Article 6 of the

[13] See para. 3 for further references.

[14] This choice may be considered as an attempt by European States and EU institutions—*in primis* the European Commission—to maintain, at least on paper, a leading role in the adoption of politically sensitive decisions, trying to exert a discretionary control over the IMF involvement. It is worth noting that a slightly different wording has been used in the 'Term Sheet on the ESM', attached to the European Council Conclusions of 20 April 2011, that says that ESM financial support is to be provided "on the basis of strict policy conditionality, under a macro-economic adjustment programme and a rigorous analysis of public debt sustainability" to be conducted by the Commission, in liaison with the European Central Bank, together with the IMF, without further caveats.

[15] Article 6.1 Proposal for a Regulation of the European Parliament and of the Council, *on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area*, COM(2011) 819 of 23.11.2011.

Proposal establishes that the beneficiary State is to prepare, in agreement with the Commission and the ECB, a draft adjustment programme that has, then, to be approved by the Council, acting by qualified majority on a proposal by the Commission. The Commission and the ECB are also entrusted with the power to monitor the implementation of the programme. The European Parliament, at its first reading,[16] introduced some amendments in this regard. First, it clarified that the Commission and the ECB should act, "whenever appropriate",[17] in *liason* with the IMF to define or update the adjustment programme, while in its original version the Proposal did not recognize any role to the IMF neither in the negotiation, nor in the supervision phase. Secondly and, to some extents, more importantly, it also proposed to grant to the Commission the power to approve the programme, as the Council would only have the possibility to repeal this decision by qualified majority within ten days.

3. THE CONTENT OF CONDITIONALITY: FINANCIAL STABILITY AS AN ABSOLUTE PRIORITY?

Conditionality attached to the financial assistance packages devised to rescue Euro States is strongly reminiscent of the neo-liberal recipes imposed by the IMF in the context of its structural adjustment programmes of the '80s and the '90s. Indeed, these packages invariably rest upon draconian austerity measures, aiming at the reduction of States' debt primarily through severe cuts to public spending and, in particular, through drastic reductions to social expenditure. In this context, several conditions touch upon key aspects of concerned States' welfare systems, imposing the adoption of measures that have an impact even on the provision of basic services in the field of social protection, education and healthcare.

In the case of Greece, for instance, the Council Decision 2011/734/EU[18] establishes, inter alia, the abolition of the budgetary appropriations for the solidarity

[16] Amendments adopted by the European Parliament on the proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the Euro area, 13 June 2012, A7-0172/2012.

[17] The ESM Treaty (Article 13.3) uses a similar wording, by stating that the IMF is to be involved "wherever possible".

[18] Council Decision 2011/734/EU of 12 July 2011, *addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit*, OJ L 296 of 15 November 2011, p. 38 amended by Council Decision 2011/791/EU of 8 November 2011, OJ L 320 of 03.12.2011, p. 28 and Council Decision 2012/211/EU of 13 March 2012, OJ L 113 of 24.04.2012, p. 8. This act replaced Council Decision 2010/320/EU of 8 June 2010*, addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit*, OJ L 145 of 11.06.2010, p. 6 amended by Council Decision 2010/486/EU of 7 September 2010, OJ L 241 of 14.09.2010, p. 12, Council Decision 2011/57/EU of 20 December 2010, OJ L 26 of 29 January 2011, p. 15 and Council Decision 2011/257/EU of 7 March 2011, OJ L 110 of 07.03.2011, p. 26.

allowances[19] (Article 2.1, lett. d), a freeze in the indexation of pensions (Article 2.2, lett. a), a reduction in pay rates for overtime work, enhanced flexibility in the management of working time and allow local territorial pacts to set wage growth below sectoral agreements (Article 2.2, lett. m), reduction in pharmaceutical expenditure by social security funds (Article 2.3, lett. n), tariff increases for the Athens transportation network (Article 2.3, lett. x), measures to make firm-level agreements prevail over sector ones and to enhance the recourse to fixed-term contracts (Article 2.3, lett. z), a comprehensive reform of the health care system (Article 2.4, lett. e) and a reform of the secondary or supplementary pension regimes (Article 2.8, lett. a). Furthermore, Annex I of the above mentioned Decision envisages cuts in health care expenditure amounting to more than 2 billion euro by 2015 and cuts in social benefits amounting to more than 5 billion euro by the same year to be achieved through, inter alia, a reduction of the monetary transfers to certain categories of vulnerable persons. Similar measures can also be found in the decisions directed toward Ireland and Portugal. As for the former, the Council Implementing Decision 2011/77/EU[20] imposes reductions of social protection expenditure and of public service pensions (Article 3.6, Article 3.7, lett. b, and Article 3.8, lett. a), the reform of the minimum wage (Article 3.7, lett. h), as well as of the employment benefit system (Article 3.7, lett. i). Similarly, the Council Implementing Decision 2011/344/EU[21] requires Portugal to reduce public sector wages and employment, to make cuts in pensions, as well as in education and health (Article 3.6, lett. b, and Article 3.7, lett. b).

All these acts are geared toward restoring and safeguarding financial stability[22] in the concerned State and in the Euro area as a whole, paying scant attention to any competing interest. The only partial exception can be found in the decisions concerning Ireland and Portugal, as a modification introduced in 2011 provides that, in carrying out its monitoring duties, the Commission, together with the ECB and the IMF, is to "review the social impact of the agreed measures" and to recommend necessary corrections in order to "minimiz[e] harmful social impacts, par-

[19] With the exception of a part for poverty relief.

[20] Council Implementing Decision 2011/77/EU of 7 December 2010, *on granting Union financial assistance to Ireland*, OJ L 30 of 04.02.2011, p. 34 amended by Council Implementing Decision 2011/326/EU of 30 May 2011, in GU L 147 of 02.06.2011, p. 17; Council Implementing Decision 2011/542/EU of 2 September 2011, OJ L 240 of 16.09.2011, p. 11; Council Implementing Decision 2011/682/EU of 11 October 2011, OJ L 269 of 14.10.2011, p. 31; Council Implementing Decision 2001/827/EU of 30 November 2011, OJ L 329 of 13.12.2011, p. 7 and Council Implementing Decision 2012/375/EU of 22 June 2012, OJ L 182 of 13.07.2012, p. 37.

[21] Council Implementing Decision 2011/344/EU of 30 May 2011, *on granting Union financial assistance to Portugal*, OJ L 159 of 17.06.2011, p. 88 amended by Council Implementing Decision 2011/541/EU of 2 September 2011, OJ of 16.09.2011, p. 8; Council Implementing Decision 2011/683/EU of 11 October 2011, OJ L 269 of 14.10.2011, p. 32; Council Implementing Decision 2012/92/EU of 14 December 2011, OJ L 46 of 17.02.2012, p. 40; Council Implementing Decision 2012/224/EU of 29 March 2012, OJ L 115 of 27.04.2012, p. 21 and Council Implementing Decision 2012/409/EU of 10 July 2012, OJ L 192 of 20.07.2012, p. 12.

[22] Further on this concept from an international law perspective A. Viterbo, *International Economic Law and Monetary Measures. Limitations to States' Sovereignty and Dispute Settlement*, Cheltenham and Northampton, Edward Elgar, 2012, pp. 4-56.

ticularly on the most vulnerable parts of [the] society".[23] This notwithstanding, it can be safely argued that financial stability in this context still represents a priority, to be achieved even at the expenses of any other potentially conflicting objective.

This one-sided approach was even more evident in the negotiation that led to the amendment of Article 136 TFEU, when the European Council rejected the proposal by the European Parliament to insert a reference to the need that the strict conditionality criteria attached to financial assistance had to be "in accordance with the principles and objective of the Union, as laid down in the Treaty of the European Union and this Treaty".[24] Similarly, the Commission's Budget Surveillance Proposal[25] that aims to establish a single conditionality procedure for all the financial assistance mechanism does not contain any reference to the need to ensure the compatibility of the policy conditions with other EU objectives and principles, such as, for instance, social ones. Once again, the European Parliament sought to fill this lacuna, by proposing, first of all, to add a reference to Article 9 already in the Preamble of the act.[26] Furthermore, the Parliament proposed to amend the procedure for the definition of the macro adjustment programme, so to make it "respect the practices and institutions for wage formation and industrial relations in the Union",[27] "fully observe Article 151 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union",[28] "ensure sufficient means for fundamental policies such as education and health care"[29] and be accompanied with an assessment, to be published, of its social consequences.[30] In this case, there is a greater chance for these amendments to be eventually incorporated in the final version of the act. Indeed, the Parliament finds itself in a much stronger position[31] than in the simplified revision procedure used to modify Article 136 TFEU,[32] since the Regulation is to be adopted in accordance with the ordinary legislative procedure.[33]

[23] This provision has been added, as it was not present in their original version, to both the Council Implementing Decision 2011/77/EU (Article 3.9) and Council Implementing Decision 2011/344/EU (Article 3.10) concerning respectively Ireland and Portugal. This kind of provision cannot be found in the decisions addressed to Greece.

[24] Annex I to the European Parliament resolution on the draft European Council decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the Euro, 23 March 2011, C7-0014/2011.

[25] See *supra*.

[26] Amendment 2.

[27] Amendment 41.

[28] *Ibidem*.

[29] Amendment 48.

[30] Amendment 49.

[31] For a wider-encompassing analysis on the role of the Parliament in this context see C. Fasone, *The Struggle of the European Parliament to Participate in the New Economic Governance*, EUI Working Papers, RSCAS 2012/45, August 2012.

[32] Article 48.6 TEU grants to the Parliament only a consultative role.

[33] As provided for by Article 121.6 TFEU.

4. CONDITIONALITY AND EU SOCIAL DIMENSION

4.1. Strengthening EU Social Dimension: From Rome to Lisbon

The strategy followed by EU institutions and Member States in trying to restore financial stability in the Euro area and, in particular, its over-reliance upon austerity measures, has attracted sustained criticism from many quarters. Indeed, these policies have been blamed for the hefty social price they are imposing upon concerned Member States and their population,[34] without, in turn, delivering the expected results.[35]

From a legal standpoint, this approach raises many doubts as to its compatibility with a number of EU basic social principles and objectives upon which rest the equilibrium between the economic and the social dimension within the EU legal order. In particular, its one-sided character appears hardly compatible with one of the defining feature of the 'European economic constitution',[36] i.e. that economic growth and social cohesion must be seen as mutually reinforcing objectives that have to be pursued simultaneously by striking a balance between competing interests and values.[37]

This vision, albeit often implemented in a less-than-consistent and coherent manner, represents a prominent characteristic of the European integration process since its origins. The choice made by the Treaty of Rome of 1957 to exclude almost any possibility for the new subject to intervene in the social sphere, barring the conferral of those powers that were necessary to ensure the functioning of the internal market,[38] was not due to founding fathers' 'social frigidity' lamented by some commentators,[39] but it was aimed to safeguard, or even strengthen, national

[34] A. Heise and H. Lierse, *Budget Consolidation and the European Social Model. The Effects of European Austerity Programmes on Social Security Systems*, Friedrich Ebert Stiftung, March 2011; H. Frazer and E. Marlier, *Social Impact of the Crisis and Developments in the Light of Fiscal Consolidation Measures*, EU Network of Independent Experts on Social Inclusion, February 2011.

[35] It is sufficient to observe that the debt-to-GDP ratio of Greece went from 145% in December 2010 to 165% in September 2012 (source: Eurostat). As a consequence, on 8 November 2012, the Greek Parliament had to pass a new 13.5 billion euro austerity package. Even the IMF was quite critical on this point: see IMF, *Coping with High Debt and Sluggish Growth*, World Economic Outlook, October 2012. See also UNCTAD, *Policies for Inclusive and Balanced Growth*, Trade and Development Report, 2012, p. 13.

[36] On this concept J. Drexl, "La Constitution économique européenne – L'actualité du modèle ordolibéral", *Revue internationale de droit économique*, 2011, pp. 419-454; W. Devroe e P. Van Cleynenbreugel, "Observations on Economic Governance and the Search for a European Economic Constitution", in D. Schiek, U. Liebert and H. Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2011, pp. 96-105; A. Hatje, "The Economic Constitution within the Internal Market", in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, Oxford and Portland, Hart Publisher, 2010, pp. 589-622.

[37] This idea has been often expressed by making reference to the polysemic and uncertain concept of 'European social model'. On this concept see Opinion of the European Economic and Social Committee on Social Cohesion: Fleshing Out the European Social Model, 6 July 2006, OJ C 309 of 16.12.2006, p. 119.

[38] The main example being the conferral to the Council of the power to adopt legislative measures for the coordination of national social security systems, so to facilitate the free movement of workers.

[39] G.F. Mancini, "Principi fondamentali di diritto del lavoro nell'ordinamento delle Comunità europee", in *Il lavoro nel diritto comunitario e l'ordinamento italiano*, Padova, CEDAM, 1988, p. 33.

welfare states. Indeed, the decision of decoupling the social sphere, leaving the former firmly in Members States' hands, from the economic one, which was opened to the intervention of the then EEC,[40] rested on the assumption that the benefits accruing from an integrated market would have strengthened States' capacity to carry out its redistributive duties. The deterioration of the economic conditions in the '70s exposed the flaws of this approach. On the other side, especially starting from the '90s, the original division of labour came under challenge from the progressive 'infiltration'[41] of internal market law into the social sphere. Indeed, the Court of Justice of the European Union (CJEU) started to assess the compatibility of many key aspects of national welfare regimes with the functioning of a competitive internal market. This was the case, for instance, with the application of competition rules to social insurance monopolies or free movement of services norms to cross-border medical treatment.[42] This evolution was strongly criticized for posing serious risks to the functioning of national solidarity institutions,[43] as the common market was perceived as "the most pressing common challenge confronting national welfare states".[44] Indeed, despite the CJEU efforts to find a workable balance between economic and social interests, it was clear that the European integration process could be a destabilizing force in this regard,[45] trying to open up systems that rest on a logic closure.[46] Many commentators called, thus, for a reform of an asymmetrical institutional setting that was perceived as favouring the creation of a competitive market over any other competing interest.[47]

The Treaty of Lisbon sought to satisfy this demand, by introducing some elements of novelty that aim to strengthen the safeguard of social interests *vis-à-vis* economic ones within the EU legal order and, thus, to contribute to find a better balance between the economic and social dimension in this context. Most of these reforms

[40] This kind of embedded liberalism was aptly described with the formula "Keynes at home, Smith abroad" by R. Gilpin, *The Political Economy of International Relations*, Princeton, Princeton University Press, 1987, p. 455.

[41] G. Lyon-Caen, "L'infiltration du droit du travail par le droit de la concurrence", *Droit ouvrier*, 1992, pp. 313-359.

[42] On this evolution see F. Costamagna, *I servizi socio-sanitari nel mercato interno europeo. L'applicazione delle norme dell'Unione Europea in materia di concorrenza, aiuti di Stato e libera circolazione dei servizi*, Napoli, Edizioni Scientifiche Italiane, 2011.

[43] See, *ex multis*, S. Giubboni, "Free Movement of Persons and European Solidarity", *European Law Journal*, 13, 2007, pp. 360-379 and, with particular regard to health care, C. Newdick, "Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity", *Common Market Law Review*, 43, 2006, pp. 1645-1668.

[44] M. Ferrera and S. Sacchi, "A More Social EU: Issues of Where and How", in S. Micossi and G.L. Tosato (eds), *The European Union in the 21st Century: Perspectives from the Lisbon Treaty*, Brussels, CEPS, 2009, p. 36.

[45] C. Joerges, "A Reinassance of the European Economic Constitution?", in U. Neergaard, R. Nielsen and L.M. Roseberry (eds), *Integrating Welfare Functions into EU Law*, Copenhagen, Djøf Publishing, 2009, pp. 37-51.

[46] As explained by Ferrera, redistributive regimes presuppose "the existence of a clearly demarcated and cohesive community, whose members feel that they belong to the same whole and that they are linked by reciprocity *vis-à-vis* common risks and similar needs". See M. Ferrera, *Friends, not Foes: European Integration and National Welfare States*, URGE Working Paper No. 10/2006, p. 3.

[47] F. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies*, 40, 2002, pp. 645-670.

have an eminently defensive character, seeking to shield national solidarity institutions against the destabilizing effects that may derive from the application of EU law. Indeed, the Treaty of Lisbon left substantially untouched the allocation of competences in the social sphere, as it did not confer to the EU any new legal power to intervene in this field. Conversely, the Reform Treaty modified the catalogue of aims contained in Article 3 TEU, dropping the protection of undistorted competition from the list and giving an unprecedented visibility to wide array of social objectives. Furthermore, it also introduced a new provision—Article 9 TFEU—that contains an 'horizontal social clause' imposing to the EU to take into account "requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health" when defining or implementing its policies. Another innovation that is relevant in this regard is, as it will be better examined in one of the next paragraphs, the conferral of a legally binding value to the Charter of Fundamental Rights ('Charter') and, in particular, to the social rights contained therein.

Consideration for Member States' autonomy in organizing and financing their social systems, no absolute prioritization of economic objectives over social ones and respect for the Charter's social rights are three fundamental components of EU social dimension that bind European institutions in the exercise of their functions. Before assessing the compatibility of conditionality with these elements, there is the need to address a preliminary question concerning the applicability of these limits to the legal instruments detailing the conditions attached to the financial assistance packages. As seen above, these conditions are not formally imposed on the recipient State, but they are agreed by the latter with the Commission, acting together with the ECB and the IMF.[48] However, we contend that Treaties' and Charter' norms imposing the respect for social objectives, national competences and rights apply in the case at hand and, consequently, they are relevant to evaluate the lawfulness and legitimacy of the way in which conditionality has been used in the context of the European sovereign debt crisis.

This conclusion rests upon two main arguments. First, these conditions, despite being detailed also in documents that are outside the EU legal system, are ultimately approved by the Council and included in fully-fledged EU normative acts, adopted on the basis of EU primary or secondary law. This is very much evident with regard to Greece, whose adjustment programme has been embedded in a series of decisions adopted in the context of the excessive deficit procedure, pursuant to Articles 126.9 and 136.1 TFEU. But the same goes also with regard to the programmes for Ireland and Portugal that have been approved by the Council with decisions adopted on the basis of Council Regulation (EU) no. 407/2010. This will be even truer should the Budget Surveillance Proposal be adopted, as this act would introduce a single conditionality instrument fully within the EU legal

[48] *Supra* para. 2.

system. Secondly, European institutions cannot hide behind the allegedly consensual nature of the conditions attached to the financial assistance packages to disregard principles and objectives that represent foundational elements of the EU legal order and that, in any case, cannot be derogated by an ad hoc agreement between the Commission single Member States.

The assumption that conditionality must be defined and applied in way that is consistent with, inter alia, Treaties' norms on EU social dimension has been further validated, albeit only incidentally, in the Pringle case. Asked to rule on the compatibility with EU law of the decision to create a mechanism such as the ESM, the CJEU confirmed that Member States have the power to do so, provided that they intended to ensure, "by providing that the granting of any financial assistance under the mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law".[49] It can be, thus, inferred that, being it a guarantee for the mechanism to comply with EU law, conditionality cannot but fully respect all the limits set by the Treaties, also those concerning the social sphere.

4.2. Conditionality and EU Competences in the Social Field: A Step Too Far?

Conditionality attached to the financial assistance programmes for Greece, Ireland and Portugal touches upon many key aspects of national welfare regimes in a way that seems to go far beyond the limits imposed by the Treaties to the EU capacity to intervene in this field.

As seen above, EU competences in the social field remain fairly limited even after the entry into force of the Treaty of Lisbon. Article 153.1 TFEU, for instance, establishes that, with regard to the combating of social exclusion and the modernization of social protection systems, the EU can only intervene to support and complement the activities of Member States that, hence, retain an exclusive competence in these fields. The only partial exception concerns social security and social protection of workers, as in this field Article 153.2 TFEU gives to the Council, acting unanimously, the possibility to adopt directives imposing "minimum requirements for gradual implementation". However, Article 153.4 TFEU makes clear that these provisions cannot affect or impair Member States capacity to define the fundamental principles of their social security systems, nor affect the financial equilibrium thereof.[50] Lastly, Article 153.5 TFEU rules out any EU intervention on issues such as pay and right of association.

[49] Judgement of 27 November 2012, *Pringle*, Case C-370/12, nyr, para. 72.

[50] Stevens observes that "[t]his means that each Member State is free to determine the details of its own social security system, including which benefits are to be provided, the conditions of eligibility, how these benefits are calculated and what level of contribution should be paid". Y. Stevens, "Interactions Between Policy and Law Regarding Pensions", in B. Cantillon, H. Verschueren and P. Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions Between Law and Policy*, Cambridge, Antwerp-Portland, Intersentia, 2011, p. 159.

A similar situation can also be observed with regard to health care. According to Article 168 TFEU, EU action in this field can only complement national policies, excluding "any harmonization of the laws and regulations of Member States". For good measure, Article 168.7 TFEU makes clear that, in any case, EU intervention has to respect "the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care", especially with regard to the management of health care services and the decisions concerning the allocation of resources to finance their provision.

The conditions contained in the Council decisions regulating the access of Greece, Ireland and Portugal to financial assistance mechanisms seem at odds with these limits.[51] Therefore there is the need to determine whether the EU can, in the exercise of its powers to ensure financial stability in the Euro area, overcome these limits. This issue has been raised in two judicial actions brought in front of the General Court by representatives of a Greek trade union seeking the annulment of some of the decisions addressed to Greece.[52] One of the grounds advanced by the applicants in support of their pleas is that Council's measures violate the principle of conferral as established by Article 5 TEU. In particular, they contended that the measures adopted under the excessive deficit procedure "cannot be prescribed specifically, explicitly and without room for deviation, since that competence is not conferred upon the Council by the Treaties". Similar arguments can also been raised with regard to the Council decisions directed toward Ireland and Portugal, as it is doubtful that Council Regulation (EU) no. 407/2010 allows for the prescription of measures with this level of detail. In this regard, it is worth observing that Article 3.3, lett. b, of the Regulation states that the decision granting a loan should contain only "the general economic policy conditions which are attached to the Union financial assistance".[53] Conversely, the decisions directed toward Ireland, Portugal, as well as those for Greece, have not a general character, nor they simply establish quantitative criteria that States have to meet in order to obtain the loans, but they impose the adoption of specific measures concerning pensions, social assistance funds, workers' right of association, provision of medical services and financing of national health systems. Therefore, it can be argued that the provisions mandating the adoption of such measures are illegitimate, in so far as they unduly detract from States' powers to organize their social protection systems.

[51] D. Triantafyllou, "Les plans de sauvetage de la zone Euro et la peau de chagrin", *Revue du droit de l'Union Européenne*, 2011, pp. 198-201.

[52] *ADEDY and Others v. Council*, Case T-541/10, Action of 22 November 2010; *ADEDY and Others v. Council*, Case T-215/11, Action of 14 April 2011. However, the General Court will not rule on the merit of these actions as it declared them inadmissible for applicants' lack of standing, as the latter failed to demonstrate that they were directly concerned by the challenged acts (*ADEDY and Others*, Case T-541/10, Order of 27 November 2012 and *ADEDY and Others*, Case T-215/11, Order of 27 November 2012).

[53] Emphasis added.

4.3. Conditionality and EU Treaties' Social Objectives

So far, one of the defining features of the strategy adopted to respond to the European sovereign debt crisis is its exclusive focus on restoring financial stability, paying little, if any, attention to other competing objectives. As seen above, this one-sided approach appears hardly compatible with the overall vision that, at least on paper, lies at the core of the European integration process and, more poignantly from a legal perspective, with the new catalogue of aims that the EU is bound to pursue with its action. Article 3 TEU, as modified by the Treaty of Lisbon, gives unprecedented visibility to a host of social objectives, putting them on a par with more traditional economic ones, such as the establishment of an internal market.[54] For instance, paragraph 3 of this article imposes to the EU to work for "the sustainable development of Europe based on […] a highly competitive social market economy, aiming at full employment and social progress […]". Furthermore, the following indent establishes that the EU "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

This objectives sound admittedly hollow, as their proclamation has not been matched with the conferral to the EU of new social powers. For instance, criticisms have been levelled against the reference to social market economy among the aims to be pursued by the EU. Joerges and Rödl contended that this reference stands in a vacuum, as the EU has not the capacity to intervene in fields—such as taxation and social policy—that are key for the implementation of the model.[55] This notwithstanding, the choice to grant constitutional status to social objectives is not meaningless, in so far as it imposes to European institutions to contribute to their achievement by, as a minimum, avoiding that the application of EU law could represent an obstacle to this end. Furthermore, this innovation calls EU decision-makers to find an adequate balance between objectives—economic and social ones—that now enjoy equal status within the EU legal order.

This duty is reiterated and further specified by the so-called 'horizontal social clause' (Article 9 TFEU). This provision establishes that "in defining and implementing its policies, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". Although lacking bite in the definition of EU obligations, the clause has been defined as "the most important innovation of the Lisbon Treaty", marking the "appearance within the constitutional arena of [a] po-

[54] F. Costamagna, "The Internal Market and the Welfare State: Anything New After Lisbon?", in M. Trybus and L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham and Northampton, Edward Elgar, 2012, pp. 385-389.

[55] C. Joerges and F. Rödl, *'Social Market Economy' as Europe's Social Model?*, EUI Working Paper No. 2004/8, May 2004, pp. 19-21. See also F. Scharpf, *The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy*, MPIfG Working Paper No. 09/12, November 2009.

tentially strong [anchor] that can induce and support all EU institutions […] in the task of finding an adequate (and more stable) balance between economic and social objectives".[56] Although originally drafted to stem the infiltration of internal market rules into the social field, this provision has a general scope of application, covering all EU policies.

In the light of the above, doubts arise as to the legitimacy of conditionality, at least in the way it has been applied in the context of EU-sponsored financial assistance packages. On the one hand, the severity of austerity measures to be adopted by the States receiving financial assistance are hindering the pursuit of objectives set forth by Article 3 TEU, such as combating social exclusion or promoting social justice and protection. Indeed, harsh cuts to social expenditure are reducing national authorities' capacity to meet even basic needs of their population, making social exclusion increase and social justice vanish. On the other hand, all these measures aim to restore financial stability paying little, if any, attention to any competing requirement and, thus, spending not too much efforts in trying to find a more appropriate balance between economic and social objectives as required by Article 9 TFEU.

4.4. Conditionality and the Charter's Social Rights

Austerity measures adopted in response to the European sovereign debt crisis have a deep impact on the enjoyment of a wide array of basic social rights.[57] Therefore, their legitimacy is to be assessed also by looking at the obligations descending from the Charter and, in particular, from those provisions on fundamental social rights, such as the right to education (Article 14), access to social security and social assistance (Article 34), access to health care (Article 35) and access to services of general economic interest (Article 36). The Charter, which has been granted "the same legal value as the Treaties" (Article 6 TEU), is addressed to EU institutions and other bodies, as well as to Member States "when they are implementing Union law".

In order to assess the compatibility of conditionality with the Charter's social rights, there is the need to clarify the normative scope of the relevant provisions, i.e. which obligations they actually impose upon EU and national institutions. Indeed, these provisions are filled with caveats and limitations that Member States wanted to insert in order to avoid that the recognition of social rights in a legally

[56] M. Ferrera, "Modest Beginnings, Timid Progresses: What's Next for Social Europe?", in B. Cantillon, H. Verschueren and P. Ploscar (eds), *op. cit.*, p. 29.

[57] CoE Parliamentary Assembly, *Austerity measures – A danger for democracy and social rights*, Resolution no. 1884 of 26 June 2012. Cephas Lumina, UN independent expert on foreign debt and human rights, observed that, with regard to Greece, "the implementation of the second package of austerity measures and structural reforms […] have a serious impact on basic social services and therefore the enjoyment of human rights by Greek people, particularly the most vulnerable sectors of the population, such as the poor, elderly, unemployed and persons with disabilities". See "Greek Austerity Measures Could Violate Human Rights, UN Expert Says", UN News Centre, 30 June 2011 [http://www.un.org/apps/news/story.asp?NewsID=38901&Cr=austerity&Cr1#.UKEnBrSFhz8].

binding instrument could end up imposing further limits on their social sovereignty. This led some commentators to argue that the Charter's social rights are not fully-fledged rights, but only programmatic principles.[58] Pursuant to Article 52.5 of the Charter, social rights' provisions could not be given direct effect, as they do not give rise to directly enforceable rights. However, the attempt to force all social rights into the 'principles' category looks over simplistic and, in the end, fallacious. As demonstrated by many commentators,[59] and further confirmed by the UN Committee on Economic, Social and Cultural Rights,[60] social rights can give rise to different types of obligations, some of them being directly enforceable, while other having a more programmatic character. This means that, as observed by some authors with regard to the Charter, "good arguments can be made for ranging fundamental social rights in the 'rights' category, rather than in the 'principles' one".[61] In any case, this distinction only concerns the possibility for these provisions to "give rise to direct claims for positive action by the Union's institutions or Member States' authorities"[62] and, thus, it does not affect their functions as yardsticks for social legitimacy.

A first provision that is relevant in this context is Article 34 of the Charter, whose paragraph 1 imposes to the Union to recognise and respect "the entitlements to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment". Paragraph 3 of the same article adds that "[i]n order to combat social exclusion and poverty" the duty to 'recognize and respect' also applies to the right of social and housing assistance, "so as to ensure a decent existence for all those who lack sufficient resources". According to some commentators,[63] this provision is to be read as safeguarding a minimum core of this right, prohibiting EU institutions, as well as national ones when implementing EU law, from adopting retrogressive measures that could put in jeopardy the access to those services that are necessary to meet the right-holder's basic needs or, to use the wording of Article 34.3 of the Charter, to run a decent existence.[64]

[58] Lord Goldsmith Q.C., "A Charter of Rights, Freedoms and Principles", *Common Market Law Review*, 38, 2001, p. 1213.

[59] R. Pisillo Mazzeschi, "Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme", *Recueil des Cours de l'Academie de Droit International de l'Haye*, 333, 2009, pp. 429-489.

[60] UN Committee on Economic, Social and Cultural Rights, *General Comment no. 3. The Nature of State Parties Obligations (Art. 2, par. 1)*, 5th Session (1990), E/1991/23.

[61] D. Damjanovic and B. De Witte, "Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty", in U. Neergaard, R. Nielsen and L.M. Roseberry (eds), *op. cit.*, pp. 79-80.

[62] *Explanation of Article 52 – Scope and interpretation of rights and principles.*

[63] O. De Schutter, "La garantie des droits et principes sociaux dans la Charte des droits fondamentaux de l'Union Européenne", in J-L. Charlier and O. De Schutter (eds), *La Charte des droits fondamentaux de l'Union Européenne. Son apport à la protection des droits de l'Homme en Europe. Hommage à Silvius Marcus Helmons*, Bruxelles, Bruylant, 2002, pp. 120-121; A. Giorgis, "Art. 34. Sicurezza sociale e assistenza sociale", in R. Bifulco, M. Cartabia and A. Celotto (eds), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, Il Mulino, 2001, pp. 242-243.

[64] This interpretation is strongly reminiscent of the 'minimum core doctrine' that had been elaborated by the UN ESCR Committee in response to claim according to which economic, social and cultural rights had only a programmatic nature (see ESCR Committee, *General Comment no. 3*, cit., para. 3). On this

This interpretation can be largely agreed with, as it is consistent with the ultimate purpose of the provision. Furthermore, this reading is in line with Articles 12, 30 and 31 of the European Social Charter (revised), upon which paragraphs 1 and 3 of Article 34 of the Charter are based.[65] In particular, Article 30 of the European Social Charter requires States parties "to take measures […] to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty […] to, in particular, employment, housing, training, education, culture and social and medical assistance". It is worth noting that this purposive interpretation of Article 34 has been recently endorsed also by the CJEU in a case concerning the access to a housing benefit by an Albanian national who had the status of long-term resident.[66] In particular, the CJEU relied upon Article 34 of the Charter as a tool to interpret the notion of "core benefits" contained in Article 11.4 of Directive 2003/109/EC.[67] The CJEU observed that Article 34 of the Charter, aiming to guarantee the possibility to enjoy a decent existence to all those who lack sufficient resources, imposes to interpret the above-mentioned provision in the sense of ensuring to all long-term residents access on a non-discriminatory basis to all those benefits that enable them to meet "their basic needs such as food, accommodation and health".[68]

The same interpretative approach could be adopted also with regard to other social rights of the Charter. This can be the case with Article 35 of the Charter, recognizing the right to have access "to preventative health care and […] to benefit from medical treatment […]". Accordingly, EU institutions and, as far as the implementation of EU law is concerned, national authorities are called upon to fully respect this right, avoiding, as a minimum, the adoption of measures that can make access to basic health care services too burdensome, especially for the most vulnerable parts of the population. Indeed, this provision is based on Article 13 of the European Social Charter that, in strong continuity with the other provisions seen above, requires States parties to make sure that "any person who is without adequate resource […] be granted adequate assistance and, in the case of sickness, the care necessitated by his condition". Furthermore, similar obligations can also be read into Article 14 of the Charter, that, after having recognized "the right to education and to have access to vocational and continuing training", set out what can be considered as the minimum core of this right. Indeed, its second paragraph establishes that "[t]his right includes the possibility to receive free compulsory education". Therefore, European and national institutions have to ensure that access

doctrine see, *ex multis*, K.G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content", *The Yale Journal of International Law*, 33, 2008, pp. 113-175.

[65] *Explanation of Article 34 – Social security and social assistance.*

[66] Judgement of 24 April 2012, *Kamberaj*, case C-571/10, nyr. On this judgement see F. Costamagna, "Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione Europea e ordinamenti interni: il caso Kamberaj", *Diritti umani e diritto internazionale*, 6, 2012, pp. 672-679.

[67] Council Directive 2003/109/EC of 25 Novembre 2003, *concerning the status of third-country nationals who are long-term residents*, OJ L 16 of 23.01.2004, p. 66.

[68] *Kamberaj*, para. 91.

to compulsory education is free of charge, avoiding the adoption of measures that go against this result.

Early assessments of the social impact of austerity measures raises several doubts as to the compatibility of the conditions attached to financial assistance packages with some of the Charter's social rights, even if taken in such a minimalist version. Cuts to social expenditure are so severe and wide-ranging to make increasingly difficult for national authorities to ensure even the provision of basic social services. Furthermore, austerity measures are disproportionately affecting lower income classes and some of the most vulnerable categories of the population—such as elderly, children, jobless and disabled persons—, as they are more dependant on social welfare or less able to have access to more costly services. One of the most visible example in this regard is that of the Greek health system, as its benefit packages has been reduced and many public hospitals are unable to buy medicines and medical equipment necessary to provide reimbursable treatments.[69] Furthermore, Greece was forced to increase user charges, with only limited exceptions for certain vulnerable groups.[70] A similar situation can be observed also with regard to other sectors, such as that of housing assistance. The reduction of available resources has forced national authorities to cut back public housing programs for those that cannot afford paying market prices, causing a dramatic increase of homeless persons and households.[71]

The available data, despite their partial coverage, seem to show the existence of a prima facie incompatibility between some of the conditions attached to financial rescue packages and the Charter's social rights. This notwithstanding, the fact that there seems to be greater attention toward adjustment programs' social implications. As duly emphasised by the Commission with regard to the Greek case,[72] concrete steps, such as imposing larger reductions in higher pensions, have been taken to minimise the impact of austerity measures on the most vulnerable strata of the population. In any case, simply showing that the implementation of conditionality determines a reduction in living standards is not enough to prove that these measures are illegitimate. Indeed, retrogressive measures are not forbidden per se, but only if they cannot be justified in the light of the context in which these measures have been adopted, their objectives and the way in which they have been designed and implemented.[73] Social protection standards cannot be considered as

[69] D. Kaitelidou and E. Kouli, "Greece: The Health System in a Time of Crisis", *Eurohealth*, 18, 2012, pp. 12-14.

[70] Ireland was also forced to adopt this measure. See S. Thomas and S. Burke, "Coping with Austerity in the Irish Health System", *Eurohealth*, 18, 2012, p. 8.

[71] For instance, NGOs' estimates show that the number of homeless persons in Greece went from 11,000 in 2009 to 20,000 in 2012. See G.A. Stamatis, "Homeless in Greece in the Current Financial Crisis. What Perspectives?", May 2012 [http://www.feantsa.org/code/en/pg.asp?Page=24&pk_id_news=5900].

[72] European Commission, *The Second Economic Adjustment Programme for Greece*, Occasional Paper No. 94, March 2012, pp. 6-7.

[73] The ESCR Committee made clear that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the

having an absolute character, as competent national authorities retain their power to continuously revise them, especially when this required to quell the threat posed by a financial crisis as grave as the present one.[74]

Furthermore, as provided for by Article 52.1 of the Charter, there is the possibility to limit the exercise of the rights to pursue "objectives of general interest recognized by the Union […]". There are few doubts that the derogation clause could find application in this case, as the re-establishment of financial stability in the concerned States and in the whole Euro area, by avoiding contagion to other fellow countries, can be regarded as a legitimate objective of general interest of the EU.[75] Indeed, ensuring sound public finance and monetary conditions is a principle that must guide the actions of EU and national institutions in the context of the economic and monetary policy, as provided for by Article 119 TFEU. Furthermore, it is evident that safeguarding financial stability is an essential condition to ensure a future not just to the EMU, but to the European integration process as a whole. In this context, the reduction of social expenditure could represent a reasonable tool to achieve this objective, due to the importance of this item for States' budget.[76]

However, there are other requirements that have to be met if limitations to the exercise of the rights recognized by the Charter are to be legitimately imposed. First of all, any limitation must respect "the essence" of the rights. This notion has much in common with that of 'minimum core', as both of them refer to those conditions that are necessary for a dignified existence. In the light of what seen above, it is dubious that conditionality, at least in the way it has been designed and implemented in the context of the rescue packages for Greece, Ireland and Portugal, could be said to safeguard the essence of social rights.

Similar problems may also arise with other requirements set forth by the derogation clause, i.e. that limitations must be subject to the principle of proportionality and that they have to be "necessary and genuinely meet" the objectives pursued. It is not possible to fully explore all the implications of a requirement that, if taken seriously, could severely restrict the number of

totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (see ESCR Committee, *General Comment no. 3*, cit., para. 9).

[74] It is worth observing that this stance has been consistently taken also by the European Committee of Social Rights in interpreting many of those articles that represent for Charter's provisions that are relevant in this context. For instance, in a case concerning the application of the right to social security (Article 12 of the European Social Charter) to a change of the social security scheme to members of the Public Prosecutor's Office emphasised that "States enjoy a wide margin of discretion on how to organize their social security systems, including defining the personal scope of schemes providing health care benefits, as long as a significant percentage of population is covered and the benefits provided are sufficiently extensive" (European Committee of Social Rights, *Decision on the Merit: Sindicado do Magistratos do Ministerio Publico (SMMP) v. Portugal*, Collective Complaint No. 43/2007, Decision of 3 December 2008).

[75] Despite not being included in the list of Article 3 TFEU.

[76] According to Eurostat data, in 2008 social expenditure—including health one, but excluding that for pensions—amounted to 26.4% of EU GDP.

admissible limitations. However, it is worth observing that exclusive reliance upon austerity, at the expenses of any other competing interest, can be hardly considered as a proportionate and necessary response to the crisis. Indeed, the experience of other non-EU States[77] that were severely hit by the crisis demonstrates that alternative strategies, more attentive to the safeguard of social rights, could have been adopted. Lastly, questions arise also with regard to the capacity of austerity measures to "genuinely meet" the objective of restoring financial stability, as data show that their negative impact on economic growth is contributing to further reduce States' revenues and, in the end, worsening their financial situation.

5. Conclusions

This paper sought to assess the compatibility of policy conditionality attached to EU-sponsored financial assistance packages with the three main pillars of EU social dimension. The analysis showed that several features of these measures are at odds with fundamental social objectives and principles set out by the Treaty, as well as with some of the social rights recognized by the Charter.

More in detail, the conditions enshrined in the Council decisions directed toward recipient States touch upon key aspects concerning the functioning of national social regimes, unduly encroaching upon States' competences in this field. Moreover, these measures are exclusively geared toward restoring financial stability in the Euro area, paying little, if any, attention to competing social objectives. This feature is incompatible with the choice made by the Lisbon Treaty to put social objectives on a par with economic ones. This, as further specified by Article 9 TFEU, imposes to the EU to find a suitable balance between potentially conflicting objectives, as they enjoy equal status within the EU legal order. Lastly, the severe cuts to social expenditure imposed as a condition to obtain financial help are making increasingly difficult for national authorities to ensure even the provision of basic services. Austerity measures are disproportionately affecting the most vulnerable categories of the population, which are more dependant on social welfare to satisfy their basic needs. All these elements point to the existence of a prima facie incompatibility between conditionality and some of the Charter's social rights. Indeed, these measures are affecting the minimum core, or the "essence", to use the wording of Article 52.1 of the Charter, of these rights, and doubts can be raised as to whether they are justified as a proportionate, necessary and suitable response to the crisis.

[77] As it is the case of Iceland, where the Government decided to adopt relatively small cuts to public spending and to prioritize the welfare state and employment legislation. On this see R. Wade and S. Sigurgeirsdottir, "Iceland's Rise, Fall, Stabilization and Beyond", *Cambridge Journal of Economics*, 36, 2012, pp. 127-144. For a legal analysis of the Icelandic case see A. Viterbo, "The Return of Capital Controls as Emergency Tools to Counter Financial Crises. Iceland's Crisis and the Constraints Imposed by the EEA Agreement", *Capital Markets Law Journal*, 6, 2011, pp. 214-237.

If taken together, all these aspects can be considered as signs of a more profound and far reaching incompatibility between the one-sided strategy devised to safeguard financial stability in the Euro area, with its over-reliance upon austerity measures, and one of the defining feature of the European economic constitution, according to which economic integration and social cohesion must be seen as mutually reinforcing objectives to be pursued by finding a balance between competing interests and values. The problem is not with conditionality per se, but with the way in which it has been defined and applied by EU institutions. Indeed, making the release of rescue funds conditional on an adjustment programme represents a necessary step in order to ensure that the beneficiary State addresses the root causes of its plight. However, there is the need for a substantive reassessment of the content of the conditions attached to the assistance packages, by fully recognizing the impact of an instrument that represents "[t]he only institutional process potent enough to pursue structural reforms"[78] as it is used toward countries that have little option but to accept it.

This is a task for EU decision-makers that must start to consider respect for social rights and objectives not as an obstacle to achieve financial stability, but rather as a building block of a more efficient exit strategy from the crisis. The European Parliament can certainly play an important role to this end, as demonstrated by the amendments formulated with regard to the Proposal for a regulation that aims to establish a single conditionality instruments applicable to all the mechanism for financial assistance. There are signs that also Member States and the Commission are realizing the need for a different approach, more attentive to the safeguard of social objectives and rights. Indeed, blind adherence to old-fashioned neo-liberal recipes may cause long-lasting damages to EU social cohesion and to the legitimacy of the whole integration process.

[78] D. Adamski, "National Power Games and Structural Failures in the European Macroeconomic Governance", *Common Market Law Review*, 49, 2012, p. 1363.