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# Securing decent incomes at a crossroads: On the legal feasibility of a Framework Directive on Minimum Income

## Abstract

In spite of having been an alleged priority for the EU and the Member States over the last ten years, the number of people in a situation of poverty and social exclusion remains unacceptably high. As the Covid-19 crisis unfolds, the EU is left at a crossroads that will likely be determinant for its future. This contribution explores the possibility of taking the solidarity route at this crossroads by activating the social competences in the form of a Framework Directive on Minimum Income. To this end, this contribution first discusses the context of this proposal and the importance of minimum income schemes in improving the living standards of the population to then explore the possibilities for legal action under the current Treaty framework. It then emphasizes the importance of choosing adequate methodologies in such an instrument to aim at securing adequate incomes to live a life in dignity in any given Member State. It argues that this is equally important to comply with the principles of subsidiarity and proportionality. Ultimately, the EU will have to bet on its social dimension to remain true to its *raison-d'être* of becoming a social market economy and when best than when is most needed, to take such a necessary step.

## 1. Introduction

In 2010, Member States pledged to lift 20 million people out of poverty throughout the ten-year-long Europe 2020 Strategy. It is 2020 and having lifted 'only' 3.1 million people out of poverty, the Europe 2020 Strategy has not even lived up to a fifth of its expectations.<sup>1</sup> True, Member States had the challenge of confronting the immense societal impact of the 2007 economic crisis over the first years of the Europe 2020 Strategy, and in fact, they managed to attain a considerable poverty reduction from its peak in 2012.<sup>2</sup> Nonetheless, amidst what is quickly unfolding as the next great recession, the discouraging results of what was once considered a major breakthrough for social Europe leave little hope for the post-corona crisis society.

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<sup>1</sup> Eurostat, 'Europe 2020 indicators – poverty and social exclusion' data extracted September 2017.

<sup>2</sup> In 2012 the number of people at risk of poverty went as high as 123 million people in poverty and social exclusion, which represents a decrease of 10 million compared to the latest numbers. *Ibid.* Note, however, that: there is quite some discussion about how to measure poverty and social exclusion in the EU'. For an academic reference e.g. Dauderstädt (2019), Nolan and Whelan (2011), Decanq et al (2014).

No doubt, the consequences of the COVID-19 pandemic will be felt long after the most urgent hazard, the expansion of the pandemic itself as a major health threat, has been put off. For one, the freezing of the European economies for the better part of the spring of 2020 has led to an unparalleled upturn of unemployment applications.<sup>3</sup> With the purpose of containing the negative effects of the corona crisis and protecting citizens and markets in as much as possible, Member States have launched an arsenal of diverse extraordinary national responses. As regards social and employment protection, emerging national responses focus mainly on ensuring effective access to healthcare and supporting job and income security.<sup>4</sup> However, a recent study shows that the potential of these measures in alleviating the effect of the crisis is unequally distributed throughout the population and that the young, low-earners<sup>5</sup> and casual workers<sup>6</sup> are hit the hardest,<sup>7</sup> which evidences the poor coverage of contributory systems. In the absence of (sufficient) contributory coverage, vulnerable individuals are left with no option but to recourse to last resort safety nets, often in the form of minimum income schemes, which are still recovering from the previous crisis, and have proven insufficient in lifting people out of poverty.<sup>8</sup> From a social protection perspective, this signals the need to improve the adequacy of our social protection nets, both contributory and non-contributory.

A different concern relates to the role of the EU in securing adequate social protection safety nets. For now, EU efforts against the corona crisis have mostly focused on easing up fiscal and legal constraints for national governments to adopt the necessary measures and on the allocation of additional funding.<sup>9</sup> While there had been talks of activating the European Stability Mechanism (ESM),<sup>10</sup> it seems that the Commission has steered EU action on a different direction towards a recovery instrument that aims at injecting 750 billion euros embedded in the EU budget.<sup>11</sup>

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<sup>3</sup> Eurostat, ‘Unemployment Statistics’ data up do August 2020.

<sup>4</sup> See overview in the ter Haar (2020).

<sup>5</sup> Regarding low-wage earners and the potential minimum wage instrument see Marchal’s contribution to this Special Issue.

<sup>6</sup> For a discussion on platform work and the recent Recommendation on access to social protection see Schoukens’ contribution in this Special Issue.

<sup>7</sup> COM(2020)156, 3. Abi Adams-Prassl, et. al. (2020a) (2020b).

<sup>8</sup> Marchal and Marx (2020).

<sup>9</sup> Commission, ‘Coronavirus response’ Available at: [https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response\\_en](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en) (last visited 7 April 2020); ECB, ‘Our Response to the coronavirus emergency’ 19 March 2020. Available at: <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200319~11f421e25e.en.html> (last visited 7 April 2020); Alcidi and Corti. (2020). Watt (2020).

<sup>10</sup> Euroactive (2020); EU news (2020); Claeys Wolf (2020).

<sup>11</sup> COM(2020) 457.

In this regard, the responses at the EU level to the Covid-19 crisis will without doubt be key in shaping the future (if any) of the European society and the EU itself.<sup>12</sup> The corona crisis is, in this vein, putting the EU ‘at a crossroads’ where there is a choice to be made between acting in solitary at the national level or taking a common approach, where possible, at the EU level. Just as the virus will not diplomatically stop at the borders between Member States, neither will the socioeconomic consequences and nor should the responses.

This ‘crossroad’ presents the opportunity to learn from past mistakes and opt for different alternatives than the ones chosen to deal with the 2007 crisis. Market flexibility and deregulation accompanied by strict conditionality of the ESM led to appalling societal results in the past,<sup>13</sup> and are unlikely to be successful at present. This time around, the EU could choose for the solidarity path instead and protect social protection systems from being the first victims of governmental expenditure cuts by ensuring more resilient social protection systems. Rather than effectively putting a ‘break’ on the recent reinvigoration of the social dimension of the EU, mostly geared by the European Pillar of Social Rights (EPSR), the EU could bet on a more social Europe and keep building on last year’s progress towards more resilient societal structures. This seems to be the direction towards which the Commission is leaning, putting solidarity, cohesion and convergence at the heart of EU recovery.<sup>14</sup> A socially involved EU, also in time of crisis, would mark a big contrast with the underwhelming results of the Europe 2020 Strategy and the devastating societal costs of the previous crisis and help rekindle the relationship between the EU and its citizens.

Against the backdrop of an imminent social crisis and the turning point that this could represent for shaping the future of the EU, this article focuses on the potential role of EU law in contributing to the long-term task of securing adequate incomes. This contribution looks into something that has traditionally been left to the Member States, namely, out-of-work income. Different from other existing contributions on this matter,<sup>15</sup> this contribution focuses on the legal feasibility of a Framework Directive on Minimum Income under the current Treaties. To this end, it first discusses the background and rationale of the proposal (section 2), to later explore the potential legal basis for its adoption (section 3) and the importance of adopting

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<sup>12</sup> Covid-19 has already been associated with increasing euroscepticism. Emerald, ‘COVID-19 will likely strengthen Euroscepticism’ (2020) Available at: <https://www.emerald.com/insight/content/doi/10.1108/OXAN-GA251922/full/html> (last access 2 October 2020)

<sup>13</sup> EESC (2013), ILO (2015)

<sup>14</sup> COM(2020)457, 1.

<sup>15</sup> Van Lancker (2010)

tailored methodologies to secure adequate income to respect the principles of subsidiarity and proportionality (section 4). The last section provides a number of concluding remarks.

## **2. The driving force behind a Framework Directive on Minimum Income: Context and Rationale**

According to the latest data, 16.9% of the EU was at risk of income poverty after social transfers in 2017, meaning that their disposable income was below 60% of their national median equivalised income. As such, securing an adequate income remains one of the most efficient ways to tackle poverty.<sup>16</sup> In this context, adequate and effective social protection systems remain key in ensuring a decent standard of life for all that is compatible with the right to human dignity.<sup>17</sup> Minimum income schemes represent the last resort safety net that should, in principle, ensure that no one falls below this threshold. As such, minimum income schemes, when adequate, play a key role in fighting poverty and social exclusion and overall, improving the living standards. However crucial, given the high rates of income poverty that studies have found, it is perhaps unsurprising that while most Member States do have some sort of minimum income schemes, most of these are found inadequate. In fact, only few minimum income schemes in the EU suffice to lift people out of poverty.<sup>18</sup> On this note, a recent study of Eurofound shows that the impact of social transfers on poverty reduction is following a downward trend, with no apparent impact of the business cycle (even if poverty and social exclusion indicators are economic-swing dependant).<sup>19</sup> This signals the deterioration of social protection nets, which are not keeping up with current societal needs and are insufficient to provide a life in dignity.

Minimum income schemes are not only key in fighting poverty and social exclusion, they are also indispensable for achieving more equal societies which, in turn, perform better on many social and economic indicators. On top of this, minimum income schemes represent a very small percentage of governmental social expenditure, while providing a huge return on investment, which has an enormous impact on the long-term costs for society, particularly as minimum income schemes partially absorb the social impact in times of crisis.<sup>20</sup> In fact, minimum income schemes are also likely to have a counter-cyclical impact providing resources

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<sup>16</sup> European Parliament resolution of 24 October 2017 on minimum income policies as a tool for fighting poverty (2016/2270(INI)) [2018] O.J. C 346; Commission (2014); EAPN (2019).

<sup>17</sup> See on the substantive meaning of social assistance and its relation to human dignity Bambrough and Vonk in this Special Issue.

<sup>18</sup> Frazer and Marlier (2015:29).

<sup>19</sup> Eurofound (2019).

<sup>20</sup> European Parliament (2017:44).

to improve demand in the internal market<sup>21</sup> and generate an upward pressure, not only on minimum rights in social security and social assistance but on the quality of activation schemes for people living under social assistance too.<sup>22</sup>

The necessity of minimum income schemes is something that very few put into question. Also EU institutions have repeatedly recognised the importance of adequate minimum income schemes,<sup>23</sup> which most recently led to the adoption of the Council Conclusions on strengthening minimum income protection to combat poverty and social exclusion in the covid-19 pandemic and beyond.<sup>24</sup> This recognition was explicitly embodied in principle 14 EPSR, which enshrines the right to a minimum income, as such, for the first time as a separate right from a more general right to social assistance.<sup>25</sup> It conceives the right to minimum income as a way to ensure a life in dignity at all stages of life and, importantly, sees the need to combine minimum income with effective access to enabling services that allow an active participation in the labour market and society.<sup>26</sup> However, without further action either at national or European level, the rights embedded in the Pillar are not directly enforceable.<sup>27</sup> For now, the Commission is committed to implement this principle within the European Semester and more in particular through Country Specific Recommendations and the Joint Employment Report.<sup>28</sup> While implementation through a ‘socialising’ European Semester<sup>29</sup> might *a priori* seem a good scenario for benchmarking, exchanging good practices and monitoring through the Social Scoreboard, past experience has shown, that in the absence of sturdier commitments, the objective to fight poverty and social exclusion in the European Semester is doomed to be cornered by market interests.<sup>30</sup>

Similarly, other EU efforts to fight poverty and social exclusion have, up until now, been limited to soft-law instruments, including the Social Open Method of Coordination, the Europe

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<sup>21</sup> *Ibid.*

<sup>22</sup> Vandenbroucke, et.al. (2012).

<sup>23</sup> Council Conclusions on combating poverty and social exclusion: an integrated approach 27 June 2016; European Parliament, ‘Minimum Income Policies in EU Member States’ (2017); EESC, ‘Towards European a European Minimum Income (2015); This support also led to the creation of the European Minimum Income Network. See: EMIN official website, Available at: <https://emin-eu.net/what-is-emin/> (last visited 7 April 2020).

<sup>24</sup> Council Conclusions on strengthening minimum income protection to combat poverty and social exclusion in the covid-19 pandemic and beyond, Brussels 25 September 2020.

<sup>25</sup> SWD(2018) 67 final, 66.

<sup>26</sup> Such incentive can for example take the form of an obligation to recipients of minimum income benefits to use employment services that support labour integration.

<sup>27</sup> COM(2017) 250, 7; SWD (2017) 201, 3 ff.

<sup>28</sup> SWD(2018) 67 final, 67.

<sup>29</sup> Zeitlin and Vanhercke (2018).

<sup>30</sup> Council of the European Union (2013:§22); EAPN (2014); Bekker (2017); Sabato at. al. (2018: 21)/ See on the downward pressure on wages: Menegatti (2017).

2020 Strategy and a number of recommendations.<sup>31</sup> The impact of these instruments, however, has remained limited. This is evidenced by the underwhelming results of the Europe 2020 Strategy in achieving, or even significantly advancing, towards its headline target. Not only are the results of soft-law instruments scarce for the fight against poverty and the overall social development of the Union, but as poverty rates remain unacceptably high and inequalities between Member States exacerbate, the credibility of the Union's commitment to a decent minimum income shatters.<sup>32</sup>

The post Europe 2020 era needs to reflect on the inability of the Europe 2020 Strategy to live up to its headline target. This should trigger a stronger base for action in terms of governance that is capable of delivering the promises that were made a decade ago. Particularly, at a time where securing income has become more important than ever, a Framework Directive on Minimum Income would not only represent a stronger commitment with specific methodologies, but also give further meaning to the well-embedded objective to fight poverty and social exclusion clearly outlined in Article 3 TEU, the horizontal social clause (Article 9 TFEU) and the social objective of the Union (Article 151 TFEU). Moreover, it would serve to respond to the normative query of implementing the right to social assistance<sup>33</sup> under the European Social Charter (Article 13 ESC) and the Charter of Fundamental Rights of the EU (Article 34 CFREU), and materialise the right to human dignity (Article 1 CFREU and 2 TEU) by enabling citizens' participation in society and implementing the EPSR.

Whereas, different from other principles in the EPSR, implementing Principle 14 by means of secondary legislation did not seem to be among the priorities of the Commission,<sup>34</sup> as a more employment-based active inclusion policy has remained the main focus,<sup>35</sup> the conversation on

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<sup>31</sup> Council Recommendation 92/441/EEC of 24 June 1992 [1992] OJ L 245; European Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market (notified under document number [2008] O.J. L 307; Council recommendation of 15 February 2016 on the integration of the long-term unemployed into the labour market [2016] O.J. C 67; European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe [2010] O.J. C 70; European Parliament resolution of 24 November 2015 on reducing inequalities with a special focus on child poverty [2015] O.J. C 366; European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights [2018] O.J. C 242; European Committee of the Regions' Opinion on the European Platform against poverty and social exclusion [2011] O.J. C 166; EESC's Opinion on European Minimum income and poverty indicators [2014] O.J. C 170; COM(2010) 2020 final; COM(2008)418 final.

<sup>32</sup> Kuhn et. al. (2016); Hobol and de Vries (2016); Garben (2018b: 212-213); Koukiadaki and Kretsos (2012) *ILJ*; della Porta, Kouki and Fernández (2017).

<sup>33</sup> See on the right to social assistance Vonk G. and Bambrough E. in this Special Issue.

<sup>34</sup> SWD(2017) 201 final, 3 and 56

<sup>35</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] O.J. L 186; Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed [2019] O.J. C 387; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive [2019] O.J. L 188; Regulation (EU) 2019/1149 of the European

the need to establish an EU-wide minimum income approach has more recently ignited.<sup>36</sup> This is also visible from recent political discussions.<sup>37</sup> Most recently, on 25 September the German EU Council Presidency published on its website Council Conclusions on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond where it referred to the possibility of a Union framework on minimum income.<sup>38</sup>

The Commission, however, has previously hidden behind the argument that the EU has no competence to adopt such an instrument, on the basis that Article 153(1)(j) TFEU limits EU action in the field of poverty and social exclusion to measures of coordination.<sup>39</sup> It follows that this field cannot accommodate a legally binding instrument. The field of combatting social exclusion, however, is not the only field that may accommodate an instrument on minimum income. To this end, next section discusses the possibility of adopting an instrument under a different field in Article 153 TFEU instead, namely, under the field of the integration of people excluded from the labour market' (Article 153(1)(h) TFEU). The next section discusses using this competence as the legal basis for a minimum income directive and rebuts a number of potential counterarguments given the limitation of the social policy title.<sup>40</sup>

### 3. The rocky road of social competences

According to Article 4(2) TEU, the EU has shared competences in the field of social policy and Article 153 TFEU in the social policy title enshrines a number of fields in which the EU may act in order to attain its social objective, which include, *inter alia*, the field of poverty and social exclusion and the field of people excluded from the labour market. Contrary to the field of poverty and social exclusion (Article 153(1)(j)), which is limited to measures of coordination

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Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland) [2019] O.J. L 186; Von der Leyen U., 'Mission Letter' (2019) Available at: [https://ec.europa.eu/European\\_Commission/sites/beta-political/files/mission-letter-nicolas-schmit\\_en.pdf](https://ec.europa.eu/European_Commission/sites/beta-political/files/mission-letter-nicolas-schmit_en.pdf) (last visited 11.09.2019); C(2020) 83 final.

<sup>36</sup> See in this regard: <https://www.irishtimes.com/business/economy/europe-needs-a-minimum-income-says-eu-jobs-chief-1.4253788#.XsKPm9kgFFI.mailto> (last visited 2 October 2020).

<sup>37</sup> Dassis (2019); DGB and NAK (2019). European Parliament resolution of 24 October 2017 on minimum income policies as a tool for fighting poverty (2016/2270(INI)) [2018] O.J. C 346; Van Lancker and Farrel (2018).

<sup>38</sup> Council Conclusions on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond, Brussels (2020).

<sup>39</sup> Article 153(2)(b) establishes that social exclusion is not included as one of the fields where the EU has competence to adopt minimum requirements for gradual interpretation. The Commission clarified this with regard to the Citizen's Initiative on Unconditional Basic Income and stressed that the proposed text (under Article 153(1)(j) would fall 'manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the treaties' See C(2012)6288 final.

<sup>40</sup> Note that these legal arguments have been used and further been developed in Van Lancker, Aranguiz and Verschueren (2020).



(Article 153(2)(a) TFEU), the field of integration of people excluded from the labour market (Article 153(1)(h) TFEU) does not exclude harmonisation of laws (Article 153(2)(b) TFEU). As such, the latter legal basis allows the Union to take measures beyond the confines of soft-law mechanisms such as the Social OMC to adopt minimum standard directives. Thus, this could *a priori* host a Framework Directive on Minimum Income. In fact, principle 14 EPSR supports this interpretation. In the explanatory documents accompanying the EPSR, the Commission envisioned the field of ‘integrating people excluded from the labour market’ and not any other, as the EU legal powers regarding the right to minimum income.<sup>41</sup> This is also visible in the wording of the principle itself where specific attention is drawn onto incentives to (re)integrate in the labour market. By explicitly acknowledging that minimum income is part of the EU competence in the field of integration of persons excluded from the labour market, the Commission opened the door for a possible legal instrument on minimum income. Moreover, in contrast to what is required in many other areas under the social policy title, this field of Article 153 TFEU is to be adopted by the ordinary legislative procedure. Not only is this important from the point of view of, being an area of high political sensibility, significantly facilitating sufficient consensus to adopt a given instrument, but also because the Parliament co-legislates in this case. Being the only directly democratically accountable institution, this increases the democratic value and legitimacy of an EU instrument of minimum income. What is more, the fact that the Parliament has remained a supporter of an instrument on minimum income also enhances the political feasibility of a Framework Directive on Minimum Income being adopted.

This is not to say that a Framework Directive on Minimum Income on the basis of Article 153(1)(h) TFEU would be completely unproblematic. In fact, notwithstanding the possibilities, the limits to this provision (and overall to the social policy title) remain manifold.

The first of these limitations would undoubtedly be the limited personal scope of such an instrument. Even though previous research has shown that steps towards a minimum income regulation in Europe should take a broad perspective including, *inter alia*, minimum wages,<sup>42</sup> welfare state efforts to increase the take home pay of low wage earners and minimum income protection for jobless households,<sup>43</sup> Article 153(1)(h) TFEU would limit EU action to the latter. Since this basis refers to people excluded from the labour market, read *a contrario*, people included in the labour market cannot be covered by its personal scope. As such, a Framework

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<sup>41</sup> SWD(2018) 67 final.

<sup>42</sup> See for a discussion on a EU coordinated approach to minimum wages Marchal in this Special Issue.

<sup>43</sup> Cantillon and Vandenbroucke (2014); Cantillon (2011).

Directive on Minimum Income would have a limited scope and would not, by definition, take a broader perspective to minimum income protection.

Secondly, Article 153 TFEU imposes a number of limitations for EU action regarding: its impact on small or medium enterprises, defining the fundamental principles of social security and altering the financial equilibrium thereof. On top of this, there are a number of explicitly excluded areas, including ‘pay’.<sup>44</sup>

Given that an instrument on the field of integration of persons covers only persons excluded from the labour market, such an instrument would not, at least directly, have a negative impact on enterprises, whether they are big or small. This limitation, therefore, would not apply to a Framework Directive on Minimum Income.

It would, however, have a considerable impact on the welfare systems of Member States. In this vein, it follows from Article 153(4) TFEU that the provisions adopted under this basis shall not affect the right of Member States to determine the fundamental principles of their social security systems and/or significantly alter their financial equilibrium. In this regard, the first indent of Article 153(4) TFEU acts as a special constitutional saving clause that limits the power of the Union legislator to regulate on the fundamental principles of national social security systems. This would constitute a second potential limitation. However, this limitation applies to social security systems and a minimum income scheme that covers ‘only’ people excluded from the labour market is likely to be part of social assistance instead, which would suggest that the limitation under Article 153(4) TFEU is not necessarily applicable. Nonetheless, given the diversity of mixed systems across the EU, this limitation should not be quickly dispatched and deserves at least some consideration. This indent can be divided in two separate limitations: not affecting the right of Member States to define the fundamental principles of their social security systems and second, to not significantly alter their financial equilibrium.

As regards the former, EU action cannot legislate in fundamental matters such as how these systems are being financed or how they are structured. On this note, it is important to recall that all Member States have some sort of minimum income scheme in place. As such, a Framework Directive on Minimum Income would build on the existing foundations of the minimum income schemes and establish a methodology and adopt minimum standards of, *inter alia*, adequacy, coverage and transparency to guarantee a life in dignity. Such an instrument

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<sup>44</sup> Note that this limitation is also enshrined in the EPSR Commission Recommendation of 26.04.2017 on the European Pillar of Social Rights C(2017) 2600 final [2017] O.J. L 113, Preamble para.19.

would therefore not interfere with the fundamental principles of their social security (or even social assistance) systems.

The second limitation under the same indent, to not significantly alter the financial equilibrium of the social security system, also deserves some consideration. No doubt, an instrument that requires to lift the current protection floor will have a financial impact. However, the own wording of the provisions seems to suggest that there is room for financial impact as long as this is not ‘significant’ and does not alter the ‘equilibrium’ of the social security system. From this wording. It follows that the legislator may adopt instruments with financial consequences insofar as these do not imbalance the social security systems in a disproportionate manner.<sup>45</sup> Such an assessment would have to be part of an impact assessment accompanying the measure nonetheless. In any case, a Framework Directive on Minimum Income would have to be implemented gradually and considering what is realistic (also economically) for Member States in order to ensure that the burden placed on the welfare states is distributed in time. It has been explained above, moreover, that minimum income schemes represent a very small percentage of governmental social expenditure in contrast to the huge return on investment which has a substantial impact on the long-term costs for society.<sup>46</sup> On top of this, a methodology that is country-specific and contextualised with the living standards of a given Member States which is gradually implemented, should not, *a priori*, alter the equilibrium in such a significant manner. In this regard, input indicators such as reference budgets (see below) play a key role in contextualising the at risk of poverty threshold (AROP, 60% of the median equivalised income) to the specific needs and capabilities of each Member State. This threshold is not far from what the European Committee of Social Rights (ECSR) has deemed adequate in its case-law.<sup>47</sup> Given that all Member States are signatory to the ESC (whether to the original text or the ratified version), they have already committed to respecting a similar threshold, and therefore the impact of an EU law instrument should not jeopardise the financial equilibrium of the social security systems of Member States.

Any provisions adopted pursuant to Article 153 TFEU shall not, in addition, prevent Member States from adopting or maintaining more stringent social protection measures as long as they are in line with the Treaties. In this regard, a Framework Directive on Minimum

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<sup>45</sup> Repasi (2013:15).

<sup>46</sup> European Parliament (2017:44).

<sup>47</sup> ECSR, *Finish Society for Social Rights v. Finland*, Complaint no. 88/2013, para.111; ECSR, ‘Conclusions 2004, Lithuania’, p. 373; For a more in-depth study of Article 13 ESC see: Dalli (2020); de Becker (2019: 120-137), Aranguiz (2020: Chapter 4).

Income, following the wording of both Article 151 TFEU and 53 CFREU would ensure that Member States comply not only with EU objectives, but with general duties enshrined in international human rights instruments to ensure a certain standard of living that is compatible with human dignity, such as the one offered by Article 13 ESC. As such, it would not only aim at raising the standards, but by ensuring compliance with instruments of international law, it would also ensure that Member States are not put in a conflictive situation. This could happen if EU law contradicts other instruments of fundamental social rights, as it has happened in the past.<sup>48</sup> Hence, it would avoid any international rule of law conflict in the future. In any case, a Framework Directive on Minimum Income should include a non-regression clause that prevents a race to the bottom.<sup>49</sup> Moreover, it follows from the principle of subsidiarity and from the idea of ‘minimum standards’ that Member States are free, and even encouraged, to adopt higher or more stringent standards.

Lastly, there remains the limitation of areas that are explicitly excluded from EU competence which include, *inter alia*, ‘pay’ (Article 153(5) TFEU). This raises the question of whether or not minimum income can be considered ‘pay’ and therefore be excluded from EU competence.<sup>50</sup> The case-law of the Court of Justice of the EU (CJEU) seems to answer this question in the negative. In this vein, the Court has explicitly stressed that the limitation on pay refers to ‘the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed wage’.<sup>51</sup> This definition does not seem to support the idea that an income outside the employment relationship could be interpreted as ‘pay’ and, subsequently, be excluded from EU action. While the Treaties do not define ‘pay’, the concept of ‘pay’ as interpreted in the context of equal pay between men and women (Article 157 TFEU) and a number of directives on atypical employment could shed some further light on this issue. Under these auspices, the CJEU has interpreted ‘pay’ covering a wide-number of areas.<sup>52</sup> However, the Court has unequivocally held that what is important

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<sup>48</sup> ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, 3 July 2013. CoE, ‘State of democracy, human right and the rule of law in Europe (2014), p. 41; ILO, ‘2010 Report of the Committee of Experts on the Application of Conventions and Recommendations’ (2010), p. 209; ILO, ‘Observation (CEACR) -Adopted 2010, published 100<sup>th</sup> ILC session’ (2011); ILO, ‘Observation (CEACR)- adopted 2012, published 102<sup>nd</sup> ILC session’ (2013). Rocca (2016) Garben (2018b).

<sup>49</sup> Corazza (2011); originally referring to the article of ALES (2007).

<sup>50</sup> Aranguiz and Garben (2019).

<sup>51</sup> C-395/08 - *Bruno and Others*, ECLI:EU:C:2010:329, para.37; C-268/06 – *Impact*, ECLI:EU:C:2008:223, para.125.

<sup>52</sup> Including, *inter alia*, the following: Voluntary payments, - or supplementary pay and one-off payments, overtime supplements, special bonuses by the employer, travel allowances, training compensations, severance grants in cases of dismissal, family and marriage allowances, maternity benefit, bridging pensions and

in order to fall within the concept of ‘pay’ is that the allowance is paid to the worker by reason of the employment, whether it is a direct or an indirect employment relationship.<sup>53</sup> As indirect as this employment relationship might be,<sup>54</sup> because the Framework Directive on Minimum Income discussed inevitably is limited in its personal scope to people excluded from the labour market, it seems unreasonable to defend that minimum income could qualify as ‘pay’. As such, the Framework Directive on Minimum Income would also respect this constitutional saving clause.<sup>55</sup>

Overall, while the social competences of the EU might be limited in many ways, there is no reason to believe that Article 153 TFEU could not accommodate an instrument on minimum income protection,<sup>56</sup> provided that it complies with the principles of subsidiarity and proportionality. The following section centres on this issue.

#### **4. Respecting subsidiarity and proportionality through tailored methodologies**

Beyond the limits of the legal basis itself, an instrument on areas of shared competence must also comply with the principles of subsidiarity and proportionality. While this contribution cannot dwell on this issue extensively,<sup>57</sup> some remarks need to be noted. In this vein, the primary responsibility for social policy lies with the Member States, and the Union will only act where action at the EU level is preferable in order to attain the objective of the instrument. As such, the Framework Directive on Minimum Income is confined to the minimum required to achieve these objectives.

Similar to the arguments displayed by Marchal in the case of minimum wages,<sup>58</sup> an instrument on minimum income at the EU would also serve a threefold purpose: normative,

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occupational pensions: C-333/97 – *Lewen*, ECLI:EU:C:1999:512; C-281/97 – *Krüger*, ECLI:EU:C:1999:396, C-360/90 - *Arbeiterwohlfahrt der Stadt Berlin v Bötzel*, ECLI:EU:C:1992:246 C-285/02 - *Elsner-Lakeberg*, ECLI:EU:C:2004:320. C- 58/81 – *European Commission v Luxembourg*, ECLI:EU:C:1982:215 ; C-12/81 - *Garland v British Rail*, ECLI:EU:C:1982:44. C-360/90 - *Arbeiterwohlfahrt der Stadt Berlin v Bötzel*, ECLI:EU:C:1992:246; C-33/89 - *Kowalska v Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265, para.16; C-187/98 - *European Commission v Greece*, ECLI:EU:C:1999:535; C-342/93 - *Gillespie and Others*, ECLI:EU:C:1996:46; C-132/92 - *Birds Eye Walls v Roberts*, ECLI:EU:C:1993:868; C-262/88 - *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.

<sup>53</sup> C-366/99 – *Griesmar*, ECLI:EU:C:2001:648, para.28. More recently C-192/18 - *European Commission v Poland (Indépendance des juridictions de droit commun)*, ECLI:EU:C:2019:924.

<sup>54</sup> C-400/93 - *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155.

<sup>55</sup> For more on the limitation on pay see: Ryan (1997).

<sup>56</sup> These arguments, as well as the possibility to use dual basis combining Article 153(1)(c) TFEU and 175 TFEU for a framework directive on minimum income, are developed more in detail in Van Lancker, Aranguiz and Verschueren (2020).

<sup>57</sup> See for an extensive analysis on the principles of subsidiarity and proportionality: De Baere and Gutman (2017); Davies (2006); Watson (1991:37-40); Barnard (2012: 267); Craig (2012); Bermann (1994); de Búrca (1999); Sauter (2013); Klatt and Meister (2012); Webber (2010:179); Aranguiz (2020).

<sup>58</sup> See her contribution in this Special Issue.

functional and political. In this vein, strengthening convergence in anti-poverty strategies by engaging in common strategies for resilient minimum income schemes would, beyond translating specific fundamental rights and objectives of the Union into specific action, also foster the social cohesion in the Union. Moreover, as explained above, improving minimum income standards at the EU level is likely to have a positive impact on the internal market by increasing demand for goods and services, particularly, in times of economic distress. Because of globalization, digitalization and the opening of the internal market, purely national approaches would not only display a partial picture of the current problems but also prove counterproductive as many of the current issues are common among Member States. Taking into account the above, the increasing level of unequal distribution throughout the EU and that minimum income insufficiency is widespread across the EU, it seems logical that one single action at the EU level setting some core requirements is preferred to 27 different national ones. This is moreover reinforced by the general aim of the EU to reduce disparities between Member States and to combat social exclusion (Article 3 TEU).<sup>59</sup>

The political argument lies along the lines of increasing the EU's credibility among its citizens, which shattered during the previous economic crisis,<sup>60</sup> and risks reaching a point of no return if the 'wrong' decisions, such as focusing solely in economic and fiscal interests, are taken during this new crisis.

In this regard it is important to highlight the choice of a 'framework' directive, that emphasizes the importance of the subsidiarity principle and that maintains that a 'one-size-fits-all' approach does not exist.<sup>61</sup> As such, a Framework Directive on Minimum Income should leave to Member States the responsibility to implement agreed common standards and to adapt them to the national context. Whereas Member States would retain the competence to structure and give content to their minimum income schemes, the Framework Directive on Minimum Income would call on Member States to guarantee the right to minimum income that secures a decent standard of living by establishing a methodology on its adequacy that can be tailored to each Member State. It would also include a number of provisions regarding coverage and transparency that aim at lifting existing constraints. As such, this instrument would translate a common EU objective into specific binding actions while remaining sensitive to national priorities and divergences. A common methodology in understanding the right to minimum

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<sup>59</sup> Van Lancker and Farrel (2018: 3-5) and Van Lancker, Aranguiz and Verschueren (2020).

<sup>60</sup> See above, note 32.

<sup>61</sup> Van Lancker (2010) and Van Lancker, Aranguiz and Verschueren (2020).

income is further essential for cross-country comparisons in order to enhance the understanding of poverty at the EU level and identify common gaps in current strategies.<sup>62</sup>

As far as proportionality is concerned, the failure of previous soft-law mechanisms in making significant advances in contributing to the fight against poverty and social exclusion, signals the need to sturdier commitments to achieve set goals. A Framework Directive on Minimum Income that sets a minimum floor through methodologies to benchmark a decent standard of living but leaves abundant room for Member States to decide on how to structure minimum income schemes and to contextualise what a decent standard of living is in each country context, can hardly be argued to be disproportionate. A thorough assessment should in any case be included in a future impact assessment.

It follows that in order to respect the abovementioned limitations of Article 153 TFEU as well as the principles of subsidiarity and proportionality, the content of the directive would be limited to establishing core standards through a methodology for Member States to develop a minimum income scheme that can effectively improve the living standards of the population as well as securing a number of procedural and transparency requirements. In order to do so, two important pillars must be considered. On the one hand, adequacy, mostly in terms of securing an adequate income level, and on the other, accessibility, which should aim at lifting unnecessary constraints to access minimum income schemes.

As far as adequacy is concerned, if the goal of a minimum income scheme is to prevent people from falling into poverty, then it is just logical that adequacy is measured against the AROP threshold. This represents a reliable and robust indicator, recognised by the CJEU<sup>63</sup> and consistently used by the ESC.<sup>64</sup> At least in a procedural manner, it allows for a comparison *vis-à-vis* Member States. Moreover, because adequacy is still measured by means of a threshold based on a percentage of national median income, the directive would be careful to adjust adequacy to the specific country.

However, because guaranteeing a minimum income above the AROP does not necessarily allow for a life in dignity, Member States should be urged to use national reference budgets<sup>65</sup>

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<sup>62</sup> Goedemé et.al.(2015a); Goedemé et.al (2015b).

<sup>63</sup> C-168/18 - *Pensions-Sicherungs-Verein*, ECLI:EU:C:2019:1128, para. 44-46.

<sup>64</sup> ECSR, ‘Conclusions XIX-2, Luxemburg’ (2009); ECSR, ‘Conclusions XV-1, France’ (2000), pp. 270-271; ECSR, ‘Conclusions I, Statement of Interpretation on Article 13§1’ (1969), p. 64 ; ECSR, ‘Conclusions XIII-4, Statement of Interpretation on Article 13§1’(1996), pp. 54-57; ECSR, ‘Conclusions XIV-1, Portugal’ (1998), pp. 701-702; ECSR, *Finish Society for Social Rights v. Finland*, Complaint no. 88/2013, para.111; ECSR, ‘Conclusions 2004, Lithuania’, p. 373; For a more in-depth study of Article 13 ESC see: Dalli (2020); de Becker (2019: 120-14-137); Aranguiz (2020).

<sup>65</sup> Reference budgets (also known as budget standards) are illustrative priced baskets of goods and services that represent a certain standard of living. These are mostly used to identify the resources required for a decent standard

to contextualise the AROP and to assess the adequacy of minimum income.<sup>66</sup> By doing so, Member States could contextualise this threshold to a factual national reality and tailor a general methodology to the specificities of each country. It follows that Member States could argue (in a monitoring process) that while income lies below the AROP line, it is still sufficient to ensure a decent standard of living.<sup>67</sup> This methodology would somewhat resemble that of the ECSR, which also provides some margin for Member States to justify benefit schemes that lie below the AROP threshold as long as it is not ‘manifestly’ inadequate.<sup>68</sup> Contextualising the AROP threshold, therefore, would become an integral part of the principle of proportionality, ensuring that the methodologies to measure adequacy are fit to ensure a life in dignity in each Member State, without going beyond what is necessary. Moreover, when developed in a cross-national comparative way,<sup>69</sup> reference budgets may serve as an opportunity to frame the current EU approach towards the fight against poverty and social exclusion in terms of adequacy of Member States’ income protection systems.

The importance of using reference budget-based methodologies to contextualise minimum income schemes and secure a life in dignity that allows also for social participation, has recently been confirmed by several actors.<sup>70</sup> The directive should moreover serve as an incentive to prioritise research on cross-country comparable budget references by giving a clear mandate to the indicator sub-group and the SPC to develop this methodology and reach an agreement within a reasonable period.<sup>71</sup>

## 5. Other provisions

Besides a establishing a methodology to measure adequacy of minimum incomes, there are a number of important transparency and procedural limitations that should be incorporated in such a directive. For one, accessibility, which includes coverage and non-take-up, should

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of living and they serve a variety of purposes, *inter alia*, setting income maintenance levels, determining additional income support, debt rescheduling, financial education or assessing the adequacy of minimum income and wages. Goedemé et.al.(2015a); Goedemé et.al (2015b).

<sup>66</sup> Penne et. al. (2019).

<sup>67</sup> In many countries, however, the reference budgets will be higher than the AROP thresholds.

<sup>68</sup> See as regards regard the ECSR’s history of allowing for some flexibility.: ECSR, ‘Conclusions XIV-2, Statement of Interpretation on Article 4§1’ (1998) p. 50-52; ECSR, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Complaint No. 66/201, para.57. According to the ECSR anything below 40% of the median equivalised income falls ‘manifestly’ under the poverty line and is, therefore, unacceptable.

<sup>69</sup> Goedemé et. al. (2019: 33-34).

<sup>70</sup> Commission (2019); Dassis (2019); Van Lancker and Farrel (2018).

<sup>71</sup> When developing these methodologies, the work done by the ImPRovE project as well as by the Herman Deleeck Centre for Social Policy at the University of Antwerp should particularly be considered. Storms et.al. (2014); Goedemé et. al (2015); Goedemé et. al. (2019).



also be a priority in the Framework Directive on Minimum Income, as several actors have pointed out its unfitness.<sup>72</sup> Particularly problematic areas include legal residence requirements and supporting documentation (ie. IDs, rental contracts) and overly-restrictive requirements such as minimum age. Problems also arise with people transitioning from contributory to non-contributory schemes, such as from unemployment benefits to minimum income.<sup>73</sup> Considering the risks of this transition, unstable employment is likely to render less attractive and people might be inclined to remain unemployed since it may signify the risk of losing their income once their employment contract is over. This eventually leads to further overburdening welfare schemes.<sup>74</sup>

To incentivise take-up, clearly disseminated information and simplified procedures should be part of the aim of the directive. Member States should ensure that information and guidance is available for those who might be entitled. As such the directive should aim at guaranteeing transparency and accessibility also at the administrative level, by reducing bureaucratic burdens and unnecessary risks of applying to minimum income benefits. At the very least, these provisions should lead to not hindering the legal situation of individuals when resorting to minimum income schemes.<sup>75</sup>

On top of this, a directive that is based on the field of reintegration of people excluded from the labour market and implements Article 14 EPSR would not be complete without provisions to ensure that minimum income benefits are also ‘enabling’ to join the labour market.<sup>76</sup> As such, a directive should also include provisions that aim at guaranteeing that minimum income is combined with incentives to join the labour market (where possible), thereby avoiding unemployment traps.

Beyond the above, other general provisions are also necessary. These include reference to the existing human rights instruments (such as Articles 1 and 34 CFREU, Article 13 ESC and Article 14 EPSR), which are essential in making rights justiciable before the CJEU. The objectives of the Union (Article 3 TEU and Articles 9 and 151 TFEU) should equally be incorporated, in order to read the directive in light of the social objectives of the Union, particularly in case of conflicting interests. In this light, it would also be important to indicate under which conditions a right to minimum income can be limited. In this vein, limitations

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<sup>72</sup> Van Lancker and Farrel (2018: 16); Frazer and Marlier (2015: 23-25).

<sup>73</sup> Peña-Casas and Ghailani with Sabato and Nicaise (2013).

<sup>74</sup> Van Lancker and Farrel (2018: 17) and Callado et.al (2019).

<sup>75</sup> *Ibid*, p. 16; Marlier and Frazer (2015: 11).

<sup>76</sup> Van Lancker and Farrel (2018).

should always pursue a legitimate aim, be prescribed by law and comply with a principle of proportionality that takes into consideration the vulnerability of the applicants and that ensures that any limitation to the right to minimum income distributes the burden proportionately across societies.<sup>77</sup> The instrument should also refer to existing policy instruments on the topic, particularly to the 92 Recommendation on sufficient resources.<sup>78</sup> Other important provisions should include an aim or objective of the instrument, definitions (*inter alia*: Minimum income, people excluded from the labour market, adequacy, reference budgets, accessibility, etc.), personal and material scope, a non-regression clause, the role of Social Partners and civil society (who should be consulted both *ex-ante* and *ex-post* for this instrument), provisions on procedures on the transposition of the directive into the national context as well as a monitoring system.<sup>79</sup>

## **6. Conclusions: Do not fall asleep at the wheel**

Just as it was the case in the 2007 crises, the Covid-19 crisis too, is quickly exposing the weaknesses of our social protection systems and the importance of securing adequate incomes. At this point, the EU can either repeat past mistakes and choose austerity and market flexibility or take the solidarity route instead.

This contribution complements others in this Special Issue by supporting the potential to choose the latter option and take poverty as the impending challenge that it is. Particularly, this article explored the legal feasibility of adopting a Framework Directive on Minimum Income under the current Treaty framework. In doing so, it has discussed the background and rationale of a minimum income directive, the existing EU competences and its limitations as well as the importance of implementing proper methodologies to comply with the principles of subsidiarity and proportionality. It has argued, that while limited, the EU has sufficient competences to adopt such an instrument. If not by 2020, perhaps a Framework Directive on Minimum Income could deliver on the commitments made ten years ago and lift a considerable part of the population out of poverty and social exclusion.

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<sup>77</sup> This would resemble the procedural safeguards that both the ESC and the ECtHR have put in place in the case of limiting social protection systems. See for example: ECSR, ‘Conclusions XIII-4’, p. 139; ECSR, ‘Conclusions XIV-1’, p. 48; ECSR, *Sindicato dos Magistrados do Ministerio Publico v. Portugal*, Collective Complaint No. 43/2007, §42, ECSR, ‘Conclusions XIV-1 Austria’ (1998), pp. 81-82; ECtHR, *Šeiko v. Lithuania*, App. No. 82968/17; ECLI:CE:ECHR:2020:0211JUD008296817, §34; For an analysis on the latter see: Kagiarios (2019).

<sup>78</sup> See above n. 35.

<sup>79</sup> An excellent concrete proposal for a Framework Directive on Minimum Income that includes many of the elements above was already put forward by Van Lancker in 2010. Van Lancker (2010).

This contribution argues that, from a legal standpoint, the EU is equipped to take the social ‘turn’ at this crossroads by pledging to sturdier commitments in the fight against poverty and social exclusion and secure minimum incomes that are compatible with human dignity. The direction chosen by the EU will ultimately unveil whether or not it remains truthful to the promise of becoming a social market economy, and whether the drivers towards recovery will indeed be founded on solidarity, cohesion and convergence.

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