

The (Possible) Role of the Right to Social Security in the EU Economic Monitoring Process

By E. De Becker^{*}

Abstract

The outbreak of the financial and economic crisis in 2008 had a severe impact on the member states of the European Union. Countries like Greece had to ask the Troika (the European Commission, the European Central Bank and the International Monetary Fund) for financial aid. In return, they were obliged to reduce public spending and, as a result, national social security systems were drastically reformed. Furthermore, the EU has exercised its competences to supervise national budgets more extensively, even for countries not applying for financial aid through the Country Specific Recommendations under the European Semester. Like the decisions providing financial support, these recommendations also touch upon member states' social security systems. Moreover, the actions of the EU seem to generate a tension between the social rights provisions in (inter)national human rights instruments and the EU economic monitoring process, hence creating a possible deficit at the level of the EU. The five collective complaints against Greece under the framework of the European Social Charter (Council of Europe) illustrate this tension. This Article investigates this tension further and provides insights in possible ways to close the gap between (inter)national social rights provisions and the EU economic monitoring process by looking at the right to social security in the EU legal order. In doing so, this Article scrutinizes the judicial safeguards available at EU level, namely the right to social security in the Charter of Fundamental Rights (CFEU) and the role of general principles of Union's law for the protection of fundamental rights. It will become clear that a lot of uncertainty still remains regarding the content and scope of the right to social security in the CFEU, as well as the enforceability of this provision in the EU economic monitoring process.

^{*} Eleni De Becker is a PhD candidate at the Institute of Social Law, KU Leuven, Belgium. This Article was finalized in November 2015.

A. Introduction

The outbreak of the financial and economic crisis in 2008 had a severe impact on the member states of the European Union (EU). Several EU countries, such as Greece, needed to ask for financial aid from the International Monetary Fund, the European Commission, and the European Central Bank. In return, they were obliged to reduce public spending and, as a result, national social security systems were drastically reformed. Additionally, the EU has exercised its competences to supervise national budgets more extensively, even for countries not applying for financial aid, for example through the Europe 2020 strategy and the European Semester. Under the European Semester, EU member states receive Country Specific Recommendations (CSRs) through which member states' economic and employment policies are coordinated. Like the decisions to provide financial support, these recommendations touch upon member states' social security systems.

The increased impact of the EU on national social security systems through its economic monitoring procedure raises several questions regarding the constitutional balance between the Union and its member states. Welfare policies, such as social security, are incorporated in the EU economic monitoring process through their link with public finances and budgetary considerations.¹ This seems to be in contradiction with the limited competences of the EU as welfare policies are traditionally preserved for member state action.² As a result, the EU economic monitoring policies seem to circumvent both the (limited) competences of the EU in the area of social policy³—as well as the restrictions laid down by the Treaties in this field—and the ability of the member states to decide on the concrete implementation of their own social security policies.⁴

The increased impact of the EU on member states' social security policies through economic monitoring also raises questions with regard to the compatibility of these measures with the social objectives and social rights as laid down in the Treaties and the Charter of Fundamental Rights of the EU (CFEU).⁵ With the Lisbon Treaty, we saw a

¹ Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 *MOD. L. REV.* 817, 824–25 (2013); DAGMAR SCHIEK, *EUROPEAN LEGAL STUDIES ONLINE-PAPERS: A CONSTITUTION OF SOCIAL GOVERNANCE FOR THE EUROPEAN UNION* 9–10 (2015).

² See Consolidated Version of the Treaty on the Functioning of the European Union art. 151–61, Oct. 26, 2008, 2012 O.J. (C 326) [hereinafter TFEU] (regarding limitations found in the Social Policy Chapter of the TFEU).

³ See Floris de Witte, *The Architecture of a Social Market Economy* 7 (London Sch. Econ. Working Papers, Working Paper No. 13-2015, 2015).

⁴ See Alicia Hinarejos, *The Euro Area Crisis and Constitutional Limits to Fiscal Integration*, 14 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 243 (2012); see also *id.* (providing an overview of the evolution of EU social policy).

⁵ SCHIEK, *supra* note 1, at 10 (stating that “the question which is as yet unanswered, is whether the new economic governance in promoting and enforcing EMU can be reconciled with the EU’s social values substantively. This can

renewed commitment at EU level to the promotion of economic and social progress as well as social justice.⁶ The CFEU, which the EU is obligated to respect and uphold in defining and implementing its policies,⁷ further iterates a duty to the promotion of social rights.⁸ Regardless of this renewed commitment, there are several restrictions to challenge the EU economic monitoring measures on their compatibility with the social rights in the CFEU. Furthermore, with respect to the content and scope of the social rights in the CFEU, these rights are formulated rather vaguely, leaving it up to the legislature and the Court of Justice of the EU (CJEU) to further develop them.

When EU economic monitoring is contested on the basis of fundamental social rights, this is mostly done indirectly through challenging national implementing law on the basis of international social rights provisions. Examples of this kind of indirect challenge are the five collective complaints against Greece (No. 76-80/2012) under the framework of the European Social Charter⁹ (ESC).¹⁰ At a national level, social policy reforms are also being challenged on the basis of national constitutional provisions.¹¹ Additionally, the financial

be doubted since the dynamics resulting from new economic governance as management by objectives are coupled with the macro-economic structure engrained in the legal frame of the 200 currency . . . New economic governance allows the EU to actively influence national social policies and wage levels within Member states in order to achieve such adjustment.”).

⁶ See Consolidated Version of the Treaty on European Union pmb. & art. 3(3), Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU]; TFEU art. 9.

⁷ See TEU art. 6(1) for a discussion that rights, as laid down in the Charter of Fundamental Rights of the European Union, indicating that “the rights, freedoms, and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

⁸ See Charter of Fundamental Rights of the European Union, ch. IV, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter CFEU].

⁹ The European Social Charter is an instrument of the Council of Europe.

¹⁰ *Collective Complaint No. 76/2012, IKA-ETAM v. Greece*, Eur. Comm. Soc. Rts. (2012); *Collective Complaint No. 77/2012, Panhellenic Federation of Public Service Pensioners v. Greece*, Eur. Comm. of Soc. Rts. (2012); *Collective Complaint No. 78/2012, ISAP v. Greece*, Eur. Comm. of Soc. Rts. (2012); *Collective Complaint No. 79/2012, POS-DEI v. Greece*, Eur. Comm. of Soc. Rts. (2012); *Collective Complaint No. 80/2012, ATE v. Greece*, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/eng#>.

¹¹ Case 474/2013 [Constitutional Court of Portugal] (Aug. 28 2013), <http://www.tribunalconstitucional.pt/tc/en/home.html>; Case 187/13 [Constitutional Court of Portugal] (Apr. 5, 2014), <http://www.tribunalconstitucional.pt/tc/en/home.html>; see also Case 253/201, [Constitutional Court of Portugal] (May 23, 2013), <http://www.tribunalconstitucional.pt/tc/en/home.html>; Case 474/2013 [Constitutional Court of Portugal] (Aug. 29 2013), <http://www.tribunalconstitucional.pt/tc/en/home.html>; see Roberto Cisotta & Daniel Gallo, *The Portuguese Constitutional Jurisprudence during the Economic Crisis*, in SOCIAL RIGHTS IN TIMES OF CRISIS IN THE EUROZONE: THE ROLE OF FUNDAMENTAL RIGHTS’ CHALLENGES 85–94 (Claire Kilpatrick & Bruno De Witte eds.,

assistance measures and the CSRs under the European Semester were subjected to criticism from the European Parliament,¹² the Council of Europe¹³ and academics¹⁴ for not taking into account the social objectives and social rights at the EU level.

This Article aims to provide some clarity to the possible role of social rights in the EU legal order, in particular the right to social security, as well as the possibility to use social rights as a ground for review in the EU economic monitoring process. Furthermore, this Article explores the possible meaning and scope of the right to social security in Article 34 CFEU in the aftermath of the changed EU economic monitoring process and its increased impact on national social security systems.

This Article is divided into two sections which provide an overview of the difficulties in challenging EU economic monitoring measures—such as the financial assistance measures and the CSRs—on the basis of a European right to social security. In doing so, this Article questions the role of social rights in the EU economic monitoring process and exposes a possible conflict between the renewed pledge to uphold the social rights in CFEU and an increased indirect impact on domestic social security policies, subject to limited judicial control in the EU economic monitoring process.

Eur. Univ. Inst. ed. 2014); Colm O’Cinneide, *Austerity and the Faded Dream of a Social Europe*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 169, 189 (Aoife Nolan ed., 2014); see also Case 2009-43-01 [Constitutional Court of Latvia] (Dec. 21 2009), <http://www.satv.tiesa.gov.lv/en/>; Cases 46-52/2010, 70/2010, 77/2010, 82-87/2010, 94/2010, 100-101/2010, 109/2010, 114/2010, 123-124/2010, 128-129/2010, 133-134/2010, 142-143/2010, 1-2/2011, 5/2011, 8/2011, 16/2011, 21/2011, 23/2011, 25/2011, 29/2011, 32/2011, 37/2011, 39/2011 [Constitutional Court of Lithuania] (Feb. 6, 2012), <http://www.lrkt.lt/en/>; *Council of Europe Commissioner for Human Rights Issue Paper on Safeguarding Human Rights in Times of Economic Crisis*, at 7 (Dec. 3, 2013), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2664103&SecMode=1&DocId=2215366&Usage=2>; *Council of Europe Commissioner for Human Rights Issue Paper on the ISSA Crisis Monitor Project on Coping with the Crisis: Managing Social Security in Uncertain Times*, at 25 (Jan. 2012), http://observatorio.anses.gob.ar/archivos/documentos/OBS-000210%20-%20Coping%20with%20the%20crisis_Managing%20social%20security%20in%20uncertain%20times.pdf.

¹² See Report of Committee on Employment and Social Affairs on Employment and Social Aspects of the Role and Operations of the Troika (ECB, Commission, and IMF) with Regard to Euro Area Programme Countries (2014/2007(INI)) para. 40, EUR. PARL. RESOL. A7-0135/2014 (2014).

¹³ Council of Europe Press Release DC011(2014), Secretary General Calls for Better Protection of Social Rights in Times of Austerity (January, 28 2014), <https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR011%282014%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

¹⁴ See ANDREAS FISCHER-LESCANO, *HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY: THE EU INSTITUTIONS AND THE CONCLUSION OF MEMORANDA OF UNDERSTANDING* (2014); see also O’Cinneide, *supra* note 11; Dagmar Schiek, *The EU Constitution of Social Governance in an Economic Crisis in defense of a Transnational Dimension to Social Europe*, 20 MAASTRICHT J. EUR. & COMP. L. 185, 207 (2013).

The first Section discusses the particularities of the EU economic monitoring process and its impact on the national social security systems of the member states. In this Article the concept of the EU economic monitoring is defined broadly, taking into account the financial assistance measures for member states in financial difficulties as well the coordination of the member states' economic and employment policies under the Europe 2020 strategy. For the purpose of this Article, the term "EU economic monitoring" includes the financial assistance measures—now governed by the Treaty establishing the European Stability Mechanism (ESM-Treaty)—as well as the CSRs which are part of the Europe 2020 strategy, now complemented by the European Semester, with a stricter control for Eurozone member states.

The second Section looks at the right to social security at EU level as a possible ground for review in the EU economic monitoring process. The right to social security in Article 34 CFEU should be distinguished from a right to social security as a general principle of Union's law. As this discussion will show, the legal enforceability of Article 34 is rather limited. By looking at the right to social security as a general principle of Union's law, this right may have greater applicability as a ground for review in the EU economic monitoring process. In doing so, the gap between the protection of (inter)national social rights provisions and the EU economic monitoring process could start to close.

B. EU Economic Monitoring Process and the Member States' Social Security Systems

I. The Impact of EU Economic Monitoring on the Member States' Social Security Systems

In 2010, several Eurozone members, including Greece, requested financial assistance in order to repay their debts.¹⁵ In May 2010, the European Commission, the European Central Bank, and the International Monetary Fund (IMF) granted Greece financial support on the condition that the country would restore its financial sustainability and implement structural reforms in order to improve the sustainability of its public finances.¹⁶ The financial assistance program consisted of two components—(1) a financial assistance program that created conditional loans and disbursements, and (2) a program setting out budgetary, financial, and structural reforms. These reforms were laid down in the

¹⁵ See Hinarejos, *supra* note 4, at 247; Koen Lenaerts, *Economic Integration, Solidarity and Legitimacy: The EU in a Time of Crisis, in* EUROFORUM KU LEUVEN (2013), T 4? <https://www.kuleuven.be/euroforum/viewpic.php?LAN=E&TABLE=DOCS &ID=860>.

¹⁶ See Hannes Hofmeister, *To Bail out or not to Bail Out – Legal Aspects of the Greek Crisis*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 113–34 (2011), for an overview on the Greek bailout; Manos Matsaganis, *The Welfare State and the Crisis: The Case of Greece*, 21 J. EUR. SOC. POL'Y 501, 501–12 (2011); see also *The Greek Sovereign Debt Tragedy: Approaching the Final Act*, 48 COMMON MKT. L. REV. 1769 (2011).

Memorandum of Understanding signed between the European Commission, the European Central Bank, the IMF, and Greece, and were translated into Council Decision No. 2010/320/EU.¹⁷ Greece was not alone in requesting support. Several other EU countries, such as Portugal and Ireland, needed financial assistance as well. Like Greece, financial assistance came with a demand to take structural reforms.¹⁸

Such structural reforms included changes to unemployment schemes, health care, and pensions. For example, the Council Decision required that Greece reduce its highest pensions, as well as reduce the Easter, summer, and Christmas bonuses and allowances paid to civil servants. Greece was also asked to introduce a unified statutory retirement age of 65 years, a gradual increase in the minimum contributory period for retirement on a full benefit from 37 to 40 years, and to create an automatic adjustment mechanism linking the retirement age with the increase in life expectancy.¹⁹ Ireland was similarly required to increase the state pension age to 66 years in 2014, 67 in 2021, and 68 in 2028 to ensure long-term sustainability of public finances.²⁰ Other reforms related to the reduction of public spending on welfare benefits—in particular pensions in Greece and Cyprus²¹—and to the increase of activation measures in the unemployment schemes such as in Ireland and Portugal.²² The proposed reforms were formulated mainly in terms of budgetary or

¹⁷ See Council Decision 2010/320 of May 10, 2010, 2010 O.J. (L 145) (addressing Greece with view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for deficit reduction judged necessary to remedy situation of excessive deficit).

¹⁸ See Council Decision 2011/344, art. 3(6)(h) of May 30, 2011, 2011 O.J. (L 159) 88 (EU) (granting Union financial assistance to Portugal).

¹⁹ See Council Decision 2010/320, art. 2(2)(b) of June 8, 2010, 2010 O.J. (L 146) (addressing 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), *repealed by* Council Decision 2011/734 of July 12, 2011, 2011 O.J. (L 296) (addressing 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).

²⁰ See Council Decision 17211/1/10, art. 3(7)(d) of Dec. 7, 2010, 2011 O.J. (L 30) 34 (granting Union financial assistance to Ireland).

²¹ See Council Decision 2011/734, annex, of Dec. 4, 2012, 2013 O.J. (L 4) (providing some examples with regard to Greece and repealing Council Decision 2010/320); Council Decision 2010/320, art. 2(e)(f)(g) of June 8, 2010, 2010 O.J. (L 146) (addressing 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); Council Implementing Decision, art. 2(9)(i) of Sept. 13, 2013, 2013 O.J. (L 250) 40–45 (regarding Cyprus's approval of the macroeconomic adjustment programme for Cyprus) (repealing Decision 2013/236) (EU).

²² See Council Decision 17211/1/10, art. 7(1) of Dec. 7, 2010, 2011 O.J. (L 30) 34 (on granting Union financial assistance to Ireland); *see also* Council Decision 2011/344, art. 3 & 6(h) of 30 May 2011, 2011 O.J. (L 159) 88 (EU) (granting Union financial assistance to Portugal).

employment-oriented objectives. Changes in the national social security system were thus perceived as a means to achieve those objectives.

Even member states not applying for financial assistance are encouraged to reform their national social security system through the Country Specific Recommendations (CSRs). These recommendations are part of the European Semester, which is a European monitoring cycle of economic and employment policy coordination. Through the European Semester, the goals set forth in the Europe 2020 Strategy—the EU strategy for jobs and growth concluded in 2010—are systematically reviewed.²³ The Europe 2020 Strategy coordinates and interconnects economic and employment policies throughout the EU.

The CSR considers national social security systems often as an important cost factor and like the measures providing financial assistance, most member states are obliged to reform their social security system in order to sustain public finances. For example, in some CSRs, member states were asked to harmonize the pension age for men and women,²⁴ or link the statutory retirement age to life expectancy,²⁵ again to ensure long-term sustainability of

²³ See KENNETH ARMSTRONG, GOVERNING SOCIAL INCLUSION: EUROPEANIZATION THROUGH POLICY COORDINATION 264–99 (2010); see also Paul Schoukens & Joris Beke Smets, *Fighting Social Exclusion under EU Horizon 2020: Enhancing the Legal Enforceability of the Social Inclusion Recommendations*, 15 EUR. J. SOC. SECURITY 5 (2014).

²⁴ Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Austria and delivering a Council opinion on the 2015 Stability Programme of Austria, 2015 (C 272); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Croatia and delivering a Council opinion on the Convergence Programme of Croatia, 2014 (C 247).

²⁵ See Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Austria and delivering a Council opinion on the 2015 Stability Programme of Austria (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Belgium and delivering a Council opinion on the 2015 Stability Programme of Belgium (C 272); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of the Czech Republic and delivering a Council opinion on the Convergence Programme of the Czech Republic, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Finland and delivering a Council opinion on the Stability Programme of Finland, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Lithuania and delivering a Council opinion on the Convergence Programme of Lithuania, 2014 (C 247); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Luxembourg and delivering a Council opinion on the 2015 Stability Programme of Luxembourg, 2015 (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Malta and delivering a Council opinion on the 2015 Stability Programme of Malta, 2015 (C 272).

public finances. Member states were also encouraged to curb expenditures in health care.²⁶

Although the CSRs are, strictly speaking, non-binding, it is in some cases possible to sanction member states for not following these recommendations. In the aftermath of the economic and financial crisis, the operating procedures under the European Semester were reshaped and strengthened in order to further monitor and coordinate the budgetary policies of the member states.²⁷ In this regard, the EU has tightened its budgetary discipline rules in order to prevent and correct macro-economic imbalances.²⁸ In this area, it is

²⁶ See Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Bulgaria and delivering a Council opinion on the 2015 Convergence Programme of Bulgaria (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Croatia and delivering a Council opinion on the 2015 Convergence Programme of Croatia (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of the Czech Republic and delivering a Council opinion on the 2015 Convergence Programme of the Czech Republic (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Germany and delivering a Council opinion on the 2015 Stability Programme of Germany (C 271); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Ireland and delivering a Council opinion on the 2015 Stability Programme of Ireland (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Lithuania and delivering a Council opinion on the 2015 Stability Programme of Lithuania (C 272); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of the Netherlands and delivering a Council opinion on the Stability Programme of the Netherlands, 2014 (C 247); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Slovakia and delivering a Council opinion on the 2015 Stability Programme of Slovakia (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Spain and delivering a Council opinion on the 2015 Stability Programme of Spain, 2015 (C 272).

²⁷ See Sonja Bekker, *European Socioeconomic Governance in Action: Coordinating Social Policies in the European Semester*, 19 EUR. SOC. OBSERVATORY 5 (2015), http://www.ose.be/files/publication/OSEPaperSeries/Bekker_2015_OseResearchPaper19.pdf; Witte, *supra* note 3, at 15.

²⁸ For example the budgetary discipline in the Growth and Stability Pact has been complemented and tightened by the Six-Pack and the Two-Pack. The Six-Pack consists of five regulations and one directive and covers both fiscal and macro-economic surveillance; four of the six measures apply to all member states, while two, which define possible sanctions, apply only to Eurozone member states:

(1) Council Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011, O.J. (L 306) 12–24 (Nov. 23 2011) (amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies);

(2) Council Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, O.J. (L 306) 25–32 (Nov. 23, 2011);

(3) Council Regulation 1177/2011 of 8 November amending regulation no. 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, O.J. (L 306) 33–40 (Nov. 23, 2011);

important to distinguish between non-Eurozone member states and Eurozone member states. For the latter, it would be possible to impose a fine when a member state fails to address its budgetary deficit.²⁹ In that regard, CSRs focusing on national social security schemes' efficiency and effectiveness can be taken into account under these stricter budgetary rules, due to their link with the need for sustainable public finances.

II. The Legal Nature of EU Economic Governance Measures

When looking at the role of a European right to social security in the EU economic monitoring process, one first has to tackle the question of whether the different instruments can be brought before the CJEU. In answering this question, this Article makes a distinction between the EU financial assistance measures and the CSRs. Even when the EU economic monitoring measures can be brought before the CJEU, it remains difficult for individuals to bring a successful claim because they are required to show that they have a direct and individual concern.

(4) Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, O.J. (L 306) 23, 41–47 (Nov. 23, 2011);

(5) Regulation no. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, O.J. (L 306) 1–7 (Nov. 23, 2011);

(6) Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, O.J. (L 306) 8–11 (Nov. 23 2011).

The Two-Pack consists of two regulations and aims at further strengthening the surveillance mechanisms in the euro area; they entered into force at 30 May 2013:

(1) Council Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, O.J. (L 140) 11–13 (May 27, 2013);

(2) Council Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to Their Financial Stability, O.J. (L 140) 1–10 (May 27, 2013).

²⁹ Under the macro-economic imbalance procedure, it is possible to adopt preventive recommendations for member states. These recommendations are part of the Country Specific Recommendations under the European Semester. It can be decided to open up an excessive imbalance procedure for more severe cases requiring member states to adopt a clear roadmap and deadlines. Furthermore, a more rigorous enforcement regime is established for euro area countries, consisting of a two-step approach: an interest-bearing deposit can be imposed after one failure to comply with the recommended corrective action, after a second compliance failure, this interest-bearing deposit can be converted into a fine. *See also* http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm.

1. Financial Assistance Measures: EU Law?

In the beginning of the crisis, several financial assistance measures were taken ad-hoc, while during the crisis several institutions were created in order to deal with member states facing financial difficulties, such as the European Financial Stabilization Mechanism (ESM) and the European Financial Stability Facility (EFSF).³⁰ There has been a lot of debate about whether these financial assistance measures constitute EU law or not. This is a difficult question to answer. In the beginning when these different financial assistance measures were adopted, this was done in some cases outside the EU framework, making it unclear whether such measures constitute EU law or not.³¹ With the ESM-Treaty this procedure has been further institutionalized. In the following paragraphs, this article will mainly focus on the proceedings under the ESM-Treaty, because this is the procedure which governs new requests for financial assistance by EU member states.³²

Throughout the economic crisis different institutions have been created in order to provide financial support to member states facing financial difficulties. In 2010 the European Financial Stabilization Mechanism (EFSM) was created, as well as the European Financial Stability Facility (EFSF). In 2013, the European Stability Mechanism (ESM), an international law institution providing financial support for EU member states in times of financial difficulties, replaced the EFSM. Some authors have called the ESM a “semi-intergovernmental method,”³³ not guaranteeing the same level of protection as under the

³⁰ See Paul Schoukens, Eleni De Becker & Joris Beke Smets, *Ontwikkelingen van sociaal Europa: de socio-economische monitoring van de EU juridisch afgetoetst aan het grondrecht op sociale zekerheid (Europees Sociaal Handvest)*, 2e BELGISCH TIJDSCHRIFT VOOR SOCIALE ZEKERHEID 215, 221–22 (2014), for more information on the EFSF and ESM; see also Lenaerts, *supra* note 15, at 17–24, for a discussion on the *Pringle* judgment.

³¹ For example, Greece received its first loan in 2010 through a pooled bilateral loan agreement (the Greek loan facility). Earlier loans to non-Eurozone countries such as Romania (2008) were passed off on the basis of Article 143 TFEU. With the establishment of the EFSF and EFSM, we see that countries, such as Portugal and Ireland, received financial assistance through the EFSF (international law) and the EFSM (EU law). The same has happened with the ESM-treaty: the financial assistance measures to Cyprus were for example passed off through the ESM. More information for the different countries is available at the website of the EU Commission, giving an overview of the different documents for each country, see http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm.

³² See FISCHER-LESCANO, *supra* note 14 for an extensive discussion on the Memoranda of Understanding under the ESM-Treaty; see also Claire Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because they are not EU Law?*, 10 EUR. CONST. L. REV. 393 (2014) (analyzing the different financial assistance measures separately, also looking at non-Eurozone countries, such as Hungary, Latvia and Romania, who received financial assistance in 2008).

³³ See JEAN-PAUL KEPPENE, *THE ECONOMIC AND MONETARY UNION: CONSTITUTIONAL AND INSTITUTIONAL ASPECTS OF THE ECONOMIC GOVERNANCE WITH THE EU* (Ulla Neergaard, Catherine Jacqueson & Jens Hartig Danielsen eds., FIDE XXVI Congress, 1st ed. 2014); see also Koen Lenaerts, *EMU and the European Union's Constitutional Framework*, 6 EUR. L. REV. 753, 756 (2014).

EU treaties. In that regard, the measures under the ESM are not part of EU law and thus cannot be annulled on the basis of Article 263 and Article 267 TFEU.³⁴

Although the ESM is governed by public international law, it is still linked with EU law. For example, in *Pringle*, the CJEU held that the Memorandum of Understanding under the ESM must be fully consistent with EU law, potentially including the CFEU.³⁵ Furthermore, in the ESM-Treaty the conditionality attached to the ESM shall be contained in a *Macroeconomic Adjustment Programme* detailed in a Memorandum of Understanding. The rules for the approval of such a *Macroeconomic Adjustment Programme* are laid down in EU Regulation 472/2013, adding an additional link with EU law and some extra complexity to the matter.³⁶

Article 7 of Regulation 472/2013 states that the Council shall, if the Commission proposes, approve a member state's draft *Macroeconomic Adjustment Programme*.³⁷ As a result, there is a concrete link between the assistance measures under the ESM and EU law. As stated by Lenaerts, "since the Council decision approving the draft *Macroeconomic Adjustment Programme* is an EU measure, it may be challenged (either directly before the EU Courts or indirectly before the national courts on the ground that it is incompatible with the Charter)."³⁸ He then adds that "the question [that] needs to be asked is actually whether by adopting those measures, the Member State receiving financial assistance is

³⁴ See Case T-289/13, *Ledra Advertising v. Comm'n*, paras. 56–59 (Nov. 10, 2014), <http://curia.europa.eu/>; see also Case T-291/13, *Eleftheriou and Papachristofi v. Comm'n*, paras. 56–59 (Nov. 10, 2014), <http://curia.europa.eu/>; Case T-293/13 *Theophilou v. Comm'n*, paras. 59–60 (Nov. 10, 2014), <http://curia.europa.eu/> (stating that "it must be noted that, in the context of an action for annulment covered by Article 263 TFEU, the General Court has jurisdiction only to review the legality of acts of the institutions, bodies, offices or agencies of the European Union. In applying the disputed passages to be annulled; the applicant seeks the annulment in part of the MoU, which was adopted jointly by the Republic of Cyprus and the ESM. Since neither the ESM, nor the republic of Cyprus is among the institutions, bodies, offices or agencies of the European Union, the General Court has no jurisdiction to examine the legality of acts which they have adopted together."); Case C-370/12, *Pringle*, para. 180 (Nov. 27, 2012), <http://curia.europa.eu/> (finding member states are not implementing EU law, and, as a result, the CFEU is not applicable).

³⁵ See *Pringle*, Case C-370/12 at para. 174; see also Kilpatrick, *supra* note 32; Alexander Kornezov, *Social Rights, the Charter and the ECHR – Caveats, Crises and Other Disasters*, in EUROFORUM KU LEUVEN 4–7 (2015), <https://www.kuleuven.be/euroforum/page.php?LAN=E&FILE=policy-papers>.

³⁶ See Council Regulation 472/2013, art. 7, of the European Parliament and of the Council of 21 May 2013 on Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability, O.J. (L 140) 1–10 (May 27, 2013).

³⁷ *Id.*

³⁸ Lenaerts, *supra* note 33, at 759.

fulfilling an obligation imposed by EU law, notably by the Council Decision approving that programme and/or Regulation 472/2013.”³⁹

The financial assistance measures under the ESM have a dual nature, making it difficult to determine whether the measures constitute EU law or not. Even though there are some links with EU law that allow for review of the financial assistance measures through the *Macroeconomic Adjustment Programme*—which the Council needs to approve—it is uncertain whether the CJEU would follow this line of thought. Furthermore, it is not clear whether member states are implementing EU law. If not, it is not possible to review national legislation on the basis of the CFEU, creating a problem of justiciability.

The discussion on whether the measures constitute EU law could be settled if President Juncker’s proposal would be followed. In June 2015, Juncker proposed the full integration of the ESM into the EU framework between July 2017 and 2025.⁴⁰ At this point, however, it would be difficult to challenge these measures, as well as any national law implementing them, even if they conflict with the right to social security in the CFEU. If the CJEU would not consider the financial assistance measures under the ESM-Treaty as EU law, individuals could only rely on national constitutional provisions or international obligations to challenge the member states implementing legislation.

2. Country Specific Recommendations: Binding or Not?

CSRs are, in principle, not binding. As Article 263 TFEU excludes recommendations and opinions from judicial review because they do not have (explicit) binding effect, it will be difficult to bring an action for annulment of one of the CSRs before the CJEU. Only under exceptional circumstances can such recommendations be brought before the CJEU, however, the complainant needs to show that an EU institution adopted these CSRs and that they produce legal effects *vis-à-vis* third parties.⁴¹ Proving the first requirement is generally not a problem, as the CSRs are adopted by the Council on a proposal by the Commission and endorsed by the European Council. It is, however, more difficult to show that these recommendations have legal effects *vis-à-vis* third parties.⁴²

³⁹ *Id.*

⁴⁰ See *Commission Report on Completing Europe’s Economic and Monetary Union*, at 21 (2015), http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf (stating that in stage 2 the ESM should be integrated into the EU law framework).

⁴¹ See TFEU art. 263(4).

⁴² See Case C-207/01, *Altair Chimica*, 2003 E.C.R. I-8894, paras. 41–43:

As regards, third, the interpretation of Recommendation 81/924, it must be recalled that, according to the case-law of the Court, even if

Some CSRs can however have a certain binding character and could thus create binding effects. This is the case for recommendations focusing on social security in order to sustain public finances. For some of these recommendations, it would be possible to sanction Eurozone member states when they fall under the Macro-Economic Imbalances Procedure and not reduce their budgetary deficit.⁴³ In this case, the CSR can be enforced under the surveillance mechanism of the European Semester and can have a binding effect *vis-à-vis* third parties. Likewise, in earlier case law, the CJEU considered the Council conclusions holding the excessive deficit procedure brought against France and Germany in abeyance as having legal effect *vis-à-vis* third parties and thus binding and challengeable before the European courts.⁴⁴

Furthermore CSRs without binding character can still be challenged through preliminary references on the validity of EU law. Article 267 TFEU allows for the review of the validity of acts of Union institutions, bodies, offices or agencies through a preliminary reference, irrespective of whether or not the recommendation has binding effect.⁴⁵ As the Court held in *Grimaldi*, “the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.”⁴⁶ In this way, non-binding CSRs that require member states to alter their national social security legislation are potentially

recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.”

Id. (regarding the binding effects of recommendations); see also Case C-322/88, *Grimaldi*, 1989 E.C.R. 04407, paras. 7, 16, & 18; Case C-55/06, *Arcor*, 2008 E.C.R. I-02931, para. 94; Cases C-317/08, C-318/08, C-319/08, C-320/08, *Alessini et al.*, 2010 E.C.R. I-02213, para 40.

⁴³ See Council Regulation 473/2013, art. 8, of the European Parliament and of the Council of 21 May 2013 on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, O.J. (L 140) 11–13 (May 27, 2013).

⁴⁴ Case C-27/04, *Comm’n v. Council*, 2004 E.C.R. I-06649, paras. 44–51.

⁴⁵ TFEU art. 267(1)(b).

⁴⁶ *Grimaldi*, Case C-322/88 at para. 18.

reviewable. Additionally, most CSRs leave a wide margin of appreciation to the member states, allowing the member states to decide whether they take the CSRs into account.⁴⁷ Nevertheless, for Eurozone member states with a budgetary deficit, the recommendations are more detailed, with a greater possibility to sanction member states when they do not reduce their budgetary deficit.⁴⁸

3. Procedural Requirements for Individuals in the Case of an Action for Annulment⁴⁹: Direct and Individual Concern

Even when an act constitutes an act of EU law—such as Council decisions providing financial assistance—or has legal effects vis-à-vis third parties—such as the CSRs—it is difficult for individuals to meet the procedural requirements as laid down by Article 263(4) TFEU. Individuals need to show that they have a direct and individual concern in order to challenge EU economic monitoring measures. The CJEU interprets these criteria strictly. According to the CJEU, individuals first need to show that they have a direct concern. The Court defines a direct concern as “[t]he contested measure, first, must affect directly the legal situation of the individual and, second, leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.”⁵⁰

⁴⁷ See Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Austria and delivering a Council opinion on the 2015 Stability Programme of Austria, 2015 (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Belgium and delivering a Council opinion on the 2015 Stability Programme of Belgium, 2015 (C 272); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of the Czech Republic and delivering a Council opinion on the Convergence Programme of the Czech Republic, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Finland and delivering a Council opinion on the Stability Programme of Finland, 2014 (C 247); Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Lithuania and delivering a Council opinion on the Convergence Programme of Lithuania, 2014 (C 247); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Luxembourg and delivering a Council opinion on the 2015 Stability Programme of Luxembourg (C 272); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Malta and delivering a Council opinion on the 2015 Stability Programme of Malta (C 272).

⁴⁸ See Council Regulation no. 473/2013, art. 8, of the European Parliament and of the Council of 21 May 2013 on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, O.J. (L 140) 11–23 (May 27, 2013).

⁴⁹ See TFEU art. 263(4) (indicating that only individuals will need to show direct and individual concern in order to bring an action for annulment before the CJEU. The European Parliament, the Council, Commission and the European Council can be considered as privileged applicants as they do not need to show direct and individual concern. This is different for the Court of Auditors, the European Central Bank and the Committee of Regions as they can bring an action for annulment for the purpose of protecting their prerogatives).

⁵⁰ Case T-541/10, *Adedy v. Greece*, 2012 E.C.R. 00000, para. 64.

In *Adedy v. Council*, several Greek trade unions challenged some provisions of the Council Decisions providing financial assistance to Greece as well as the decision itself.⁵¹ Regarding the provisions that reduced the Easter, summer, and Christmas bonuses and allowances for civil servants, the CJEU held that these provisions left the decision on how to implement the measures to the discretion of the Greek authorities.⁵² According to the CJEU, only national implementing measures could directly affect the legal situation of the applicants, while the provisions in the Council Decision providing financial assistance could not.⁵³ Although the Council Decision sets out the different objectives for the government, it did not stipulate the means of reducing the different benefits, nor the categories of civil servants affected by it.⁵⁴ As a result, the provisions in the Council Decision could not be of direct concern to the applicants.

Regarding the other contested provisions, the Court held in *Adedy v. Council* that the Greek authorities have a wide discretion, so long as they achieve the objectives of financial sustainability and reduce the excessive deficit taking into account the principles set out in the Council Decision.⁵⁵ Additionally, even if the provisions have negative consequences for the applicants and civil servants in general, financially, or employment-wise, such consequences do not alter or affect their legal situation—only their factual one.⁵⁶

Even if applicants could show that the measures directly affect them, it is also difficult to show that one has an individual concern *vis-à-vis* the Council Decision.⁵⁷ Individuals need to show that the Council Decision affects them by reason of certain attributes which are peculiar to them or by reasons of circumstances in which they are differentiated from all other persons and these factors distinguish them individually.⁵⁸ As the Council Decisions are drafted in a broad and general manner, it is difficult to show that they explicitly address the individual complainant.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at para. 72.

⁵⁵ *Id.* at paras. 82–84.

⁵⁶ *Adedy*, Case T-541/10 at paras. 84–85.

⁵⁷ See Kilpatrick, *supra* note 32, at 417; see also Schoukens, De Becker & Smets, *supra* note 30, at 259–60.

⁵⁸ Case C-25/62, Plaumann v. Comm'n, 1963 E.C.R. 00199.

Although success seems rather limited for individuals under the action for annulment, it remains possible to ask the national court for a preliminary reference on the interpretation or validity of EU law. The CJEU explicitly mentions this possibility in *Adedy v. Greece*.⁵⁹ Up until now, such references have not been successful before the CJEU.⁶⁰ This may be due to the fact that the current preliminary references in this regard did not make an explicit link to the Council Decisions providing financial assistance. The national court simply asked the CJEU to review the national legislation in light of the CFEU without any reference to the EU economic monitoring process. As a result, the CJEU decided that the member state was not implementing EU law and that the Court was not competent to review national legislation in light of the CFEU.⁶¹ Like Kilpatrick argues, the Court could have applied a more creative reformulation in order to make the referred questions admissible.⁶²

In sum, currently, the judicial review of the financial assistance measures under the ESM seems rather limited. Even when there is a Council Decision—and thus a link with EU law—the Court refuses to review them when the procedural requirements for individuals are not fulfilled (action for annulment) or when the preliminary references does not make an explicit link with the EU economic monitoring process and the national implementing

⁵⁹ *Adedy*, Case T-541/10 at para. 93

[F]irstly it is apparent from the case-law that admissibility of an action for annulment before the European Union courts does not depend on whether there is a remedy before a national court enabling the validity of the act being challenged to be examined. A fortiori the admissibility of an action before the European Union courts cannot depend on the alleged slowness of national proceedings. In that regard, it must also be borne in mind that the second subparagraph of Article 19 (1) TEU provides that Member states are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.”

Id.

⁶⁰ See Case C-128/12, *Sindicato dos Bancários do Norte*, paras. 8–14 (Mar. 7, 2013), <http://curia.europa.eu/>; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*, paras. 17–22 (Oct. 21, 2014), <http://curia.europa.eu/>; Case C-134/12, *Corpul Național al Polițiștilor v. Biroul Executiv Central*, 2012 E.C.R. 00000, paras. 11–15; Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, paras. 11–16 (Oct. 21, 2014), <http://curia.europa.eu/>.

⁶¹ See Case C-128/12, *Sindicato dos Bancários do Norte*, paras. 8–14 (Mar. 7, 2013), <http://curia.europa.eu/>; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*, paras. 17–22 (Oct. 21, 2014), <http://curia.europa.eu/>; Case C-134/12, *Corpul Național al Polițiștilor v. Biroul Executiv Central*, 2012 E.C.R. 00000, paras. 11–15; Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, paras. 11–16 (Oct. 21, 2014), <http://curia.europa.eu/>.

⁶² See Kilpatrick, *supra* note 32, at 418.

legislation. Regarding CSRs, the picture is mixed. While it might be possible to bring an action for annulment when a member state does not follow the recommendations, and receives a sanction under the Macroeconomic Imbalances procedure, it seems that most CSRs are difficult to challenge. Nonetheless, it should be possible to challenge CSRs on the basis of a preliminary reference on the validity of EU law. Even so, EU social security policy under the EU economic monitoring measures operates largely in a judicial vacuum, allowing for little judicial control.

C. The Right to Social Security in the EU Economic Monitoring Process

I. A (Social Rights) Deficit at EU Level?

National legislation implementing the EU economic monitoring measures is being challenged at both an international and national level. The five collective complaints (No. 76-80/2012) against Greece under the framework of the European Social Charter (ESC) serve as an example in the area of social security.⁶³

In the five collective complaints against Greece, several trade unions argued that the new pension legislation violated the right to social security in the ESC, because the Greek implementing legislation did not take into account the vulnerable position of the pensioners.⁶⁴ In its decision, the European Committee of Social Rights (ECSR) decided that some of the reforms themselves did not constitute a breach of Article 12 (3) ESC.⁶⁵ Yet, the cumulative effect of the Greek reforms brought about a significant degradation of the pensioners' standard of living and their living conditions.⁶⁶ Although taking into account Greece's specific context, the ECSR found that the Greek government did not conduct the level of research and analysis necessary to genuinely assess the full impact of the new pension legislation on the different vulnerable groups in the Greek society.⁶⁷ The case made clear that the reforms, taken by the member states of the EU after receiving financial assistance, cannot remove the social protection floor provided by the social rights in the ESC or other fundamental rights guaranteed by international instruments, as well as national constitutions.⁶⁸

⁶³ See Collective Complaint No. 76/2012, IKA-ETAM v. Greece, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/>. See generally Collective Complaint No. 77/2012, Panhellenic Federation of Public Service Pensioners v. Greece, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/>; see generally Collective Complaint No. 78/2012, ISAP v. Greece, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/>; see generally Collective Complaint No. 79/2012, POS-DEI v. Greece, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/>; Collective Complaint No. 80/2012, ATE v. Greece, Eur. Comm. of Soc. Rts. (2012), <http://hudoc.esc.coe.int/>.

⁶⁴ *Id.*

⁶⁵ IKA-ETAM, Collective Complaint No. 76/2012 at para 78.

⁶⁶ *Id.*

⁶⁷ *Id.* at para. 79.

⁶⁸ See O'Cinneide *supra*, note 11, at 197–98.

The five collective complaints against Greece⁶⁹ show—as do other examples before national courts and international organizations—that member states' implementing legislation is being challenged.⁷⁰ This is not surprising because, under international law, member states remain bound to respect the rights contained in international treaties to which they are parties. The same reasoning applies to fundamental rights recognized in national constitutions. In contrast, the EU is not bound to the national constitutions of the member states, the European Social Charter,⁷¹ nor the instruments of the International Labour Organization (ILO)⁷². As a result, neither the ILO nor the ECSR review the economic monitoring measures taken by the EU (or the Troika) in light of the ILO Conventions or the ESC. For example, the ECSR, in the five collective complaints v. Greece, did not consider the question of whether the EU financial assistance measures to Greece respected the rights set out in the ESC.⁷³

Although the EU is not bound to international social human rights instruments such as the ESC, there are several judicial safeguards for the protection of social rights in the EU legal order, such as in the CFEU, which the EU is bound to respect when defining and implementing policies. An example is the right to social security in Article 34 CFEU, although it is not clear what this provision means, nor is it clear to what extent this provision can be invoked in the EU economic monitoring process.

Because the enforceability of Article 34 seems rather limited, this Article will also look into the possibility of a right to social security as a general principle of Union's law based on the

⁶⁹ See *IKA-ETAM*, Collective Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners*, Collective Complaint No. 77/2012; *ISAP*, Collective Complaint No. 78/2012; *POS-DEI*, Collective Complaint No. 79/2012; *ATE*, Collective Complaint No. 80/2012.

⁷⁰ See *IKA-ETAM*, Collective Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners*, Collective Complaint No. 77/2012; *ISAP*, Collective Complaint No. 78/2012; *POS-DEI*, Collective Complaint No. 79/2012; *ATE*, Collective Complaint No. 80/2012; Council of the State of Greece, Case No. 668/2012; see also Council of State of Greece, Cases No. 1283-1286/2012 (Apr. 2, 2014); Evangelia Psychogiopoulou, *Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges*, 1 EUR. J. Soc. L. 12, 19–21 (2014).

⁷¹ See Collective Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation & Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Eur. Comm. of Soc. Rts. (2011), <http://hudoc.esc.coe.int/> [hereinafter *GENOP-DEI*].

⁷² See *World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice*, INTERNATIONAL LABOUR REPORT, 2014, at xxv.

⁷³ See Eleni De Becker, *The Constraints of Fundamental Social Rights on EU Economic Monitoring: Collective Complaints No. 76-80/2012, IKA-ETAM, Panhellenic Fed'n of Pub. Serv. Pensioners, ISAP, POS-DEI, ATE v. Greece*, 16 EUR. J. SOC. SECURITY 123 (2014); Isabelle Hachez, *Le Comité européen des droits sociaux confronté à la crise financière grecque: des décisions osées mais inégalement motivées*, REVUE DE DROIT SOCIAL 243 (2014) (Fr.).

constitutional traditions of the member states and international treaties. Fundamental rights recognized as general principles of Union's law must be distinguished from fundamental rights that fall under the CFEU. Before the Charter entered into force, fundamental rights were derived from unwritten general principles of Union's law. Now with the binding CFEU, it is unclear whether these general principles still have a role to play in the protection of fundamental rights, particularly when CFEU already recognizes them, such as with the right to social security. This Article accounts for this ambiguity when exploring the right to social security as a general principle of Union's law.

II. The Right to Social Security in the CFEU

The first part of this Article tackled the problems that might arise from challenging EU financial assistance measures or CSRs from an EU constitutional point of view. This second part looks at a possible ground of review—namely the right to social security in Article 34 CFEU. In doing so, this article will discuss the content of Article 34 CFEU and its legal enforceability further.

With the enforcement of the Lisbon Treaty, the CFEU has the same legal value as the TEU and TFEU.⁷⁴ The Solidarity Chapter of the CFEU recognizes several social rights, including the right to social security in Article 34, which contains the primary guarantee for the protection of the right to social security and social assistance. This further discussion will center on Article 34(1) CFEU. The other two paragraphs of Article 34 CFEU fall beyond this Article's scope, as they contain references to principles of equal treatment in the area of social security coordination, and the right to social and housing assistance. Article 34(1) CFEU reads as follows:

“The Union recognizes and respects the entitlement 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, in accordance with the rules laid down by Community law and national laws and practices.”⁷⁵

First, this Article discusses the possible interpretation of Article 34(1). In its second part, this article will review the possibility to invoke Article 34(1) CFEU in the EU legal order.

⁷⁴ TEU art. 6(1).

⁷⁵ CFEU art. 34(1).

Finally, this Article summarizes the discussion regarding rights and principles contained in Article 52(5) CFEU, as this will shed further light on the enforceability of Article 34(1) CFEU.

1. The (Possible) Interpretation of Article 34 (1) CFEU

The explanations to the Charter suggest that Article 34(1) CFEU is based on the competences set out in the Social Policy Chapter, Articles 153 and 156 TFEU, as well as Article 12 ESC, and Point 10 Community Charter.⁷⁶ When interpreting Article 34 CFEU, these sources can provide further guidance and context. Nonetheless, the precise implications and scope of this provision remain unclear and need further clarification by the CJEU in the future.

Article 12 ESC contains a four-fold obligation whereby member states must “establish or maintain a national social security system (paragraph 1), maintain the national social security system at a satisfactory level (paragraph 2), endeavor to raise progressively the system of social security (paragraph 3) and respect the principle of non-discrimination in the area of social security (paragraph 4).”⁷⁷ The ECSR, responsible for the ESC’s supervision, has developed these obligations further. Article 12 ESC could provide an important starting point for interpreting Article 34(1) CFEU.

Little ground can be found to interpret Article 34(1) CFEU in the same way as Article 12 ESC. For example, the CFEU does not contain a provision, unlike the European Convention on Human Rights (ECHR),⁷⁸ which mandates that the rights found in it correspond to the rights guaranteed by the ESC and should be interpreted in conjunction with one another. Additionally, Article 12 ESC contains several positive obligations, including the duty to establish and maintain a national social security system and to strive to raise the national social security system to a higher level. This contradicts the very language of Article 34(1) CFEU, which requires the Union to respect and recognize claims to social security rights and services.

On the other hand, interpreting Article 34(1) CFEU as providing protection against measures restricting social security rights is in conformity with the wording of this provision. The principles developed by the ECSR regarding the restrictions to social security claims could be relevant for the further development of the right to social security in the

⁷⁶ Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/17).

⁷⁷ European Social Charter (Revised) art. 12, May 3, 1996, C.E.T.S. No. 163 [hereinafter ESC].

⁷⁸ CFEU art. 52(3).

EU, as Article 12 ESC lays down several conditions member states still need to respect when reforming social security rights under the national social security system. For example, this could mean that Article 34(1) could constitute an obligation for the EU and its member states not to violate claims to social security rights in a disproportionate manner when reforming national social security systems.⁷⁹ In this manner, Article 34(1) CFEU would not entail a duty to legislate or to take action, but rather to protect existing social security rights. A protection-centered approach would also be consistent with Article 51(2) CFEU that states, “this Charter does not establish any new power or task for the Community or the Union, or modify powers or tasks defined by the Treaties.”⁸⁰

Under Article 12 (3) ESC, the ECSR allows member states to restrict social security rights whilst taking into account the different conditions developed by the ECSR. At first instance Article 12 (3) lays down the obligation for member states to progressively raise the national social security system to a higher level. Over the years, the ECSR has accepted that restrictive measures do not automatically constitute a violation of Article 12(3) ESC.⁸¹ The ECSR stated in its Conclusions of 1998 that “in view of the close relationship between the economy and social rights, the pursuit of economic goals is not necessarily incompatible with the progressive obligation [of Article 12(3)].”⁸²

According to the ECSR, states must differentiate measures at “dismantling social security schemes” from arrangements that try to preserve the national social security system so that it can resume its progress, economic conditions permitting further development of the national social security system.⁸³ Measures aiming to preserve national social security systems can thus be justified when they pursue a legitimate aim, such as the maintenance of the national social security system, as well as when measures are proportionate to

⁷⁹ Jennifer Tooze, *Article 34: Social Security and Social Assistance*, in *ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS* 161, 166 (Tamara Hervey & Jeff Kenner eds., 2003).

⁸⁰ CFEU art. 51(2).

⁸¹ Eur. Comm. Soc. Rights, *Right to Social Security*, Conclusions XIII-4, 143 & 150.

⁸² *Id.*; see also Eur. Comm. Soc. Rights, *General Introduction*, Conclusions XIV-1, 46.

⁸³ See Eur. Comm. Soc. Rights, *Right to Social Security*, Conclusions XIII-4, 139; Eur. Comm. Soc. Rights, *General Introduction*, Conclusions XIV-1, 48; see also *Collective Complaint No. 43/2007, Sindicato dos Magistrados do Ministério Público v. Portugal* at para. 42, Eur. Comm. Soc. Rights (2007); Eur. Comm. Soc. Rights, *Austria*, Conclusions XIV-1, 81–82; Eur. Comm. Soc. Rights, *Belgium*, Conclusions XIV-1, 117118; Eur. Comm. Soc. Rights, *Czech Republic*, Conclusions XX-2, 21; Eur. Comm. Soc. Rights, *Armenia*, Conclusions 2009, 87; Eur. Comm. Soc. Rights, *Moldova*, Conclusions 2009, 544; Eur. Comm. Soc. Rights, *Romania*, Conclusions 2009, 772; Eur. Comm. Soc. Rights, *Turkey*, Conclusions 2009, 815; Eur. Comm. Soc. Rights, *Norway*, Conclusions 2009, 615; Eur. Comm. Soc. Rights, *Lithuania*, Conclusions 2013, 29; Eur. Comm. Soc. Rights, *Austria*, Conclusions XV-1, 44; Eur. Comm. Soc. Rights, *Luxembourg*, Conclusions XV-1, 63.

achieve the set-out aim. In its conclusions, the ECSR has previously accepted measures to consolidate public finances, address demographic changes—like aging populations—or to change employment structures to ensure the viability of the social security system.⁸⁴ In its proportionality analysis, the ECSR considers the effect of national legislation on vulnerable groups in society, as well as whether legislative measures reduce the national social security system to a system of social assistance, which is not allowed by the ECSR. Consequently, member states are still required to ensure the maintenance of a basic compulsory social security system which is sufficiently extensive.⁸⁵ Such reforms should thus not “undermine the effective social protection of all members of society against social and economic risks.”⁸⁶

If Article 34(1) CFEU is interpreted according to the principles developed by the ECSR to review restrictions to social security rights in light of Article 12(3) ESC, Article 34(1) might constitute a guarantee against the deterioration or abolition of social security rights.⁸⁷

⁸⁴ See Eur. Comm. Soc. Rights, Right to Social Security, Conclusions XIII-4, 139; Eur. Comm. Soc. Rights, General Introduction, Conclusions XIV-1, 48; see also *Sindicato dos Magistrados do Ministério Público*; Collective Complaint No. 43/2007 at para. 42; Eur. Comm. Soc. Rights, Austria, Conclusions XIV-1, 81–82; Eur. Comm. Soc. Rights, Belgium, Conclusions XIV-1, 117–118; Eur. Comm. Soc. Rights, Czech Republic, Conclusions XX-2, 21; E Eur. Comm. Soc. Rights, Armenia, Conclusions 2009, 87; Eur. Comm. Soc. Rights, Moldova, Conclusions 2009, 544; Eur. Comm. Soc. Rights, Romania, Conclusions 2009, 772; Eur. Comm. Soc. Rights, Turkey, Conclusions 2009, 815; Eur. Comm. Soc. Rights, Norway, Conclusions 2009, 615; Eur. Comm. Soc. Rights, Lithuania, Conclusions 2013, 29; Eur. Comm. Soc. Rights, Austria, Conclusions XV-1,44; Eur. Comm. Soc. Rights, Luxemburg, Conclusions XV-1, 63.

⁸⁵ See Eur. Comm. Soc. Rights, Right to Social Security, Conclusions XIII-4, 143–44; Eur. Comm. Soc. Rights, General introduction, Conclusions XIV-1, 48; Eur. Comm. Soc. Rights, General introduction, Conclusions XIV-1 vol. 1, 47; Eur. Comm. Soc. Rights, Austria, Conclusions XIV-1 vol. 1, 81; Eur. Comm. Soc. Rights, Belgium, Conclusions XIV-1 vol. 1, 117; Eur. Comm. Soc. Rights, Denmark, Conclusions XIV-1 vol. 1, 190; Eur. Comm. Soc. Rights, Finland, Conclusions XIV-1 vol. 1, 232; Eur. Comm. Soc. Rights, Germany, Conclusions XIV-1 vol. 1, 319; Eur. Comm. Soc. Rights, Greece, Conclusions XIV-1 vol. 1, 369–370; Eur. Comm. Soc. Rights, Italy, Conclusions XIV-1 vol. 2, 22; Eur. Comm. Soc. Rights, Netherlands, Conclusions XIV-1 vol. 2, 113-14; Eur. Comm. Soc. Rights, Portugal, Conclusions XIV-1 vol. 2, 196; Eur. Comm. Soc. Rights, Poland, Conclusions XV-1 Addendum, 163; Eur. Comm. Soc. Rights, Spain, Conclusions XIV-1 vol. 2, 228; *Sindicato dos Magistrados do Ministério Público*; see also Collective Complaint No. 43/2007 at paras. 41–42; Eur. Comm. Soc. Rights, Lithuania, Conclusions 2009, 467; Eur. Comm. Soc. Rights, Armenia, Conclusions 2013, 12; Eur. Comm. Soc. Rights, Georgia, Conclusions 2013, 14; Eur. Comm. Soc. Rights, Moldova, Conclusions 2013, 28; Eur. Comm. Soc. Rights, Georgia, Conclusions 2013, 14; Eur. Comm. Soc. Rights, Lithuania, Conclusions 2013, 29; Eur. Comm. Soc. Rights, Slovenia, Conclusions 2013, 27.

⁸⁵ See Eur. Comm. Soc. Rights, Denmark, Conclusions XIV-1 vol. 1, 190; Eur. Comm. Soc. Rights, Denmark, Conclusions XVIII-1, 275; see also Eur. Comm. Soc. Rights, Sweden, Conclusions 2009, 772.

⁸⁶ Eur. Comm. Soc. Rights, Statement of interpretation, Conclusions XIV-1, 74.

⁸⁷ See Steven Peers & Sacha Prechal, *Scope and Interpretation of Rights and Principles*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1455, 1508 (Steven Peers et al. eds., 2014).

Consequently, Article 34(1) could provide a judicial safeguard to protect the reduction or abolition of social security rights under the financial assistance measures or CSRs. Not only in Article 12 (3) ESC do we find principles which states have to respect when reducing social security rights, also the ECtHR has developed some principles in its case law regarding the restriction of social security rights under the right to property (Article 1 Protocol Number 1 ECHR). This case law can also provide some inspiration in further developing the content of Article 34 (1) CFEU.

In *Stec v. United Kingdom*, the ECtHR held that social security entitlements fall within the ambit of Article 1, Protocol Number 1 ECHR when an individual has an assertable right to a welfare benefit.⁸⁸ Under the right to property, states are permitted to take restrictive measures, but those measures should be made in accordance with national legislation, pursue a legitimate aim (for example, the financial sustainability of the national pension scheme)⁸⁹ and respect the principle of proportionality.⁹⁰ The latter meaning that a measure should not constitute an individual and unreasonable burden,⁹¹ or should not totally divest someone from its means of subsistence.⁹² These principles developed under Article 1, Protocol Number 1 are, to a certain extent, similar to the ones developed by the ECSR regarding the restriction of social security rights as found in the conclusion developed by the ECSR under Article 12(3) ESC. Both rights require that member states motivate changes to already existing social security entitlements under the national social security system.

Interpreting Article 34(1) CFEU in line with the principles developed by the ECSR under Article 12 (3) ESC and the ECtHR under Article 1 Protocol number 1 ECHR is consistent with Article 53 CFEU. According to this provision:

⁸⁸ See *Valkov v. Bulgaria*, App. No. 72636/01, (Jan. 8, 2015), <http://hudoc.echr.coe.int/>; *Da Conceicao Mateus v. Portugal*, App. No. 62235/12, (Oct. 8, 2013), <http://hudoc.echr.coe.int/>; *Cichopek v. Poland*, App. No. 15189/10, para. 130 (May 14, 2013), <http://hudoc.echr.coe.int/>; *Iwaszkiewicz v. Poland*, App. No. 30614/06 (July 26, 2011), <http://hudoc.echr.coe.int/>; *Carson v. United Kingdom*, App. No. 42184/05, para. 64 (Mar. 16 2010), <http://hudoc.echr.coe.int/>.

⁸⁹ See *Valkov*, App. No. 72636/01 at para. 92; see also *Khoniakina v. Georgia*, App. No. 17767/08, (June 19, 2012), <http://hudoc.echr.coe.int/>; *Ortiz v. Spain*, App. No. 42430/05, (Feb. 2, 2010), <http://hudoc.echr.coe.int/>.

⁹⁰ See *Valkov*, App. No. 72636/01 at para 84; *Da Conceicao Mateus*, App. No. 62235/12; *Cichopek*, App. No. 15189/10 at para. 130; *Iwaszkiewicz*, App. No. 30614/06; *Carson*, App. No. 42184/05 at para. 64.

⁹¹ See *Asmundsson v. Iceland*, App. No. 60669/00, para. 45 (Oct. 12, 2015), <http://hudoc.echr.coe.int/>; *Hoogendijk v. the Netherlands*, App. No. 58641/00, (June 27, 2000), <http://hudoc.echr.coe.int/>; see also *Adedy v. Greece*, App. No. 57665/12, para. 46 (May 07, 2015), <http://hudoc.echr.coe.int/>.

⁹² See *Valkov*, App. No. 72636/01 at para. 97; see also *Wieczorek v. Poland*, App. No. 18176/05, para. 71 (Dec. 8, 2009), <http://hudoc.echr.coe.int/>.

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.⁹³

Although there is some debate as to whether this provision applies to the ESC, the text of Article 53 CFEU explicitly refers to the ECHR, requiring from the EU and the member states, when implementing EU law, to respect the minimum level of protection, as set out in the ECHR, including the protection of social security rights under the right to property in Article 1 Protocol Number 1. Unlike the ECHR, we do not find an explicit reference to the ESC. Even though all member states are bound by either the 1996 Revised ESC or the original 1961 ESC, they are not all bound to the same document, nor to all the rights in the (Revised) Charter as these instruments do not require member states to ratify all the different social and economic rights. Yet, the EU should at least respect the guarantees for social security rights under the ECHR and the case law of the ECtHR.

2. Legal Enforceability of Article 34(1) CFEU

Although one could advocate for Article 34(1) CFEU to be interpreted as providing protection against restrictions to social security rights, it is unclear as to what extent this article can be invoked before the CJEU. Title VII CFEU suggests that the enforceability of Article 34(1) CFEU is limited in nature.⁹⁴

Article 52(5) CFEU makes a distinction between rights and principles, limiting the judicial enforceability for the latter. According to Article 52(5), principles may only be invoked before the CJEU to review legislative and executive acts enacted by institutions, bodies, offices and agencies of the Union, as well as by acts of member states when implementing the principle in question. Principles shall only be judicially cognizable in the interpretation of such acts and in the ruling on their legality.

⁹³ CFEU art. 53.

⁹⁴ CFEU art. 52.

From the reading of Article 52 (5) CFEU, it seems that principles do not give rise to subjective rights,⁹⁵ as EU members states are bound to recognize and respect principles in the course of implementation.⁹⁶ Kornezov describes principles as “mere programmatic guidelines addressed to the legislature and/or the executive that can be used by the courts only as a benchmark to review their actions.”⁹⁷ Alternately, rights can be relied upon to demand positive enforceable actions.

Furthermore, principles may only be invoked when interpreting or challenging acts that implement the principle in question. There is no obligation under the CFEU to implement principles.⁹⁸ Some authors call for a broader reading of Article 52(5) CFEU, allowing applicants to challenge EU law when it clearly violates the principle in question. This would allow for a wider justiciability and protection, permitting conflicting legislation to be set aside.⁹⁹ Nonetheless, a strict reading of Article 52(5) CFEU suggests that applicants can only rely on principles before a court when challenging the legislation that implements the relevant principle.

Principles will thus only be relevant to the courts when they need to interpret or review acts implementing the principle in question.¹⁰⁰ In *Glatzel v. Freistaat Bayern* the Court held that:

It must be recalled, as is clear from Article 52(5) and (7) of the Charter and the Explanations relating to the Charter of Fundamental Rights concerning Articles 26

⁹⁵ See Mirjam de Mol et al., *Inroepbaarheid in Rechten van het Handvest van de Grondrechten van de Europese Unie: Toepassingsgebied en het Onderscheid Tussen 'rechten' en 'beginselen'*, 60 TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT 222, 232 (2012).

⁹⁶ See Mirjam De Mol, *Dominguez: A Deafening Silence Court of Justice of the European Union (Grand Chamber)*, 8 EUR. CONST. L. REV. 280, 298 (2012).

⁹⁷ KORNEZOV, *supra* note 35, at 14.

⁹⁸ *Id.* at 15–16.

⁹⁹ See Peers, *supra* note 87, at 1509–10; Olivier De Schutter, *Les Droits Fondamentaux Dans Le Projet Européen*, in UNE CONSTITUTION POUR L'EUROPE: RÉFLEXIONS SUR LES TRANSFORMATIONS DU DROIT DE L'UNION EUROPÉENNE 81 (Olivier De Schutter & Paul Nihoul eds., 2004).

¹⁰⁰ See Explanations of Article 52(5) Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/17), Kamberaj (Apr. 24, 2012), <http://curia.europa.eu/> (concerning the interpretation of Council Directive 2003/109/EC in light of Article 34 (3) CFEU); see also Elisabeth Koch, *The Interaction Between Human Rights Case Law: Convergence or Competition?*, in RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW 103 (Frans Pennings & Gijbert Vonk eds., 2015); Robin White, *Article 34—Social Security and Social Assistance*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 927, 940 (Steven Peers et al. eds., 2014).

and 52(5) of the Charter, that reliance on Article 26 thereof before the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article [emphasis added], namely the integration of persons with disabilities¹⁰¹ Thus, in so far as Directive 2006/126 is a legislative act of the European Union implementing the principle contained in Article 26 of the Charter, the latter provision is intended to be applied to the case in the main proceedings.¹⁰²

Neither the CFEU nor the explanations to the CFEU contain a detailed list of which provisions constitute a right or a principle. Yet, the Explanations to the CFEU illustrate that Articles 25 (rights of the elderly) and 26 (integration of persons with disabilities) do in fact embody principles. In some cases, such as Article 34 CFEU, provisions may contain elements of both a right and a principle.¹⁰³ Distinguishing between rights and principles is not easy, particularly because neither the CFEU, nor the explanations to the CFEU, provide clarifying guidance. Nonetheless, rights seem to be more precisely formulated and absolute, whereas principles are more vague and leave more of a margin of discretion regarding implementation and execution.¹⁰⁴

According to Advocate General Cruz Villalon in *Association de Médiation Sociale*, there should be a presumption that rights under the Solidarity Chapter, including the right to social security, are principles.¹⁰⁵ The Advocate General adds that this can never be anything

¹⁰¹ Case C-356/12, *Glatzel v. Freistaat Bayern*, para 74 (May 22, 2014), <http://curia.europe.eu/>.

¹⁰² *Id.* at para. 76.

¹⁰³ Article 52(5) Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/17).

¹⁰⁴ *See de Mol, supra* note 95, at 232.

¹⁰⁵ Opinion of Advocate General Villalon at para. 55, Case C-176/12, *Association de Médiation Sociale v. Union Locale des Syndicats* (July 18, 2013), <http://curia.europa.eu/>; *see also* Mark Dawson & Bruno de Witte, *The EU Legal Framework of Social Inclusion and Social Protection*, in *SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTIONS BETWEEN LAW AND POLICY* 41, 63 (Bea Cantillon et al. eds., 2012); Francesco Costamagna, *Saving Europe "Under Strict Conditionality": A Threat for EU Social Dimension*, 19 (Laboratorio di Politica Comparatae Filosofia Pubblica, Working Paper No. 7, 2012), http://www.centroeinaudi.it/images/abook_file/WP-LPF_7_2012_Costamagna.pdf ("However, the attempt to force all social rights into the 'principles' category looks over simplistic and, in the end, fallacious.").

but a presumption.¹⁰⁶ To hold otherwise would contradict with the case law of the CJEU which states that certain social rights are judicially cognizable.¹⁰⁷ In *Dominguez*, Advocate General Trstenjak stated that a significant feature of principles in the CFEU is that principles require the adoption of implementing measures.¹⁰⁸ Under the CFEU, the Advocate General added that principles are framed more like guarantees of objective law, because they are “recognized” or “respected”.¹⁰⁹

In its case law, the CJEU has not yet examined the nature of Article 34(1) CFEU. Recently, in *Office national de l'emploi v. Rose Melchior* it had the possibility to decide on this matter, but, according to the court, it did not need to examine the question in light of Article 34(1) CFEU.¹¹⁰ According to Advocate General Mengozzi, Article 34(1) of the CFEU does in fact constitute a principle:

As is clear from its wording and from the Explanations relating to the Charter (“the Explanations”), that provision sets out a “principle” based on Articles 153 [of the] TFEU and 156 [of the] TFEU, Article 12 of the European Social Charter and point 10 of the Community Charter of Fundamental Social Rights of Workers.¹¹¹

¹⁰⁶ Opinion of Advocate General Villalon, *supra* note 105, at para. 55.

¹⁰⁷ See Case C-438/05, *Int'l Transp. Workers' Fed'n & Finnish Seamen's Union v. Viking Line ABP* (Dec. 11, 2007), <http://curia.europa.eu/> [hereinafter *International Transport Workers' Federation and The Finnish Seamen's Union*]; Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, (Dec. 18, 2007), <http://curia.europa.eu/> [hereinafter *Laval*]; Case C-271/08, *Comm'n v. Germany*, (July 15, 2010), <http://curia.europa.eu/>; see also Opinion of Advocate General Trstenjak, Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique* (Sept. 8, 2011), <http://curia.europa.eu/>.

¹⁰⁸ See Opinion of Advocate General Trstenjak, *supra* note 107, at para. 77.

¹⁰⁹ *Id.* at para. 76.

¹¹⁰ Case C-647/13, *Office National de l'Emploi v. Marie-Rose Melchior*, para. 29 (Feb. 4, 2015), <http://curia.europa.eu/>.

¹¹¹ Opinion of Advocate General Mengozzi at para. 60, Case C-647/13, *Office National de l'Emploi v. Marie-Rose Melchior* (Apr. 4, 2015), <http://curia.europa.eu/>.

The literature agrees with Advocate General Mengozzi in *Melchior*.¹¹² According to White, the explanations to Article 34 (1) CFEU clearly indicate that this provision concerns a principle, as the first sentence begins with: “the principle set out in article 34(1) ... ”.¹¹³ Reviewing the formulation of other principles under the CFEU, like Articles 25 and 26, we see that the same language used for Article 34(1) CFEU is used for those articles as well, (*The Union and the member states must recognize and respect...*). One could argue, by analogy, that Article 34(1) CFEU constitutes a principle as well. This would be consistent with Advocate General Trstenjak’s argument in *Dominguez*, suggesting that rights that call for the respect or recognition by the Union and the member states indicate the existence of a principle.¹¹⁴

Although the CJEU still needs to clarify whether Article 34(1) CFEU constitutes a principle, the majority of the literature considers Article 34(1) to be a principle, not a right. Consequently, Article 34(1) cannot be invoked when challenging the Council’s decisions providing financial assistance and CSRs, as these instruments do not implement the principles laid down in Article 34(1) CFEU. The Explanations to the CFEU support a strict interpretation of Article 34(1), as we find here that the Union must respect Article 34(1) when exercising the powers awarded to it by Articles 153 and 156 TFEU (Social Policy Chapter). Consequently, Article 34(1) CFEU seems to provide a rather meager judicial safeguard for the protection of social security rights at the EU level.

3. A Call for a Broader Interpretation of Principles Under the CFEU

A strict reading of Article 52(5) CFEU indicates that applicants cannot challenge EU measures or national measures implementing EU law that clearly violate a principle under the CFEU when the regulation does not implement the principle in question. As such, the enforceability of principles under the CFEU are markedly hindered, allowing the EU and member states, when they are implementing EU law, to circumvent the principles set out in the CFEU.

¹¹² See Thorsten Kingreen, *Article 34*, in *DAS VERFASSUNGSRECHT DER EUROPÄISCHEN UNION MIT EUROPÄISCHER GRUNDRECHTECHARTA KOMMENTAR* margin number 1–15 (Christian Callies & Matthias Ruffert eds., 2011); Tooze, *supra* note 79, at 165.

¹¹³ White, *supra* note 100, at 936; see also de Mol, *supra* note 95, at 232.

¹¹⁴ Opinion of Advocate General Trstenjak, *supra* note 107, at para. 76 (“It [Article 31(2)] therefore clearly differs from other provisions in Title IV of the Charter (‘Solidarity’), which are worded more like a guarantee of objective law in that the rights granted there are ‘recognized’ or ‘respected’. These differences in wording are evidence of a graduated intensity of protection according to the legal right concerned.”).

Some authors call for a broader interpretation of principles under the CFEU.¹¹⁵ That way, principles do not impose positive obligations on the EU or national authorities. Nonetheless, principles may be relied upon to set aside conflicting legislation, without distinguishing between legislation that implements the principle and legislation that does not. Limiting the justiciability of principles under the CFEU to implementing legislation limits the effectiveness of principles under the CFEU.¹¹⁶ In that respect, we can also refer to Advocate General Cruz Villalon in *Association de Mediation Sociale*, stating that:

if the reference to ‘such acts’ applied exclusively to implementing legislative acts giving substance to the principle, there would be a “vicious circle”: those implementing legislative acts would be reviewed in the light of a principle whose content, as stated in Article 27 of the Charter, is precisely that which is determined by those implementing legislative acts.¹¹⁷

Interpreting principles in the CFEU in a broad manner would imply that principles provide protection against the EU or other national measures, even if it concerns non-implementing legislation that clearly violates the principle in question. In this respect, we can also refer to Ladenburger who discusses the extent to which principles in the CFEU apply to the CJEU when interpreting or judging a Council’s Decision in the area of economic governance:

These examples show that such a literal reading would produce absurd results and go against the intent of the initiators of the concept in the first convention. Instead, the word “such acts” should be read merely as a generic referral to the *categories* of legislative or

¹¹⁵ See De Schutter, *supra* note 99, at 81; Dora Gudmundsdottir, *A Renewed Emphasis on the Charter’s Distinction Between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?*, 52 COMMON MKT. L. REV. 685, 692 (2015); CLEMENS LADENBURGER, PROTECTION OF FUNDAMENTAL RIGHTS POST-LISBON: THE INTERACTION BETWEEN THE CHARTER OF FUNDAMENTAL RIGHTS, THE EUROPEAN CONVENTION OF HUMAN RIGHTS, AND NATIONAL CONSTITUTIONS (FIDE XXV Congress 2012), http://www.fide2012.eu/index.php?doc_id=88; see also Opinion of Advocate General Villalon, Opinion of Advocate General Villalon, *supra* note 105, at para. 55; Chris Hilson, *Rights and Principles in EU Law: A Distinction Without Foundation?*, 15 Maastricht J. Eur. & Comp. L. 193, 199–200 (2008) (discussing how to interpret the wording ‘implementing the principle’).

¹¹⁶ See De Schutter, *supra* note 99, at 81; see also de Mol, *supra* note 95, at 232; Dora Gudmundsdottir, *supra* note 115, at 692.

¹¹⁷ Opinion of Advocate General Villalon, *supra* note 105, at para. 69.

executive acts in the first sentence of the paragraph. ... But where a litigant has standing under a different ground to challenge a legislative or executive act, then Article 52(5) leaves open the possibility for the judge to resort to a principle in order to strike down that act.¹¹⁸

The argument of guaranteeing the effectiveness of principles under the CFEU not only calls for a broader enforceability of Article 34 CFEU, but also the social objectives laid out in Article 3(3) TEU and the horizontal social clause in Article 9 TFEU, argue for a broad interpretation of the enforceability of Article 34 CFEU before the CFEU.

Since the Treaty of Lisbon, the EU treaties contain several social objectives—outlined in Article 3 (3) TEU—as well as a horizontal social clause, included in Article 9 TFEU. Both seek a transversal respect of social objectives throughout the different policy areas of the EU. According to Article 3(3) TEU, the EU shall (a.o.) combat social exclusion and shall promote social justice and solidarity between generations.¹¹⁹ This paragraph resembles Article 151(1) TFEU, which structures the objectives the EU must pursue when exercising its competences under the Social Policy Chapter.¹²⁰ The horizontal social clause in Article 9 TFEU requires EU institutions to take into account (a.o.) the need for adequate social protection and the fight against social exclusion when defining and implementing policies and activities.¹²¹ These provisions elucidate the EU's need to strive towards the realization of both social and economic objectives in its different policy domains, including its economic monitoring process.¹²²

Where the social objectives and the horizontal social clause have general applicability and should be respected throughout the different policy domains, the right to social security in the CFEU should be similarly applied. The right to social security is an explicit expression of the social objectives in Article 3(3) TEU and Article 9 TFEU, and it would be strange to limit the justiciability of Article 34(1) CFEU while requiring the EU institutions and the member states to respect the social objectives in all EU policy domains.¹²³ Furthermore, it would be

¹¹⁸ LADENBURGER, *supra* note 115, at 4.

¹¹⁹ TEU art. 3(3).

¹²⁰ TFEU tit. X.

¹²¹ TFEU art. 9.

¹²² See ARMSTRONG, *supra* note 23, at 245; Dawson, *supra* note 105, at 54; Costamagna, *supra* note 105, at 17.

¹²³ See De Schutter, *supra* note 99, at 81.

possible to challenge measures, not directly implementing Article 34 (1) CFEU, although clearly violating it. This, however, does not mean that Article 34(1) CFEU would give rise to subjective rights through which individuals could claim social security benefits before the CFEU.

III. General Principles of Union's Law and the Right to Social Security

When interpreting principles under the CFEU in a strict manner, the protection of the right to social security in the EU legal order is of a rather limited nature. Fundamental rights in the EU are however not only recognized through the CFEU, but also through general principles of Union's law. In the absence of an effective European right to social security in Article 34(1) CFEU, we will discuss the possibility of developing a right to social security as a general principle of Union's law.

Before the CFEU was adopted, fundamental rights in the EU legal order were recognized through unwritten general principles of Union's law. Sources of inspiration were the common constitutional traditions of the member states and international treaties, particularly the ECHR. One must distinguish the general principles of Union's law from principles under the framework of the CFEU. Unlike principles under the CFEU, general principles of Union's law can be relied upon without further intervention by the EU legislature.¹²⁴

The CJEU has used an ad hoc method for discovering general principles of Union's law, fostering a dialogue between the Court and the constitutional traditions of the member states.¹²⁵ In doing so, the CJEU attempted to develop an EU perspective on the protection of fundamental rights.¹²⁶ Although the TEU only mentions the constitutional traditions of the member states¹²⁷ and the ECHR¹²⁸ as sources for recognizing general principles of

¹²⁴ See Case C-101/08, *Audiolux SA e.a. v. Groupe Bruxelles Labert SA*, para. 63 (Oct. 15, 2009), <http://curia.europa.eu/> [hereinafter *Audiolux and Others*]; see also Koen Lenaerts & José Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 *COMMON MKT. L. REV.* 1629, 1629–31 (2010).

¹²⁵ See Elise Muir, *The Court of Justice in the Novel System for the Protection of Fundamental Rights in the EU* 8 (Maastricht Faculty of Law Working Papers, Paper No. 5, 2012).

¹²⁶ *Id.*

¹²⁷ See TEU art. 6(3); see also Case C-4/73, *Nold v. Comm'n*, para 13 (Jan. 11, 1977), <http://curia.europa.eu/>; Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Dec. 17, 1970), <http://curia.europa.eu/> [hereinafter *Internationale Handelsgesellschaft*]; Case C-353/99, *Council v. Hautala* (Dec. 6, 2001), <http://curia.europa.eu/>; Case C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, para. 17 (July 13, 1989), <http://curia.europa.eu/> [hereinafter *Wachauf*]; Case C-274/99, *Connolly v. Comm'n*, para. 17 (Mar. 6, 2001), <http://curia.europa.eu/>; Case C-94/00, *Roquette Freres SA v. Directeur general*

Union's law, the CJEU also looks at the ESC¹²⁹ and the CFEU.¹³⁰ General principles of Union's law therefore can be found in laws common to the member states, international law, and EU treaties.¹³¹

In order to be elevated to the status of a general principle of Union's law, there must be a consensus of acceptance.¹³² To determine what should be considered a general principle of Union's law, the CJEU looks to the text, aims, and objectives of the treaties, as well as to the laws of the member states and to international agreements to provide general guidance. According to Tridimas, "the principle must incorporate a minimum ascertainable legally binding content. In the absence of guidance by Community written law, it must be widely accepted in one way or another by the member states."¹³³

Article 6 TEU now refers to both the CFEU as the general principles of Union's law as a source for the protection of fundamental rights.¹³⁴ In that respect, we find in Article 6(1) TEU that the CFEU is a legally binding instrument with the same legal force as the TEU and TFEU. Subsequently, Article 6(3) TEU states that it is possible to recognize fundamental rights, as guaranteed by the ECHR, and as provided by the constitutional traditions common to the member states, as general principles of Union's law, next to the fundamental rights recognized under the CFEU. Unfortunately, Article 6 TEU does not provide any guidance clarifying the relationship among different sources of fundamental rights, nor does it draw any priority rule.¹³⁵ Moreover, we do not find any information

de la concurrence, de la consommation et de la repression des fraudes (Oct. 22, 2002), <http://curia.europa.eu/> [hereinafter *Roquette Freres*].

¹²⁸ See *Internationale Handelsgesellschaft*, *supra* note 127, at paras. 3–4.

¹²⁹ See *Laval*, *supra* note 107, at para. 91.

¹³⁰ *Id.* at para. 90.

¹³¹ See XAVIER GROUSSOT, *GENERAL PRINCIPLES OF COMMUNITY LAW* 9 (2008).

¹³² See TAKIS TRIDIMAS, *GENERAL PRINCIPLES OF EU LAW* 26 (2006).

¹³³ *Id.*

¹³⁴ TEU art. 6.

¹³⁵ See Takis Tridimas, *Fundamental Rights, General Principles of EU Law and the Charter*, 16 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 361, 376–77 (2014).

concerning the function or status of general principles, nor to criteria indicating their recognition.¹³⁶

Although general principles of Union's law will remain a source of inspiration for the CJEU, the CFEU seems to be the primary point of reference for the protection of fundamental rights, as the CFEU contains a written catalogue of fundamental rights.¹³⁷ As a result, the role of the general principles of Union's law in the EU legal order calls for a redefinition. General principles will function as a residual category, providing a legal basis to identify fundamental rights not enshrined in the CFEU, which may emerge over time.¹³⁸ It is however not clear to what extent general principles can advance the protection of fundamental rights, considered as principles under the CFEU.

Recognizing fundamental rights considered as principles under the CFEU as also constituting general principles of Union's law might be interesting, as general principles can have a broader scope of application. In particular, when the enforceability of principles under the CFEU is strictly interpreted and limited to measures implementing the principle in question. General principles of Union's law could operate as a means to overcome this restriction.¹³⁹

The CFEU has been previously considered as a possible source to inspire the formation of fundamental rights as general principles of Union's law. *Laval*¹⁴⁰ exemplifies the effective potential of the Charter, decided before the CFEU was declared legally binding.¹⁴¹ This idea is also found in the CFEU's preamble stating the affirmative nature of the Charter's rights, as they result from the common constitutional traditions of the member states and their international obligations.

There is some debate in the literature and in the conclusions of the Advocates General as to whether it is possible to develop a separate fundamental rights protection system that recognizes the same rights found in the CFEU, but with a different enforceability regime. In

¹³⁶ See *id.* at 377.

¹³⁷ *Id.*

¹³⁸ See Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 655 (2008); see also LADENBURGER, *supra* note 115, at 4.

¹³⁹ See Sara Iglesias Sanchez, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49 COMMON MKT. L. REV. 1565, 1598 (2012).

¹⁴⁰ *Laval*, *supra* note 107, at paras. 90–91.

¹⁴¹ See Sanchez, *supra* note 139, at 1598.

this regard, we can refer to Advocate General Trstenjak in *Dominguez*, who states that the coherent protection of fundamental rights demand that fundamental rights regimes are interpreted in coordination.¹⁴² Trstenjak adds that the restrictions of the CFEU would be circumvented if one could rely on general principles for a broader protection.¹⁴³ Ladenburger also points out that the overall coherence of the Union's legal system might be undermined if one develops a separate set of horizontal rules, relying on the general principles, differing from the CFEU.¹⁴⁴ Using general principles of Union's law to recognize fundamental rights seems reserved to cases where the CFEU provides no protection.¹⁴⁵

Further research could explore the idea of the development of a right to social security as a general principle of Union's law, focusing on international treaties and the common constitutional traditions of the EU member states. Through these instruments, if research determines a need for a broader protection of the right to social security than is found in the CFEU, one could argue for the creation of a broader general principle of Union's law. Through these means, the right to social security as a general principle of Union's law could provide an extended ground for review and an avenue to challenge EU law. Questions nonetheless remain as to how to interpret the relationship between the CFEU and the general principles of Union's law, as well as to what extent that such general principles of Union's law can be invoked when a fundamental right is already protected under the CFEU.

Even when it is impossible to recognize already existing fundamental rights in the CFEU as general principles of Union's law with a different scope of application, general principles and the methodology used by the CJEU could still be used to interpret provisions of the CFEU—including the right to social security—advancing the interpretation of Article 34(1) CFEU. In that respect, although a redefinition of the role of general principles of Union's law is necessary, general principles will still retain their creative function and will fill the gaps of protection, as well as solidify the validity of various sources.¹⁴⁶ According to Tridimas, general principles, in most cases, will be a source of inspiration, influencing and morphing the interpretation of the CFEU, rather than establishing autonomous, self-

¹⁴² Opinion of Advocate General Trstenjak, *supra* note 107, at para. 128.

¹⁴³ *Id.*

¹⁴⁴ See LADENBURGER, *supra* note 115, at 4.

¹⁴⁵ *See id.*

¹⁴⁶ Muir, *supra* note 125.

standing rights.¹⁴⁷ In that respect, general principles could also provide a source of inspiration for the interpretation of the rights outlined in the CFEU. According to Muir:

General principles are also likely to serve as cement, as a way to bring together several sources. This observation is not only triggered by divergences in scope and content of the charter and the ECHR, but also by reference to strong national concerns for the protection of fundamental rights, if not an actual renationalization of this protection. The charter itself makes clear in Articles 52(4) and 53 that domestic constitutional traditions remain at the core of the pluralist system of protection of fundamental rights in the EU.¹⁴⁸

Tridimas adds that “the [t]reaty setting therefore seems to provide a framework for the integration of general principles into the interpretation of the charter.” The comparative approach of reviewing common constitutional traditions of the member states would no longer require the recognition of certain fundamental rights, but would rather be relied upon in order to determine their content, limitations, and scope. Such an interpretation would be consistent with Article 52(6) CFEU, mandating a full account of national laws and practices as specified in the CFEU.

D. Conclusion

This Article’s purpose was to explore the possible role of a European right to social security in the EU economic monitoring process. In the aftermath of the economic and financial crisis, the economic monitoring has further been strengthened and incorporated the possibility and ability to sanction member states that do not comply with the EU’s budgetary rules. In that respect, member states’ social security policies are influenced indirectly through the coordination of their budgetary and fiscal policies. Not only for member states requesting financial assistance, but also for fellow member states, we see that the EU has an increasingly strong influence on their social security systems. This is surprising, as social security is traditionally considered a policy domain largely preserved for member state action.

¹⁴⁷ Tridimas, *supra* note 135, at 378.

¹⁴⁸ Muir, *supra* note 125, at 8.

With the Treaty of Lisbon, a renewed commitment to the “social dimension” of the EU blossomed through the social objectives (Article 3(3) TEU), the horizontal social clause (Article 9 TFEU), and the now binding CFEU, which places several social rights next to civil and political rights. This seems to contradict with the EU’s economic monitoring measures, which have received severe criticism for not taking into consideration the social objectives and the social rights of the CFEU. Furthermore, uncertainty remains regarding the extent to which these economic monitoring measures can be challenged before the CJEU. Consequently, mostly national law, implementing the EU’s economic monitoring measures, has been challenged on the basis of international fundamental rights provisions.

This Article sought to develop the right to social security as a ground to challenge the EU’s economic monitoring procedures and review the extent to which the EU needs to respect the social objectives and social rights of the CFEU. Incorporating social objectives in the Treaties and social rights in the CFEU implies that the EU should not only respect the social rights throughout its different social policy domains, but also in policy areas indirectly touching upon member states’ social policies, such as the EU economic monitoring measures.

The first Section of this Article showed that there are several restrictions to challenge the EU’s economic monitoring measures before the CJEU. Even if it were possible to bring financial assistance measures or CSRs before the CJEU, there would be additional hurdles for individuals attempting to challenge these measures to face. They would need to have direct and individual concern on the basis of Article 263(4) TFEU. In this respect, the judicial control on the EU’s economic monitoring measures is rather limited.

The second Section of the Article made clear that there remains some uncertainty regarding the meaning, scope, and legal enforceability of Article 34(1) CFEU, as a possible ground for review. This Article attempts to provide some input to this debate by proposing to develop the content and the legal value of Article 34(1) further. Nonetheless, the legal enforceability of this provision seems limited to challenging acts that implement this principle, whereby the EU’s economic governance measures cannot be challenged because they do not implement Article 34(1) CFEU. A broader interpretation of principles under the CFEU could certainly provide the possibility to challenge the EU’s economic governance measures, violating these principles.

This Article also examines the possibility of developing a right to social security as a general principle of Union’s law, using a bottom-up approach, by taking into account the already existing obligations for the EU and its member states under the EU treaties (TEU, TFEU, CFEU) and the Community Charter, as well as the constitutional traditions of the member states and international treaties (ECHR and the ESC). Developing the right to social security as a general principle of Union’s law could compensate for the lack of legal enforceability of

Article 34(1) CFEU. It could, for example, impose a duty on EU institutions to review the impact of social security reforms outlined by the Council Decisions providing financial assistance and CSRs. Even though there is some debate as to whether it is possible to develop general principles of Union's law with a broader scope than the rights of the CFEU, the general principles and the methodology of the CJEU could still prove useful when interpreting the provisions of the CFEU, in light of the common traditions of the member states and international treaties. In that way, there is some assurance of consistency between the different international and national human rights provisions. Nevertheless, we should consider and be aware of procedural difficulties that may arise when challenging the EU economic monitoring measures.

In conclusion, the outlook regarding the protection of European social rights in the area of EU economic monitoring is rather bleak. While some possible benchmarks regarding the EU's respect of its social commitments do exist in the EU treaties—as laid down in the social objectives, social horizontal clause, and social rights in the CFEU—there are several restrictions inherent in the legal enforceability of these provisions (for example, Article 34 CFEU) and in the ability to challenge the EU economic monitoring measures. In that respect, we may ask ourselves whether the EU takes its own social objectives and social rights provisions seriously, in particular in its economic monitoring process.