Constitutional Perspectives of EU's social dimension in the context of the debate on the future of Europe

Committee on Constitutional Affairs (AFCO) of the European Parliament
Hearing of 27 November 2018

The 'social' and the 'economic' in the European integration process after the crisis: Which role for the EU?

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The debate on the future of the EU social dimension touches upon a vast array of issues. Today, I wish to focus on just one of them, looking at the relationship between the 'economic' and the 'social' in the European integration process, with a specific focus on the EMU. The reason for this choice is that one of the most troubling development of the European social dimension over the last decade has been its subordination to the pursuit of economic objectives, in a way that, in my view, is at odds with the wording and the spirit of the Treaty. And that has contributed much to the dramatic erosion of the legitimacy of the whole integration process.

In the first part of my presentation, I will take a step back and have a look at how things have unfolded. This will provide the background to the second part of my speech, where I will take a more forward-looking approach.

The Working Document drafted by Barbara Spinelli with Fabio Massimo Castaldo pointedly highlights that the EU still enjoys a limited capacity to act in the social field. An element that is often overlooked is that the choice to leave the social sphere beyond the reach of supranational institutions was meant to preserve Member States' capacity to exercise their social prerogatives. Such a compromise, coupled with the creation of an integrated market, aimed at strengthening the redistributive capacity of national authorities, thereby contributing to the levelling up of social standards.

De iure this compromise is still largely here: if one compares the TFEU, as modified by the Treaty of Lisbon, with the Treaty of Rome, it will realize that EU social competences have remained largely unaltered. New provisions have been included so to reinstate and reinforce the old division of labour or, at least, to make sure that EU institutions "take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health" when acting (Article 9 TFEU).

But, *de facto*, it is clear that the original compromise has long gone. This is all the more evident with regard to the EMU, especially after the reform of the European economic governance. The new architecture entrusts EU institutions with an unprecedented capacity to exercise policy formulation, supervision and guidance on social issues - such as pensions, wages and dismissals procedures - that fall

squarely within Member States' exclusive competence. The main problem is that the exercise of these powers is functional to the stabilization of the EMU and to not to the pursuit of core social objectives, such as promoting dignity, autonomy and social justice. In this context, the 'social' has been transformed into an adjustment variable, to be treated either as a cost to be reduced in order to balance Member States' budgets or as a factor that should contribute to increasing their external competitiveness.

Operationally, the transformation described above has been achieved, in the case of the Semester, by creating of a hybrid framework that brings under the same umbrella different strains of EU policy coordination and surveillance and that allows the Commission to gain leverage in sectors covered by soft coordination processes while relying on the threat of hard sanctions. In the case of bailout packages, this has been achieved by escaping from EU law, its logic and guarantees, so to fully exploit the asymmetry of power that underpins the relationship between a party that controls the financial resources and another that badly needs those resources to avoid default.

In the light of the above, one may wonder which legal measures can be adopted to halt this evolution, so to re-balance the 'economic' and the 'social' in this context. Treaty reforms aiming at conferring new social competences to the EU does not seem to be a priority, in this regard. Rather, there is the need to make sure that the newly created mechanisms operate in a way that is compatible with the EU Treaties, the Charter and, prospectively, the European Social Charter both procedurally and substantively.

In the case of financial assistance packages, an important step in that direction could be made by bringing structural adjustment packages fully under EU law. In the *Florescu* judgment (C-258/14, 13 June 2017), the Court, dealing with a bailout package based on Article 143 TFEU, declared its competence to rule on the compatibility between Romanian austerity measures and EU law provisions protecting fundamental rights. To this end, it found that the MoU is reviewable under Article 267 TFEU, since it is mandatory and "constitutes an act of an EU institution".

Moreover, there is the need to make sure that the conditions attached to assistance packages comply with EU law since the moment in which they are drafted. Article 7 of Regulation (EU) No. 472/2013 is quite timid in this regard, establishing that, when a Member State requests financial assistance, the draft macroeconomic adjustment programme has to take "into account the practice and institutions for wage formation and the national reform programme of the Member State concerned", as well as to "fully observe Article 152 TFEU and Article 28 of the Charter". Even though they would apply in any case, it may be advisable to make clear that these programmes have to comply with the whole set of social provisions contained in the Treaties and in the Charter. Operationally, this should feed into a social impact assessment, as strongly advocated by Juncker since the beginning of the mandate of this Commission. The problem is that, as demonstrated by the farcical impact assessment carried out with

regard to the Greek MoU of 2015, so far this instrument has been used mainly to praise the reforms adopted, rather than to critically engage with their social sustainability.

In the case of the Semester, there has been many attempts to 'socialize' it, with regard to both its organizational and its substantive components. Undeniably, some results have been achieved, as demonstrated by the growing number of recommendations that treat social issues not just as factors that should contribute to the attainment of EMU core objectives. However, it is doubtful whether this evolution actually marks the end of the prioritisation of economic objectives over social ones within the Semester. Indeed, the more 'socially-oriented' recommendations are still marginal if compared with those adhering to the 'traditional' approach. This is hardly surprising, considering that the Semester has been created to ensure the smooth functioning of the EMU and that, consequently, in this context social objectives are bound to play second fiddle.

One may wonder whether the adoption of the European Pillar of Social Rights can make any meaningful difference in this regard. According to the Annual Growth Survey 2018, the Pillar should "serve as a point of reference for the further implementation of the European Semester", being "a compass for renewed convergence towards better working and living conditions". At the moment this has only led to the adoption of a new set of indicators that should to contribute to a better monitoring of Member States' social performance.

There is, thus, the need to take more decisive steps to halt the systematic prioritization of economic objectives in the context of the Semester. It may be argued, as done in the Working Document, that the only way to achieve this objective is by dismantling the Semester and abandoning the underlying idea to promote social policy convergence as a way to strengthen the EMU.

The key objective of any reform aiming at strengthening the EU social dimension should be directed at safeguarding and strengthening the political space for an autonomous, and democratically legitimate, social policy at national level. To be sure, this is not a call for a return to the original compromise, but only the recognition that for the time being, and arguably for a long time to come, national social systems are the cornerstone of the European social dimension.

This objective is to be pursued not only by rebalancing the 'economic' and the 'social' within the different governance mechanisms, but also through other types of action. The creation of a centralised fiscal capacity to finance budgetary transfers across the Member States of the Euro area is a good case in point. Indeed, these transfers can help to ease the pressure on social policy, emancipating it from its role of sole – or main – adjustment variable within the EMU.

The key question is whether, and the extent to which, the disbursement of the funds will be made conditional upon the implementation by the recipient State of structural reforms to be negotiated with

the competent EU institutions. In *Pringle*, the Court posited that this is only way to ensure that financial assistance granted by the EU and/or other Member States does not violate the no-bailout clause enshrined in Article 125 TFEU. Indeed, "Article 125 TFEU does not prohibit the granting of financial assistance […] provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy". The interpretative approach taken by the Court is questionable under many accounts, revealing an over-broad understanding of the no-bailout clause. This notwithstanding, this reading is likely to stand, since it represents the translation in legal terms of a requirement that is strongly supported by Germany and other Northerner Member States, which fear that the EMU could be transformed into a 'transfer Union'. If so, it is even more urgent to make sure that structural adjustment programmes are fully consistent with the Treaty and the Charter, abandoning the socially-suffocating conditionality requirements contemplated so far.