

FIGHTING WITH HANDS TIED? THE EUROPEAN SOCIAL FUND AND THE PROMOTION OF SOCIAL INCLUSION

Cristina Fasone, Marta Simoncini***

Abstract

Before the COVID-19 outbreak as well as in its aftermath, the capacity of the EU budget to contribute to the protection of social rights has remained largely unexplored. This article critically highlights that the Union suffers from the misalignment between the solidarity goals set in EU primary law and the structure of the EU budget and its expenditure channels. By focusing on the European Social Fund (ESF) and the right to social assistance and inclusion, this article demonstrates that this gap has both policy and legal reasons. The many constraints on budgetary decisions and the management of the ESF generate a dysfunctional framework for the promotion of social inclusion and for the implementation of the right to social assistance, showing that the protection of social rights can be only marginally pursued through the EU budget and at high administrative and judicial costs.

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* Associate Professor of Comparative Public Law, Department of Political Science, University of Rome "LUISS Guido Carli".

** Assistant Professor of Administrative Law, Department of Political Science, University of Rome "LUISS Guido Carli". The article is the result of the joint work of the authors and reflect their shared views. However, sections 2, 3, 4, 5 and 6 should be attributed to Cristina Fasone, whereas sections 7 and 8 to Marta Simoncini.

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1. Introduction

The adoption of the EU measures to foster the recovery from the pandemic has sparked a lively debate on the functions and the goals of the EU budget. This article aims to contribute to this debate by investigating to what extent the EU budget, and the European Solidarity Fund in particular, is well-equipped to protect the social rights that EU law “promises” to deliver. The financing of the EU (regular) budget, as per the new 2021-2027 Multiannual Financial Framework (MFF) alongside Next Generation EU (NGEU)¹ will be capable to mobilise almost twice² the usual amount of resources that has typically featured the EU budget pre-crisis³. While this has been recurrently criticised for being too small to fulfil the myriad of

¹ A legislative package injecting 806.9 billion euro (in 2021 prices) for the recovery, with the recovery and resilience facility being by far the largest fund (723.8 billion euro) separated from the regular EU budget (On the “EU budgetary galaxy”, which the response to the pandemic further increases, see R. Crowe, *The European Budgetary Galaxy*, in *European Constitutional Law Review*, 13, 2017, pp. 428-452). See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17-75. For an overall view on NGEU, see https://ec.europa.eu/info/strategy/recovery-plan-europe_en#documents The size of the MFF 2021-2027 alone amounts to 1.211 trillion euro (in 2021 prices) and, thus, it is slightly higher than the MFF 2014-2020.

² According to the previous Council’s Own Resources Decision (Decision 2014/335/EU) the size of the EU budget could not exceed 1.29% of all the Member States’ Gross National Income (GNI) for commitment appropriations and 1.23% of the EU GNI for payment appropriations (Art. 3). With the new Own Resources Decision (Decision 2020/2053), in force since 1 June 2021, the ceilings will reach almost 2% of the EU-27 GNI.

³ For example, the EU budget for 2020 comprised about 153 billion euro (in payments) and was, therefore, smaller than the national budget of medium sized Member States such as Belgium or Austria.

EU objectives (especially under Art. 3 TEU)⁴, the question arises as to whether, thanks to the inflow of resources triggered by the recent post-pandemic measures, the EU budget will become more fit for purpose.

An aspect of the EU budget that so far has remained largely unexplored is its capacity to contribute to the protection of social rights in the EU. While scholarly work has been carried out on the asymmetries in the EU budget⁵ and on budget spending for what concerns the structural and cohesion funds in particular⁶, little attention has been paid to the enforcement of the social rights protected under the Charter of fundamental rights of the EU (hereinafter, the Charter) through EU budgetary resources⁷. The issue is all the more important now that the size of the EU budget has been expanded, though temporarily, and a renewed effort has been made to implement the European Pillar of Social Rights⁸ under the Portuguese Presidency of the Union⁹.

The goal of this contribution is precisely to investigate if and how the EU budget contributes to the protection against social

⁴ On this critique, which is decades old, see B. Laffan, *The Finances of the European Union* (1997), 15.

⁵ Especially on its structural deficiencies on the side of the EU own resources, see G. Della Cananea, *No representation without taxation in the European Union*, in L. Papadopoulou, I. Pernice, J.H.H. Weiler (eds.), *Legitimacy issues of the European Union in the face of crisis: Dimitris Tsatsos in memoriam* (2017), 95-122 and F. Fabbrini, *A Fiscal Capacity for the Eurozone: Constitutional Perspectives*, In-depth Analysis commissioned by the Directorate General for Internal Policies of the Union, European Parliament, PE 608.862 (2019), 10-14.

⁶ V. Viță, *Conditionalities in Cohesion Policy, Research for REGI Committee*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels (2018), 21 ff. and M. Casula, *Economic Growth and Cohesion Policy Implementation in Italy and Spain: Institutions, Strategic Choices, Administrative Change* (2020), esp. 1-110.

⁷ An interesting proposal, with this regard, has been formulated by A. Sangiovanni, *Solidarity in the European Union*, 33(2) *Oxford Journal of Legal Studies* 240 (2013) to introduce “an EU-funded compensation scheme for member states that are net importers of social assistance recipients”, thereby linking the EU budget to a clear social assistance function.

⁸ S. Giubboni, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, 4 *Quaderni costituzionali* 953 (2017) and S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (2018), esp. 142-143.

⁹ See the outcomes of the Porto Social Summit of 7-8 May 2021, in particular, the Porto Social Commitment of 7 May 2021 and the European Pillar of Social Rights Action Plan, available at: <https://www.2021portugal.eu/en/porto-social-summit/action-plan/>

exclusion. The EU in fact has embraced the policy goal of fighting poverty by recognising the fundamental right to social assistance under Art. 34 (3) of the Charter, “so as to ensure a decent existence for all those who lack sufficient resources”. This right is different from the social protection of workers on which scholarly investigation has primarily focused¹⁰. In fact it points to the core of the existence of a social Europe beyond the internal market: the specific focus on the “most deprived persons and children”¹¹ and on the need to address material deprivation through food and/or basic material assistance allows to redistribute EU resources on the EU inactive population and people temporarily out of the job market.

We will analyse the European Social Fund (ESF) as a case study to understand if and how the right to social assistance and inclusion has been effectively enforced through the EU budget and whether it is justiciable. Indeed, although there are several EU funds that can potentially contribute to fostering this right directly or indirectly - from the European Regional Development Fund to the European Globalisation Adjustment Fund - the ESF is the oldest and the largest instrument, and it has been further strengthened in the aftermath of the pandemic (ESF+) to protect the most vulnerable groups and deprived persons. According to the official figures, every year the ESF has “helped some 10 million people to find work or to improve their skills to enable them to find work in future”¹² and during the pandemic 1.4 billion euro in direct support were

¹⁰ See, amongst many, M. Dougan, E. Spaventa (eds.) *Social Welfare and EU law* (2005); D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (2017), and A. Nato, *La cittadinanza sociale europea ai tempi della crisi economica* (2020), 51-107.

¹¹ Art. 2, para 6, Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 offers a definition of “most deprived persons” as “natural persons, whether individuals, families, households or groups of persons, including children in vulnerable situations and homeless people, whose need for assistance has been established according to the objective criteria which are set by the national competent authorities in consultation with relevant stakeholders while avoiding conflicts of interest, and which may include elements that allow for the targeting of the most deprived persons in certain geographical areas”.

¹² See H. Hoffman, *Fact Sheets on the European Union – European Social Fund Plus*, European Parliament, last update March (2021), <https://www.europarl.europa.eu/factsheets/en/sheet/53/european-social-fund>

immediately mobilised from the ESF to ensure social services and guarantee vulnerable groups.

Given the complex arrangement for the financing (and national co-financing) of the ESF projects, between the domestic and the supranational levels, the effective support of social inclusion in the EU context is constrained by supranational principles and rules besides being conditioned by national law (which, however, remains out of the scope of the analysis).

Without any aim to put forward policy proposals (which is beyond the scope of the analysis), the contribution critically reviews the problematic enforcement of the right to social inclusion along several dimensions, which are closely intertwined, all of them revolving around the spending of the EU budget especially through the ESF. The first dimension considers the limits of the Treaty framework and of the case law on social rights in relation to the budgetary constraints that feature the EU spending. The institutional dimension of analysis follows, by looking at the disposition of the Council and the European Parliament towards social spending in the decision-making.

The second dimension concerns the multilevel governance of the ESF. We claim that the complexity of the cooperative mechanisms in place affects the enforcement of the rights and their justiciability. The coexistence of all these problematic dimensions, each for its own part, in the EU daily practice contributes to making the EU budget quite weak in the fight against social exclusion.

The article will proceed as follows. Firstly, we will consider the architecture of the EU budget and its many constraints (Section 2). We will then move on to review the principles, the social objectives set out in the TEU and the social rights listed in the Charter, in particular Art. 34 (3), with the aim of understanding whether and to what extent they are aligned with the competence and the powers conferred to the EU (Section 3). Subsequently, we will focus on the (to date) very limited case law of the Court of Justice on the right to social assistance in relation to budgetary constraints (Section 4). We will also examine the relevance of the right to social assistance and inclusion in the decision-making on the budget by EU representative institutions (Section 5). Against this backdrop, we will deal with the case study of the ESF and its reform in the ESF+. We will firstly trace the growth in terms of size and scope of the Fund and consequently assess how the spending of the ESF during the MFF 2014-2020 has translated into the

protection of the right to social assistance and inclusion (Section 6). In doing this, we will highlight problems and pitfalls, and focus on the key issues of the administrative governance of the Fund, showing how the cooperation between domestic authorities and the Commission and conditionality clauses affect enforcement (Section 7). On these grounds, we will also analyse the justiciability of the alleged breach of social rights due to the exclusion from the ESF (and ESF+) resources (Section 8). Section 9 concludes and emphasises how these multidimensional issues make the redistributive performance of the EU budget dysfunctional.

2. The architecture of the EU budget and its many constraints

The constitutional debate on the social function of the budget, on the protection of the welfare state and of social rights as inevitably linked to the public spending¹³, is almost lacking at supranational level while, instead, it is several decades old within the Member States and has recently resurfaced as a consequence of the sovereign debt crisis¹⁴. In particular, at the EU level, there is no elaboration on the idea of the conditional nature of social rights, and namely on the dependence of their enforcement on the availability of public resources.

Such a lack seems to derive from the (to date) incomplete nature of the EU budget as ancillary and complementary to the national ones. While it is hard to object to this conclusion when

¹³ In some countries, like Italy and Germany, there is a consolidated line of case law on the point. While in Italy the Constitutional Court has been called to fulfil a different balancing between sound public budget and guarantee of social rights, depending on the economic cycle (see jurisprudence of the 1960s and 1970s compared to judgment no. 70/2015, 118/2015, 275/2016), in Germany the social state principle has been the linchpin to develop a case law very protective of social rights. See J. King, *Social Rights, Constitutionalism and the Social State Principle*, I(3) *e- Pùblica* 19 (2014).

¹⁴ See Commissioner for Human Rights, Council of Europe, *Safeguarding human rights in times of economic crisis*, Issue Paper, November 2013, <https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa>; the special issue 1 *European Journal of Social Law* on *A comparative framing of fundamental rights challenges to social crisis measures in the Eurozone* (2014); A. Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 4 *European Human Rights Law Review* 358 (2015). For a classic on the topic, see S. Holmes, C. R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (2000).

looking at the system of financing of the EU budget - so far predominantly built up around national contributions¹⁵ (and the same massive operations to issue a common debt to finance the RRF will be ultimately backed by national budgets as a last resort) - the EU maintains a higher degree of autonomy on its spending decisions, however influenced they are by the Member States¹⁶.

The lack of EU fiscal autonomy makes it impossible for the EU budget to effectively fulfil the three classic functions that are normally attributed to state budgets: stabilisation, redistribution and allocation of resources¹⁷. According to Musgrave, the first two functions shall be exercised by the federal government, for example through transfer mechanisms or federal spending¹⁸. As the EU expenditure is inevitably constrained by the amount that national governments commit to transfer, these functions are only marginally performed by the EU, respectively through the coordination of economic policies and the cohesion policy¹⁹. The third function, the allocation of resources, which Musgrave considered to be better fulfilled by state and local authorities, is instead managed by the EU through the internal-federal market²⁰. Without dealing with the details of each of these budget functions, it suffices to say that during the sovereign debt crisis the stabilisation function, especially with regard to the Euro area, has been the main focus of attention and of several proposals of reform. Much more controversial and underexplored has been the

¹⁵ Today the quota of national contributions amount to more than 70% of the EU budget: A. De Feo, *The Multiannual Financial Framework 2021-2027: Ambition or Continuity?*, in B. Laffan, A. De Feo (eds.), *EU Financing for the Next Decade. Beyond the MFF and the Next Generation EU* (2020), 3.

¹⁶ C. Fasone, *Towards a strengthened coordination between the EU and national budgets. A complementary role and a joint control for parliaments?*, 40(3) *Journal of European Integration* 265 (2018).

¹⁷ R.A. Musgrave, *The Theory of Public Finance: A Study in Public Economy* (1959).

¹⁸ A. Hinarejos, *Fiscal Federalism in the European Union: Evolution and Future Choices for the EMU*, 50 *Common Market Law Review* 1625 (2013).

¹⁹ Writing in 2003, Oates contended that neither the EU's nor the Member States' budgets were capable of fulfilling a macroeconomic stabilisation function in the Union: see W. Oates, *Fiscal federalism and the European Union: Some Reflections*, in D. Franco, A. Zanardi (eds.), *I sistemi di welfare tra decentramento regionale e integrazione europea* (2003), 43-44.

²⁰ R. Schütze, *From International to Federal Market. The Changing Structure of EU Law* (2017), 275 ff.

redistributive function of the EU budget, traditionally considered weak and almost non-existent²¹.

Within the boundaries of the (limited) resources conferred – through truly own resources and national contributions²² – the EU budget needs to abide to a tight fiscal discipline, in theory. Art. 310 TFEU and Art. 6 of the EU Financial Regulation set the principles of the balanced budget and sound financial management²³. This in turn implies that a policy of deficit spending, for instance to finance the enjoyment of social rights, could not be pursued via the EU budget. Furthermore, based on Art. 311 TFEU, “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies” and that “without prejudice to other revenue, the budget shall be financed wholly from own resources”. The long-standing interpretation of Art. 310 combined with Art. 311 TFEU and Art. 17 of the Financial Regulation postulates that the EU is prevented from financing its budget through borrowing as the latter spells out clearly that “The Union (...) shall not raise loans within the framework of the budget”. It is precisely the very narrow leeway left to the Union to expand its budget in support of Member States social policies and of citizens’ social rights that has let EU institutions resort to the emergency clause of Art. 122 TFEU – lacking another suitable legal basis and in derogation to the

²¹ P. Pasimeni, S. Riso, *The redistributive function of the EU budget*, 174 IMK Working Paper, IMK at the Hans Boeckler Foundation, Macroeconomic Policy Institute (2016). R. Doménech, A. Maudes, J. Varela, *Fiscal Flows in Europe: The Redistributive Effects of the EU Budget*, 136(4) *Weltwirtschaftliches Archiv* 631 (2000), consider that the redistributive effect is marginal, but has increased over time and M. Citi, M. K. Justesen, *Redistribution in a political union: The case of the EU*, 60(2) *European Journal of Political Research* 317 (2021), highlight that the redistributive effort of the EU budget primarily targets inequalities within Member States rather than inter-States imbalances.

²² On the composition of the own resources, see A. Sandulli, A. Nato, M. Bellacosa, M. De Bellis, E. Tati, *The Past and Future of EU Financial Interests*, BETKOSOL Project, Work Package 1 - Deliverable 2 (2021), <https://betkosol.luiss.it/wp-content/uploads/2021/07/D2-BETKOSOL-final-26-June-2021-def.pdf>, 10-11 and A. D’Alfonso A., *Own resources of the European Union: Reforming the EU’s financing system*, European Parliamentary Service Research, European Parliament, Brussels (2021).

²³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

borrowing prohibition – to finance with loans, first, a European instrument for temporary support to mitigate unemployment risks in an emergency following the COVID-19 outbreak (SURE)²⁴ and, now, also the Recovery and Resilience Facility²⁵. The reception of these developments by legal scholarship has been mixed. For example, some have argued that while the adoption of the Next Generation EU package amounts to “a politically bold move but also a case of creative legal engineering”, the overstretching of the legal basis and the questionable interpretation of the principle of conferral and of the constraints imposed by the EU financing system can be deemed acceptable with a view to the extraordinary situation faced²⁶. Others, instead, have come close to consider that the EU institutions have acted *ultra vires* and that the bypassing of Art. 310 TFEU sets a highly problematic precedent²⁷.

²⁴ Council Regulation EU 2020/672 of 19 May 2020 on which see P. Dermine, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture*, 47(4) *Legal Issues of Economic Integration* 342 (2020); A. Nato, *Il Meccanismo europeo di sostegno temporaneo per attenuare i rischi di disoccupazione nello stato di emergenza (SURE): solidarietà in prestito nella crisi COVID-19?*, 2 *La comunità internazionale* 265 (2020); S. Giubboni, *Crisi pandemica e solidarietà europea*, 1 *Quaderni costituzionali* 218 (2021).

²⁵ While the legal basis of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility is Art. 175(3) TFEU, the same as that of the structural funds, the legal basis to proceed with the issuance of common debt by the European Commission, through the European Union Recovery Instrument, is precisely Art. 122 TFEU (see Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis).

²⁶ B. De Witte, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, 58(3) *Common Market Law Review* 635 (2021) and E. Cannizzaro, *Neither Representation nor Taxation? Or, the “Europe's Moment” – Part I*, 2 *European Papers* 705 (2020), who stresses how the choice of Art. 175(3) TFEU is meant to equip the Union with broad power insofar as this legal basis enables it to take specific actions “outside the funds”, which is exactly the case with the Recovery and Resilience Facility.

²⁷ See P. Leino, *Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU*, *Verfassungsblog*, 18 June (2020), <https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/>, subsequently pointing to the debate in Finland on the “constitutionality” of the EU own resources decision. The concerns were somewhat shared by the complainants in front of the German Constitutional Tribunal, BVerfG, *Beschluss des Zweiten Senats vom 26. März 2021*, - 2 BvR 547/21 -, Rn. 1-1, which rejected the preliminary injunction.

Whether the developments linked to the pandemic, though temporary in nature, are able to pave the way to a paradigm shift in the understanding of the EU budget and of its financing system is probably too early to say, but the debate triggered by the creative interpretation of those Treaty clauses can be coupled with that on the rigidity and the inadequacy of the EU budget as such to deliver on the many social objectives enshrined in the EU primary law. Some financial tools, such as the European Social Fund (Art. 162 TFEU), are directly acknowledged in EU primary law “to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living”, amongst other things. How the financial constraints highlighted and the capacity of this and of other EU funds impact the protection of social rights, in particular of the right to social inclusion, remains to be seen as no direct connection is drawn in the TFEU or in the Charter.

3. The EU commitment to social rights and the competence issue

When it comes to the objectives the EU sets to pursue in relation to social rights enforcement, the stake posed by the drafters of the Treaties is very high. Art. 3(1) TEU includes amongst the EU’s aims the promotion of people’s well-being. The Union aims to support “a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment” (Art. 3(3) TEU). It is committed to combating social exclusion (since the Amsterdam Treaty, in particular), to ensure solidarity amongst generations, the protection of the rights of the child and to advance “economic, social and territorial cohesion, and solidarity among Member States” (again, Art. 3(3) TEU), an implicit effort to redistribute resources across the Union.

TFEU’s Title X on social policy begins, in Art. 151(1), by recalling the European Social Charter of 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers – neither of them binding upon Member States – and highlights amongst the objectives, besides the promotion of the employment and the improvement of the working conditions²⁸, proper social

²⁸ On which, see also Arts. 152 and 154 to 158 TFEU.

protection and the dialogue between management and labour, also the combating of social exclusion. The fulfilment of these objectives, according to Art. 151(3) TFEU, will not only depend on the functioning of the internal market, favouring the harmonisation of national welfare systems, but also from the approximation of domestic legislation, regulation and administrative procedures. Moreover, the combating of social exclusion is expressly listed amongst the fields in which the Union “shall support and complement the activities of the Member States” (Art. 153(1), lit. j TFEU). Although the harmonisation of national law is excluded in this area, the European Parliament and the Council can adopt, via ordinary legislative procedure, directives setting minimum requirements for the gradual implementation of the objective to promote social inclusion (Art. 153(2), lit. b).

Thus, it appears that, compared to what the EU promises to deliver in principle on solidarity and social inclusion, the tools at the disposal of and the legal margins of manoeuvre for the Union’s institutions are rather limited²⁹. This is further confirmed by the circumstance that the provisions adopted pursuant to Art. 151 TFEU cannot “affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof” and cannot prevent them from introducing more protective social measures, in compliance with the Treaties (Art. 151(4) TFEU). In particular, the explicit reference to the fiscal implications of the EU social measures, for example those linked to combating social exclusion, left the EU to acknowledge that the protection of social rights entails considerable costs, the burden of which is predominantly borne by the Member States. The support offered by the EU, through its budget, thus comes as an addition to national budgets.

By the same token, the Charter of fundamental rights contains a long Title (IV) on solidarity with provisions ranging from fair and just working conditions and the protection of young people at work (Arts. 31 and 32) to workers’ guarantee in case of unjustified dismissal and the right to paid maternity and parental leave (Arts. 30 and 33), from the right to health care to the right to social security

²⁹ A. Sangiovanni, *Solidarity in the European Union*, cit., at 7, 229; F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), 124 ff. and F. Croci, *Solidarietà tra gli Stati membri dell’Unione europea e governance economica europea* (2020), 117 ff.

and social assistance (Arts. 34 and 35). The fulfilment of these rights does seem dependent on the politics of financing them, while in fact their effectiveness is subject to a two-tier constraint dependent on the national and EU budgets.

Due to the nature of the EU competences in matters of social policy, mainly limited to the coordination and the support of national policies except for the social protection of the workers³⁰, the action of the Union is necessarily combined with that of the Member States to secure the enjoyment of social rights, also taking into account that, in principle, the field of application of the Charter is limited to the implementation of EU law³¹.

4. The very limited European case law dealing with the fight against social exclusion

It is difficult to detect cases dealing with social benefits³² to be granted under EU law that are solved on the ground of the Title on solidarity of the Charter rather than as citizenship case law³³ or according to EU secondary law within the framework of the

³⁰ A shared competence according to Art. 4(2), lit. b TFEU, read in conjunction with Title X TFEU – Social Policy.

³¹ See, e.g., N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea: i limiti di applicazione* (2018) and A. Ward, *Article 51 – Field of application*, in S. Peers et al. (eds.), *The EU Charter of fundamental rights. A Commentary*, 2nd edition (2021).

³² Different is the case of the right to take collective action, which does not entail a direct disbursement of public money, and that has triggered important developments in terms of case law since Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line ('Viking')* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet ('Laval')* [2007] ECR I-11767.

³³ As has been claimed by S. O'leary, *Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union*, in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (2005), 51 ff. This element can also be seen as a consequence of the relatively recent entry into force of the Charter of fundamental rights compared to the codification of the citizenship provisions in the EU Treaties. For the relevant case law here, see, e.g. *Ruiz Zambrano*, C-34/09, 8 March 2011, and *Dano*, Case C-333/13, 11 November 2014 (in particular, the latter for quite a restrictive approach on the social treatment of economically inactive EU citizens). For a recent case where the CJEU turned to the Charter (Arts. 1, 7 and 24) to ascertain whether the right to social assistance has to be granted to Union citizens in the host country, see *CG v The Department for Communities in Northern Ireland*, Case C-709/20.

functioning of the internal market³⁴. Moreover, when dealing with social security and social assistance, it appears that Art. 34(2) of the Charter on the entitlement of social security benefits and services in cases of “maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment” substantially mirrors what had already been prescribed by Regulation EC no. 883/2004 and EU no. 492/2011³⁵. Aiming at combating social exclusion and poverty (Art. 34(3)), at first the Charter appears to embed just a programmatic provision when it refers to the Union’s acknowledgment and respect of “the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”. Indeed, the Explanation of this clause of the Charter hints at the mere nature of “principle” rather than a fully-fledged right under Art. 34(3). However, in one of the very few cases to date in which the CJEU had the opportunity to interpret Art. 34 of the Charter, the European Court made it clear that when the Charter’s provisions provide for social security and social assistance measures to be ensured through national law the Member States must abide by the rights and the principles set by the Charter, including those established under Art. 34³⁶. Hence the duty to guarantee the protection of a social right stems from this obligation, in that case of social housing for third country nationals with a legal residence permit under the same conditions as national and EU citizens.

The exact meaning and scope of Art. 34 and of the right to social assistance between the Member States and the Union is subject to interesting developments from the perspective of the obligation of national law to ensure the protection of this right in relation to national budgetary constraints. A preliminary reference by the Italian Constitutional Court to the CJEU concerning the granting of childbirth and maternity allowances to non-EU citizens would have offered the opportunity to use Art. 34 of the Charter as

³⁴ See, notably, CJEU, Case C-449/16, *Martinez Silva*, 21 June 2017 on family benefits to be corresponded according to Directive 2011/98/EU.

³⁵ D. Gallo, A. Nato, *L’accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell’ordinanza n. 182/2020 della Corte Costituzionale*, 4 *Eurojus* (2020), 328.

³⁶ CJEU, C-571/10, *Kamberaj*, 24 April 2012, § 80. See O. Golyner, *Article 34 – Social Security and Social Assistance*, in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2nd edition (2021), 998.

the crucial yardstick to expand the protection of the right to social assistance in the Union³⁷. Despite the central place occupied by Art. 34 of the Charter in the order of referral, the CJEU decided to follow a “minimalist approach”³⁸ on this point: the Grand Chamber has acknowledged the right of third-country nationals holding a single work permit to receive the social benefits of birth and maternity provided for by the Italian legislation (Law 190/2014 and legislative decree 151/2001) only for long-term residents, but the Court did so on the ground of EU Directive 2011/98³⁹. Although in this case the potential of the Charter has not been expounded, the tension between the right to social assistance protected under EU law and its financing stands out as a key issue and like in some previous judgments has been solved in favour of the social right’s protection⁴⁰. The approach of the CJEU has not always been

³⁷ Order no. 182/2020 of 8 July 2020 issued by the Italian Constitutional Court – on which see D. Gallo, A. Nato, *L’accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell’ordinanza n. 182/2020 della Corte Costituzionale*, cit., at 48, 308-338; N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 3 *European Papers* 1463 (2020); G. Pistorio, *L’operatività multilivello della leale collaborazione. Nota all’ordinanza n. 182 del 2020 della Corte costituzionale*, 1 *Nomos* 1 (2021).

³⁸ See D. Gallo, A. Nato, *Cittadini di Paesi terzi titolari di permesso unico di lavoro e accesso ai benefici sociali di natalità e maternità alla luce della sentenza O. D. et altri c. INPS*, forthcoming in *Lavoro Diritti Europa* (2022).

³⁹ Court of Justice, Grand Chamber, *O.D. and Others v Istituto nazionale della previdenza sociale (INPS)*, C-350/20, 2 September 2021, para 46, the Court stresses that by “reference to Regulation No 883/2004, it must be held that Article 12(1)(e) of Directive 2011/98 gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter.” Waiting for the final judgment to be published, following the decision of the Luxembourg Court, in its press release of 12 January 2022, https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20220112103101.pdf, the Italian Constitutional Court reported to have declared unconstitutional the domestic norms excluding from the contested benefits third-country nationals admitted for work purposes and those admitted for other purposes who are allowed to work and that are in possession of a residence permit lasting more than six months.

⁴⁰ See, e.g. *Grzelczyk*, Case C-184/99 [2001] ECR I-6193; *Martinez Sala*, Case C-85/96 [1998] ECR I-2691; *Collins*, Case C-138/02, [2004] ECR I-2703; *Vatsouras and Koupatantze*, Joined Cases C-22/08 and C-23/08 [2009] ECR I-4585; *Ibrahim*, Case C-310/08, [2010] ECR I-01065; *Teixeira*, Case C-480/08, [2010] ECR I-01107; *Martinez Silva*, C-449/16, 21 June 2017; *Caisse pour l’avenir des enfants (Child of the spouse of a frontier worker)*, C-802/18, 2 April 2020.

consistent in striking this balance⁴¹. Moreover, in the *Brey* judgment the Court clarified that the right to access social assistance benefits “should be balanced against the need to protect the general stability and availability of welfare resources”⁴² at domestic level.

5. The role of the representative institutions: Is there an advocate of social inclusion in the budgetary decision-making?

We now turn to the actual role and attitude of the EU representative institutions (according to Art. 10 TEU), in particular of the Parliament and the Council, in promoting social inclusion and assistance in the budgetary policy-making. Indeed, the amount of the ESF resources directly derives from the EU budget and is governed by the financial rules applicable to the general budget⁴³, within the ceilings set by the MFF. Thus, it follows that the size and the concrete objectives of the ESF are now defined by the Parliament and the Council together upon the proposal of the Commission.

The role of the European Parliament on the ESF has grown substantially over the years. Under the Maastricht Treaty (Art. 159 TEC), the Parliament could only give its assent to the general provisions regulating the funds. By contrast, since the Treaty of Lisbon the adoption of both the EU Financial Regulation (Art. 322 TFEU) and the Regulation on the ESF (Arts. 46, point (d), 149, 153(2), point (a), 164, 175, third paragraph, and 349 TFEU) is subject to ordinary legislative procedure. This adds up to the circumstance that post-Lisbon the Parliament and the Council have been placed on an equal footing also for what concerns the adoption of the annual budget (Art. 314 TFEU)⁴⁴. It follows that with the European Parliament and the Council’s symmetric positioning over the yearly

⁴¹ See the already cited case *Dano*, C-333/13.

⁴² F. De Witte, *Justice in the EU*, cit., at 36, 156. See *Brey*, Case C-140/12, 19 September 2013.

⁴³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

⁴⁴ However, for some the loss of the monopoly on non-compulsory expenditures has triggered the weakening of the European Parliament’s budgetary powers: see G. Benedetto, *The EU budget after Lisbon: rigidity and reduced spending?*, 33(3) *Journal of Public Policy* 345 (2013).

budgetary cycle and the ESF (and ESF+) Regulation, the intensity of the struggle on the matter between the two institutions has increased⁴⁵. While the European Parliament has always been keen on increasing the level of commitments and payments, the Member States through the Council, instead, have been willing to reduce them compared to the Commission's proposal⁴⁶. Such conflicting interests of the two institutions also reflect on the negotiations over the ESF.

In particular, the European Parliament has been a long-standing advocate of the design of simpler and more streamlined procedures for the ESF implementation, to improve the effectiveness of the ESF assistance to end beneficiaries and has traditionally viewed the ESF as the most important EU tool to combating unemployment. The European Parliament has also been the crucial actor behind the enlargement of the scope of the fund's objectives as to include the fights against gender inequalities, social exclusion and marginalisation of the most vulnerable groups. In its resolution of 7 October 2010⁴⁷, it considered the ESF as the main tool to react to the social drawbacks of the sovereign debt crisis and to fulfil the targets of the Europe 2020 Strategy.

During the negotiations of the MFF 2014-2020, the Parliament has successfully fought to increase the size of the ESF resources to become slightly more than 23% of the total amount of the cohesion funds and to set, amongst the ESF spending targets for each Member State, that 20% had to be allocated on social inclusion. Furthermore, following the refugee crisis 2014-2015, and with an approach that has remained consistent over time, the Parliament has claimed that the ESF should have been used to support the professional training of refugees to favour their social inclusion and prospective integration into the EU labour market⁴⁸. This proposal has been followed by the Commission, which has inserted a specific

⁴⁵ On the budgetary struggle post-Lisbon, see S. Becker, M. W. Bauer, A. De Feo, *The New Politics of the European Union Budget: Background, Key Findings, and Outlook*, in S. Becker, M. W. Bauer, A. De Feo (eds.), *The New Politics of the European Union Budget* (2017), 15-32; C. Fasone, N. Lupo, *The Union Budget and the Budgetary Procedure*, in R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law* (2018), 810-847.

⁴⁶ C. Fasone, N. Lupo, *The Union Budget and the Budgetary Procedure*, cit., at 58, 831.

⁴⁷ European Parliament resolution of 7 October 2010 on the future of the European Social Fund, Brussels, P7_TA(2010)0357.

⁴⁸ See European Parliament resolution of 5 July 2016 on refugees: social inclusion and integration into the labour market, Strasbourg, P8_TA(2016)0297.

reference to the social inclusion of migrants into its ESF+ draft Regulation for the period 2021-2027. The Parliament's amendments to this legislative proposal have gone in the direction to increase the stock of ESF resources available for food and material aids to the most deprived persons and to children living below the poverty line, to make social inclusion and assistance a priority in the spending of the ESF+, and to include a clear reference to the respect of the Charter of fundamental rights (see Recital 31 and Art. 8).

On this occasion, the Council concurred with most of the European Parliament's amendments and, also for this reason, the final text of the ESF+ Regulation looks much more protective of the right to social assistance and inclusion than the previous ESF Regulation(s). With this regard the targets are more ambitious than in the past. For example, Art. 7 prescribes that Member States must spend "at least 25 % of their resources of the ESF+ strand under shared management to the specific objectives for the social inclusion" (para 4) and "at least 3 % of their resources of the ESF+ strand under shared management to support the most deprived persons under the specific objective set out in Article 4(1), point (m)"⁴⁹ (para 5). A specific objective in the Regulation is defined to combat child poverty by using the ESF+ to implement the Child Guarantee and Member States with an average rate of minors at risk of poverty or social exclusion between 2017 and 2019 below the average level in the EU as a whole are requested to spend no less than 5% of their resources of the ESF+ strand under shared management to actions and reforms targeted to counter this trend (Art. 7, para 3).

Traditionally the Council has been much more reluctant to support the consolidation of a strong social dimension in the EU action and to consider it a priority in the budgetary decision-making, although since 2000 the Social Protection Committee has been in operation as an advisory policy committee to the Ministers in the Employment and Social Affairs Council "to promote cooperation on social protection policies between Member States and with the Commission" (Art. 160 TFEU; former Art. 144 TEC).

⁴⁹ i.e. "addressing material deprivation through food and/or basic material assistance to the most deprived persons, including children, and providing accompanying measures supporting their social inclusion".

The textual analysis of the programs of the six-month Council presidencies 2014-2021⁵⁰ reveals that social assistance and inclusion very rarely appear amongst the priorities set out. Such a result probably also depends on the national, political and legal culture on social policies and the practice and the modus operandi of the welfare systems at domestic level,⁵¹ besides the already mentioned cautious approach of the Council – hence, of Member States’ governments – to increase the size of the EU budget and funds in general (especially of those, like the ESF, for which national co-financing is foreseen).

The only exceptions to this trend were the Luxembourgish (July-December 2015), the German (July-December 2020) and the Portuguese (January-June 2021) Presidencies⁵². The agenda and priorities of the Luxembourgish presidency were in line with the change of pace favoured by the Juncker Commission post-austerity and with the Commission Work Programme for 2015, through setting the objective of a “Triple-A social rating” for Europe. Amongst the seven pillars selected there was the deepening of the Union’s social dimension, in particular promoting social investment and female employment and strengthening public health, education and high-quality child-care⁵³.

The programme of the Germany Presidency put a strong emphasis on the social recovery from the pandemic, on the implementation of the European Pillar of Social Rights, and in supporting the range of initiatives put forward by the European

⁵⁰ There is no single website of the EU Council Presidency collecting information on the various rotating presidencies. Each Presidency has created its own website where the relevant documents, including the programmes, are published.

⁵¹ S. Giubboni, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo* (2012), 32-35.

⁵² Also the Estonian Presidency (July-December 2017), in the framework of which the Gothenburg Social Summit for Fair Jobs and Growth took place (17 November 2017) and the European Pillar on Social Rights was proclaimed, highlighted social inclusion as a priority, but with a specific focus – almost exclusively – on job conditions and social security for workers rather than on combating poverty and hunger: Programme of the Estonian Presidency of the Council of the European Union, https://web.archive.org/web/20181229200455/https://www.eu2017.ee/sites/default/files/2017-06/EU2017EE%20Programme_0.pdf, p. 24 ff.

⁵³ See Grand Duchy of Luxembourg, A Union for citizens. Priorities of the Luxembourg Presidency, 1 July-31 December 2015, http://www.eu2015lu.eu/en/la-presidence/a-propos-presidence/programme-et-priorites/PROGR_POLITIQUE_EN.pdf

Commission, including the proposals for a European Unemployment Reinsurance Scheme, to promote youth employment, and to provide a European framework for national minimum income protection⁵⁴. The German Presidency also promoted the further allocation of funds to the ESF for 2021 and 2022 through NGEU and, in particular, the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU).

During the same Presidency Trio, the Portuguese Presidency has further strengthened social inclusion and assistance as a top priority through a renewed effort to implement the European Pillar of Social Rights and culminated in the Porto Social Commitment and Declaration. Under this Presidency the Council took further concrete steps in the direction of a “Social Europe”, through the Council conclusions on equity and inclusion in education and training for all⁵⁵, the Council Recommendation (EU) 2021/1004 establishing a European Child Guarantee, and the launch of the European Platform on Combating Homelessness⁵⁶. The initiatives of the Council (Presidency) during the second semester of 2020 and the first semester of 2021 were promoted in a joint effort with the von der Leyen Commission, which has proved to be more sensitive towards the issue of social assistance and inclusion compared to previous Commissions⁵⁷.

6. Between EU social goals and budgetary tools to fight social exclusions. The case of the European social fund

European funds are aimed at repairing the imbalance in the functioning of the internal market and enhancing solidarity with underdeveloped regions and sectors in economic distress. Since 1961 the European Social Fund (ESF) has supported employment

⁵⁴ Together for Europe’s recovery - Programme for Germany’s Presidency of the Council of the European Union, 1 July to 31 December 2020, <https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/06-30-pdf-programm-en-data.pdf>, p. 13.

⁵⁵ Council conclusions on equity and inclusion in education and training in order to promote educational success for all 2021/C 221/02, ST/8693/2021/INIT, OJ C 221, 10.6.2021, p. 3–13.

⁵⁶ See Lisbon Declaration on the European Platform on Combatting Homelessness, 21 June 2021, <https://www.2021portugal.eu/en/news/lisbon-declaration-on-the-european-platform-on-combatting-homelessness/>

⁵⁷ A. Hemerijck et al., *Social Europe Now! Advancing Social Europe Through the EU Budget* (2020), 36 ff.

and promoted the development of an inclusive society. Being the oldest structural fund, its functioning has often been revisited and its scope and size progressively increased. For example, for the programming period 2000-2006, under the aegis of Agenda 2000⁵⁸, the ESF was endowed with a stock of 60 billion euro and was meant to contribute both to the cohesion policy and to the European Employment Strategy. The Lisbon Strategy⁵⁹ established the open method of coordination (OMC), a new governance mechanism for the voluntary cooperation amongst Member States on a set of indicators and benchmarks also instrumental to poverty measurement. The OMC has been rearticulated and revised on several occasions, the first being in 2006, with an OMC specifically devoted to social inclusion.

Under the MFF 2007-2013⁶⁰ and the MFF 2014-2020⁶¹ the equipment of the ESF was first increased and then remained stable, at 75 and 74 billion euro, respectively, compared to 920.7 and 908.5 billion euro (in payments) of the long-term budgets' sizes. Under the MFF 2007-2013, the Europe 2020 Strategy was adopted setting as a new common target for the fight against poverty, the reduction by 25% of the number of Europeans living below the national poverty line and launching the European platform against poverty and social exclusion⁶². The ambitious objective and the difficulty in reaching it⁶³ led the Commission to establish in the MFF 2014-2020, next to the ESF, a new ad hoc Fund, the Fund for European Aid to the Most Deprived (FEAD), initially endowed with nearly 4 billion euro. During the last seven-year programming budget, the EU has also revamped its social ambitions through the much-discussed

⁵⁸ See European Commission, *Agenda 2000: For a stronger and wider Union*, COM(97) 2000, 15 July 1997.

⁵⁹ See Presidency Conclusions, Lisbon European Council, 23-24 March 2000, https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm

⁶⁰ See the Interinstitutional Agreement on budgetary discipline and sound financial management, concluded between the European Parliament, the Council and the Commission on 17 May 2006.

⁶¹ See Council Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 and the related inter-institutional agreement.

⁶² See European Commission's Communication, EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels, 3 March 2010.

⁶³ Indeed, as is well known, the objectives were not met by 2020.

European Pillar of Social Rights⁶⁴, criticised by some for its soft-law nature⁶⁵, and praised by others for its ambitious list of principles and the related initiatives taken⁶⁶. The interinstitutional proclamation of 2017 devotes considerable attention to the problem of social inclusion, for example referring to the right to unemployment benefits to a minimum income, to old age income and pensions, to the inclusion of people with disabilities, to housing and assistance for the homeless, and to access to essential services of good quality. The European Pillar of Social Rights has been described as a “dynamic and fluid, wide-ranging, and permeating” initiative⁶⁷, combining its programmatic nature with a set of several important proposals of implementation already put forward⁶⁸.

Unable to lift more than 20 million people out of poverty by 2020, as per its target set in 2010, the EU has revamped its social ambitions to support the recovery from the pandemic. At the Porto Social Summit of 7 May 2021, the President of the Commission, of the Parliament, of the rotating Presidency of the Council as well as the European social partners and civil society organisations have endorsed in a Joint Porto Social Commitment the 2030 headline targets set in the Commission’s European Pillar of Social Rights Action Plan to foster employment (1), to have at least 60% of the adults participating in training activities every year (2) and, notably, to reduce the number of people at risk of poverty or social exclusion by at least 15 million, including at least 5 million children (3). The Action Plan seems to show for the first time a new EU approach to combating social exclusion by paying considerable attention to the financing of these targets. Indeed, the Plan

⁶⁴ Proclaimed on 17 November 2017 and undersigned by the Presidents of the Council, of the Parliament and of the Commission: <https://data.consilium.europa.eu/doc/document/ST-13129-2017-INIT/en/pdf>

⁶⁵ Z. Rasnacã, *Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-level Policymaking*, 5 ETUI Working Paper 14 (2017) and S. Giubboni, *L'insostenibile leggerezza del Pilastro europeo dei diritti sociali*, 4 *Politica del diritto* 577-578 (2018).

⁶⁶ S. Sciarra, *How Social Will Social Europe Be in the 2020s?*, 21 *German Law Journal* 85 (2020) and S. Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, 22 *Cambridge Yearbook of European Legal Studies* 101 (2020).

⁶⁷ S. Garben, *The European Pillar of Social Rights*, cit., at 79, 102.

⁶⁸ See, e.g., Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM/2020/682 final, 28 October 2020.

highlights how the new allocation of Funds, following the negotiation for the MFF 2021-2027⁶⁹, can become instrumental to concretely support such objectives.

The move towards an ESF+ has followed the same rationale reinforcing the fight for social inclusion with its roughly 99 billion euro stock⁷⁰. The visible increase in the size of the Fund is due to the preference for having one single crucial instrument at EU level to curb poverty and social marginalisation. Under the MFF 2021-2027 the FEAD has been integrated into the ESF+, with important consequences for its scope of action⁷¹. While EU Regulation no 1304/2013, on the ESF, had a clear focus on equal opportunities, active participation, employability, and training as well as on local development strategies⁷², the new Regulation 2021/1057, on the ESF+, has also the declared objectives to promote social integration of people at risk of poverty or social exclusion and to address material deprivation through food and/or basic material assistance to the most deprived persons⁷³. Thus, whereas the former ESF had the job market and its failures as its main targets – to redress problems such as unemployment and unequal opportunities, the new ESF+ encompasses a wider perspective dealing with the most vulnerable fringes of the population regardless of whether they are active or inactive EU citizens.

⁶⁹ See Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027. In relation to the Recovery and Resilience Facility, both Regulation 2021/241 establishing the Recovery and Resilience Facility (Arts. 29(4) and 30(2)) and the European Pillar of Social Rights' Action Plan (p. 35) foresee the adoption by the Commission, by the end of 2021, of a delegated act to define a methodology for reporting on social expenditure under the Recovery and Resilience Facility. Delegated Regulation (EU) 2021/2105 of 28 September 2021 supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by defining a methodology for reporting social expenditure is now in force and is expected to strengthen visibility of the Facility's social impact.

⁷⁰ 88 billion in 2018 prices.

⁷¹ Within the ESF+ the Youth Employment Initiative and the EU Programme for Employment and Social Innovation have also been merged. By contrast, in the aftermath of the pandemic, the Commission has decided to keep the EU Health Programme, under the EU4Health Programme separate as an autonomous fund.

⁷² Art. 3 (1) lett. b), (i) and (vi), Regulation 1304/2013.

⁷³ Art. 4 (1), lett. l) and m), Regulation 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013.

That said, however, it cannot be neglected that, when looking at the fight against social exclusion, including supporting social assistance to inactive EU citizens, the amount of EU resources to be spent on this “priority” is minimal, nearly 5% of the size of the EU long-term budget for 2021-2027 and NGEU combined. Even more problematic, however, is the effectiveness of the ESF so far recorded to reach the objective of promoting social inclusion and combating poverty (Thematic Objective 09, according to the MFF 2014-2020). Significant delays have been registered in the ESF spending and the average rate of project selection for this objective was only 71% with lowest peaks detected in Italy (only 48%), Greece (50%) and Bulgaria (54%)⁷⁴. While the capacity to spending the ESF resources in all Member States remains considerably lower than the stock of funds allocated under the EU budget⁷⁵, it is especially lower for the Thematic Objective dealing with social inclusion, which can sound as an alarming signal for the ESF’s capacity to deliver on social assistance. Amongst the factors that impair the ESF effectiveness are the “complexity in the requirements of the ESF framework”, with multiple actors involved and significant coordination costs, the audit procedures and the data collections systems, the growing number of administrative procedures activated to finance a project⁷⁶.

This connects to the circumstance that the disbursement of this Fund has to abide to further significant constraints: ESF projects shall demonstrate their adherence to the European Semester’s targets. Member States are in fact required to prioritise projects that address the challenges identified in the European Semester through country-specific recommendations as well as in their national

⁷⁴ European Commission, Directorate-General for Employment Social Affairs and Inclusion, Directorate G, Study supporting the 2020 evaluation of promoting social inclusion, combating poverty and any discrimination by the European Social Fund (Thematic Objective 09) – Final Report, written by ICF, Cambridge Econometrics and Eurocentre, October 2020, pp. 54-55.

⁷⁵ See European Commission’s website, European Structural and Investment Funds – Data, ESIF 2014-2020: Implementation by country for European Social Fund - total cost of selection and spending as % of planned (bullet chart, excluding multi-thematic allocations), <https://cohesiondata.ec.europa.eu/funds/esf#>

⁷⁶ European Commission, Directorate-General for Employment Social Affairs and Inclusion, Directorate G, Study supporting the 2020 evaluation of promoting social inclusion, cit., p. 55.

reform programmes⁷⁷. The link between the ESF and national reforms introduces a sort of conditionality clause in the pursuit of social rights, which rewards and protects EU stability through the indirect support of the balance of national budgets.

7. The administrative governance of the European social fund

Member States and the Commission share the management of the European social fund through a “mixed administrative” and “multi-face” administration⁷⁸, where both the administrative levels contribute to designing, implementing and controlling the payment of the money sizeable on the Fund. This means that the disbursement of the resources occurs in composite administrative proceedings, where both levels of government need to exchange information and tightly cooperate to implement the policy⁷⁹. To reduce the sophistication of the cooperative mechanisms, the 2021 reform of the Fund⁸⁰ has in part aimed at simplifying procedures.

Each Member State, in partnership with the European Commission, agrees on one or more Operational Programmes (OPs) for the ESF funding, which provide the goals and priorities for ESF activities during the seven-year programming period. The ESF+ Regulation requires that the design of the ESF strategy and the monitoring of its implementation also ensure the meaningful participation of the social partners and civil society organisations⁸¹, so to understand better the needs of the relevant communities and to control the efficient and effective spending. The 2013 Regulation expressly required the participation of institutional actors, civil society and economic and social partners in the design of the partnership agreement and the OPs that the Commission should

⁷⁷ Arts. 7 (1) and 12, Regulation 2021/1057; Art. 4 (1), Regulation 1304/2013.

⁷⁸ See G. Della Cananea, *The European Union's Mixed Administrative Proceedings*, 78 *Law and Contemporary Problems* 198 (2004).

⁷⁹ See H.C.H. Hofmann, *Decision making in EU Administrative Law - The Problem of Composite Procedures*, 61 *Administrative Law Review* 199 (2009). On the legal concerns surrounding the composite administrative procedures in the European Union, see S. Alonso de León, *Composite Administrative Procedures in the European Union* (2017), esp. 2015 ff.

⁸⁰ Regulation 2021/1057/EU of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013.

⁸¹ Art. 9 (1), Regulation 2021/1057/EU.

approve following assessment and dialogue with the concerned Member State⁸². Partnership agreements essentially aimed at transposing the EU strategy and principles in the national context⁸³. The beneficiaries of the funds can be a variety of organisations, including public administrations, workers' and employers' organisations, NGOs, charities and companies.

For every OP, the Member States designate both a managing authority and an audit authority. To improve the quality of the design and implementation of programmes, Member States and their managing authorities carry out evaluations of the programmes on the grounds of their effectiveness, efficiency, relevance, coherence and Union added value⁸⁴. The Commission also performs a mid-term evaluation and a retrospective assessment on the grounds of the effectiveness, efficiency, relevance, coherence and Union added value of the Fund⁸⁵.

Payments are made in the form of pre-financing, interim payments and payments of the balance of the accounts for the accounting year⁸⁶. Until 2021, management and audit authorities were required to submit to the Commission their documents and information so to make the Commission able to examine and accept

⁸² Art. 5, Regulation 1303/2013/EU of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

⁸³ See K. Pantazatou, *European Union Funds*, in H.C.H. Hofman, G. C. Rowe, A. H. Türk (eds.), *Specialized Administrative Law of the European Union* (2018), 537.

⁸⁴ Art. 44 (1), Regulation 2021/1060/EU of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. See also Art. 54 (1) Regulation 1303/2013/EU.

⁸⁵ Art. 45, Regulation 2021/1060/EU. Art. 56 Regulation 1303/2013/EU was less specific about the role of the Commission in the mid-term evaluation, while emphasised the role of Member States in the evaluation during the programming period.

⁸⁶ Art. 89, Regulation 2021/1060/EU. See also Art. 77 (3) Regulation 1303/2013/EU.

the accounts if they were complete, accurate and true⁸⁷. The Commission could accordingly recalculate the amount chargeable to the Fund for the accounting year and the consequent adjustments in relation to the payments to the Member State⁸⁸. The case law also contributed to clarifying the responsibilities of the Member States and of the Commission in such a procedure. In particular, in *DAFSE v Frota Azul-Transportes e Turismo Lda*^a, the CJEU held that the Member State certifying the accuracy of the facts and accounts shall ascertain “first, that the expenditure incurred by the recipient of the aid is 'reasonable' and, second, that that person has displayed 'sound financial management'”⁸⁹. Yet, the final decision is exclusively on the Commission⁹⁰.

The 2021 Common Framework Regulation simplified the procedure for the examination of the accounts, conferring the general responsibility on national audit authorities and triggering the Commission’s control when (a) the audit authority has provided a qualified or adverse audit opinion due to reasons linked to the completeness, accuracy and veracity of the accounts; (b) the Commission has evidence putting into question the reliability of an unqualified audit opinion⁹¹.

In addition, financial corrections to the amounts chargeable to the Fund can be made by the Member States to protect the Union budget against irregularities and by the Commission in the case of serious deficiencies of the programme, irregularities not detected by the Member States, or if the Member States have not complied with their obligations in case of suspension of payments⁹².

The protection of the right to social assistance under the ESF is thus the result of such a complex system of governance. In the framework of the financial rules of the EU budget, the multilevel structure of cooperation challenges the enforcement of the right on different grounds.

Firstly, it creates significant procedural challenges. The design of cooperation through composite administrative

⁸⁷ Art. 137-139, Regulation 1303/2013/EU.

⁸⁸ Art. 139 (6), Regulation 1303/2013/EU.

⁸⁹ *Directora-Geral do Departamento para os Assuntos do Fundo Social Europeu (DAFSE) v Frota Azul-Transportes e Turismo Lda*, C-413/98, para 27.

⁹⁰ *Ibid.*, para 30.

⁹¹ Art. 101, Regulation 2021/1060/EU.

⁹² Arts. 103-104, Regulation 1060/2021/EU; Arts. 143-144, Regulation 1303/2013/EU.

proceedings that take place between national and supranational institutions exposes the system to a range of risks, including financial irregularities and litigation in courts, while the administrative burdens may also discourage potential applicants for assistance⁹³.

In addition, successful implementation pragmatically depends on the efficient functioning of the institutional and administrative system in each Member State⁹⁴. National variations in the administrative capacity are factual circumstances that independently affect the protection of social rights. By requiring prompt administrative performance, the governance of the ESF, however, exacerbates variations and indirectly contributes to the uneven implementation of social rights.

Thirdly, national variations also affect the disbursement of the ESF from a substantive perspective. Spending is in fact connected to the Member States' budgetary performance. Under the 2013 Common Framework Regulation, OPs shall comply with the European Semester: "the Commission may request a Member State to review and propose amendments to its Partnership Agreement and relevant programmes"⁹⁵ where – among others – the Member State has not aligned them to the pursuit of coordination in economic policies, excessive deficit requirements and macro-economic imbalance procedure. If the Member State does not comply, the Commission "shall make a proposal to the Council to suspend part or all of the commitments or payments"⁹⁶. This creates a direct link between the stability of the economic and fiscal governance and the protection of social rights.

A further challenge comes from the fact that the use of EU funds is additional to national cohesion policies and requires national co-financing. If the ESF is meant to support national efforts and not to be an alternative tool to enforce social rights, in practice this creates an additional burden on the capability of Member States

⁹³ See also K. Pantazatou, *European Union Funds*, cit., at 555.

⁹⁴ Ibid., 539. See also C. Mendez, J. Bachtler, *Prospects for Cohesion Policy in 2014-20 and Beyond: Progress with Programming and Reflections on the Future*, 88 European Policy Research Paper (2015), available at <https://eprc-strath.org/wp-content/uploads/2021/09/Prospects-for-CP-in-14-20-and-beyond-EoRPA-144.pdf>, 23.

⁹⁵ Art. 23 (1), Regulation 1303/2013/EU. See also Art. 19 (1), Regulation 2021/1060.

⁹⁶ Art. 23 (9), Regulation 1303/2013/EU. See also Art. 19 (8), Regulation 2021/1060.

to use the Fund, especially in times of crisis. However, it is worth noting that to face the adverse effects of the economic crisis, the Commission has reduced and waived the fixed co-financing rates⁹⁷. In addition, the 2021 Common Framework Regulation also set more flexible rates for co-financing⁹⁸.

As Pantazatou put it, “the more the public finances of the Member States decline – or are to be used for very specific purposes – the less likely it is that they will wish to meet these demands to complement the Union’s own investment in economic, social and territorial cohesion”⁹⁹. In other words, in comparison to the national dependency on the availability of public resources, the legal framework for the use of the ESF and the ESF+ generates a sort of double conditionality: with the EU rules aimed at the coordination of economic policies and with the national availability for co-financing.

8. The European social fund and the justiciability of the right to social assistance

The composite administrative proceedings designed for the allocation of the Fund do not allow the (potential) recipients of the funding as well as third parties to participate in all the levels of the decision-making. Shared administration is built upon the creation of binary administrative relationships, so that the interested parties effectively participate only in the national procedures, and not at the level of the Commission¹⁰⁰. This has triggered litigation regarding the competence of the Commission vis-à-vis the Member States in relation to the right of the recipients of the amounts chargeable on the Fund. The binary structure of the proceedings also reflects on the capability of the recipients of the assistance to challenge the decisions taken in the multilevel procedure¹⁰¹.

⁹⁷ Art. 24, Regulation 1303/2013/EU.

⁹⁸ Art. 112, Regulation 2021/1060/EU.

⁹⁹ K. Pantazatou, *European Union Funds*, cit., at 109, 539.

¹⁰⁰ On the legal issues generated by binary administrative relationships in the banking sector see also M. Simoncini, *Challenges of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction* 40 Yearbook of European Law 310 (2021).

¹⁰¹ On this aspect, which has been characterised as a “serious judicial review gap”, see F. Brito Bastos, *An Administrative Crack in the EU’s Rule of Law: Composite Decision-making and Nonjusticiable National Law*, 16 European Constitutional Law Review 64 (2020).

Justiciability issues emerged on different grounds. With specific reference to the ESF, the EU case law particularly reflected on procedural rights with the aim of ensuring the substantive protection of individual rights in the cooperation between national and EU authorities and set key guarantees for the exercise of procedural rights. The framework of composite administrative proceedings in fact makes the protection of the substantive right critically dependent on the certain and effective implementation of procedural rights¹⁰². Yet, this occurs in a legislative framework that focuses on multilevel administrative cooperation without protecting expressly the rights of the persons affected by such composite proceedings¹⁰³. The binary structure of the administrative proceedings has generated specific challenges with regard to the effective protection of the right to the defence and, as a consequence of that, of the right to social assistance. In the seminal case *Commission v Lisrestal*, the CJEU recognised that “even though the Member State is the sole interlocutor of the Fund a direct link is established between the Commission and the recipient of the assistance”¹⁰⁴ and pointed out that “although a decision to suspend, reduce or withdraw Community assistance may sometimes reflect an assessment and evaluation by the competent national authorities, (...) it is the Commission which adopts the final decision and takes sole legal liability for such a decision as against the beneficiaries”¹⁰⁵. As a consequence, the CJEU recognised the right of the affected party to be heard before the Commission and highlighted that substantive, triangular relationships operate between cooperating authorities and private parties beyond the formal rules¹⁰⁶.

The Court has also protected the effective capability of the parties to defend their rights in the procedure. In *Mediocurso v Commission*, it ensured the provision of a reasonable time period between the cognition of the relevant documents and the

¹⁰² See S. Cassese, *European Administrative Proceedings*, 68 *Law and Contemporary Problems* 31-34 (2004); M. Eliantonio, *Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'*, 7(2) *Review of European Administrative Law* 65 (2015).

¹⁰³ See C. Eckes, J. Mendes, *The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?*, 36 (5) *European Law Review* 665 (2011).

¹⁰⁴ *P Commission v Lisrestal*, C-32/95 [1996] ECR I-05373, para 28.

¹⁰⁵ *Ibid.*, para 29.

¹⁰⁶ See M. Simoncini, *Challenges of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction*, *cit.*, at 103, 310-334.

expression of comments on them, so that the party could be able to analyse the documents and organise its own defence¹⁰⁷. Yet, in *CPEM v Commission*, the General Court made clear that procedural irregularities should be relevant only insofar as they have “a concrete effect on the ability of the undertakings concerned to defend themselves”¹⁰⁸.

In addition, the case law pointed out that decisions on the reduction of assistance need to be “sufficiently reasoned” and in the framework of the cooperation between national authorities and the Commission, this meant that the grounds for such decisions should be clearly stated and duly justified, “either when the decision itself clearly demonstrates the reasons justifying the reduction of the assistance or, if that is not the case, when it refers in a sufficiently clear manner to a measure of the competent national authorities in the Member States concerned in which the latter clearly set out the reasons for such a reduction”¹⁰⁹.

In a nutshell, EU case law has contributed to defining the guarantees and the requirements of due process in the use of the ESF. Even though it concerned previous ESF regulations, the principles held therein are still valid and applicable to the management of the new Fund.

Nevertheless, the kind of litigation triggered by the shared management of the ESF shows that the complex legal framework has not favoured legal certainty in the implementation of social rights. The lack of certainty enhances the risk of litigation. Experience from other sectors shows that more general questions cannot be eluded. For instance, the allocation of competence between national and supranational authorities, the distribution of responsibilities and the recognition of binding legal acts may trigger concrete risks of litigation. These legal issues may also affect the very justiciability of the right, as the identification of the competent court may be problematic given the structural separation of competence between national and EU courts¹¹⁰. The

¹⁰⁷ *Mediocrurso v Commission*, C-462/98 P, para 38.

¹⁰⁸ *Centre de promotion de l'emploi par la micro-entreprise (CPEM) v Commission*, T-444/07, para 53.

¹⁰⁹ *Partex*, T-182/96, para 76.

¹¹⁰ On these aspects, see in particular F. Brito Bastos, *Derivative illegality in European composite procedures*, 55 *Common Market Law Review* 101 (2018); F. Brito Bastos, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, cit., at 104, 68 ff.; M. Simoncini, *Challenges*

multilevel system in the spending of the ESF thus structurally challenges (and weakens) the protection of the right to social assistance.

9. Conclusion

The protection of social rights and, notably, of the right to social assistance and inclusion in the EU suffers from the misalignment between the solidarity goals set in the Treaties and the Charter, on the one hand, and the structure of the EU budget and its expenditure channels on the other. As this article demonstrated, this gap has both policy roots and legal reasons.

From a policy-making perspective, social inclusion is not consistently pursued and prioritised by EU institutions. The analysis of the budgetary decision-making has shown that the European Parliament is the most relevant advocate of redistributive policies, including the protection of social rights and the promotion of social inclusion. Although the Council has also engaged with such policy effort, its position is less consistent. In addition, the Presidencies of the EU have interpreted this responsibility in different ways. In a nutshell, despite the renewed effort to promote social inclusion¹¹¹, the EU budgetary policy is still fragmented and lacks a coherent political plan.

From a legal standpoint, the protection of social rights under EU law and funds is subject to several constraints. Firstly, there is a competence limit. The Treaties and the Charter clearly confer on the EU supporting competence, so that the Member States have the major responsibility on the protection of social rights and in particular social inclusion. As the welfare remains national competence and the role of the EU is ancillary, enforcement is necessarily shared and eventually dependent on national policies.

Secondly, the existence of administrative burdens exacerbates the claims of protection. As the article explained, the management of the ESF clearly shows that the enforcement of rights strictly depends on the effectiveness of the cooperation between the

of Justice in the European Banking Union. Administrative Integration and Mismatches in Jurisdiction, cit., at 103, 313 ff.

¹¹¹ See, again, the European Pillar of Social Rights Action Plan, which gives the ESF a centrale stage, and the assessment of the social expenditures financed through the national recovery and resilience plans, as envisaged in Regulation 2021/241.

EU and national levels in composite administrative procedures. This requires the Member States to develop adequate administrative capability. The deficiencies of national administrative systems thus clutter the enforcement of rights. In addition, the binary structure of the cooperation has reduced the chances to participate in the administrative proceedings and could also affect their capability to challenge the decisions taken in the multilevel procedure, as other sectors' experience demonstrates. In short, the ambiguous allocation of responsibilities and tasks affects the certainty of the administrative guarantees and relationships. This may trigger litigation, while making the protection of substantive rights critically dependent on the certain and effective enforcement of procedural rights. As a result, protection is linked to the judicial and administrative capacity of the Member States to respond to the claims for justice.

Finally, conditionalities apply to the disbursement of the ESF resources. In fact, their use is subject to the EU law infringement conditionality: since the 2013 Common Framework Regulation, a direct link between the stability of the EMU and the protection of social rights and social inclusion has been introduced. As a result, the Commission can suspend funding if a State is suspected of the breach of EU law. The legal framework so far makes the protection of social rights conditional upon the coordination of economic policies. It indirectly creates a sort of double conditionality, which builds upon the national budgetary performance. Social rights are protected insofar as there is national compliance with EU budgetary rules and co-financing requirements. Yet the current suspension of the Growth and Stability Pact¹¹² and the current path toward the EU Economic Governance Review¹¹³ could operate on the alignment of social policies with the fiscal rules, relaxing the conditions applicable to the enforcement of social rights.

All these different constraints generate a dysfunctional framework for the promotion of social inclusion and for the right to social assistance, showing that the protection of social rights can only be marginally pursued through the EU budget and at high

¹¹² See European Commission, Communication on the activation of the general escape clause of the Stability and Growth Pact, Brussels, COM (2020) 123 final, 20 March 2020.

¹¹³ European Commission, Communication on The EU economy after COVID-19: implications for economic governance, COM(2021) 662 final, Strasbourg, 19 October 2021.

administrative and judicial costs. To take social inclusion seriously, we should address these misalignments among policy goals, law enforcement and budget resources. Only by addressing their dysfunctional combinations would solidarity either become a much more feasible goal or push for a comprehensive reform to achieve the higher standard of protection set in the Treaties and in the Charter.