

EXPERT STUDY ON A BINDING EU FRAMEWORK ON ADEQUATE NATIONAL MINIMUM INCOME SCHEMES:

MAKING THE CASE FOR AN EU FRAMEWORK DIRECTIVE ON MINIMUM INCOME

STUDY COMMISSIONED BY THE
EUROPEAN ANTI-POVERTY NETWORK (EAPN)

10 OCTOBER 2020

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EXECUTIVE SUMMARY

This study provides a legal analysis as well as legal and policy arguments on the feasibility of introducing a binding EU framework for adequate national minimum income schemes. It clarifies the appropriate legal basis, scope and content of such an EU-level instrument, in view of the upcoming discussion in the EU institutions and of forthcoming advocacy work by EAPN Europe.

Although in recent years, poverty trends have started to decline modestly, almost 110 million people – which means more than one in five people – are still at-risk-of-poverty-or-social-exclusion. Especially the financial poverty figures (AROP) hardly show any improvement. The COVID-19 crisis will certainly add to these high numbers.

The actual political context – with the commitment of the German Presidency of the European Council and of the new European Commission, the longstanding demand of the European Parliament and the European Economic and Social Committee, and the mobilisation of civil society organisations – provides an excellent environment to relaunch the discussion on a new impetus from the EU to support Member States' action to guarantee adequate minimum income for their citizens, giving flesh to the acknowledged need to protect income adequacy with the impact of the COVID-19 crisis (section 1 and 2).

Adequate, accessible and enabling minimum income schemes do not only ensure people's fundamental social rights, but also help them to stay active in society. They act as automatic stabilisers and as stimuli for the economies and contribute to more cohesion and an improved participation in society as well as to better social inclusion (section 3).

The EU should give priority to guaranteeing decent minimum income for all because it has committed to the social rights in the Charter of Fundamental Rights of the EU, the European Pillar of Social Rights (EPSR) and several policy documents including the 1992 Council Recommendation on common criteria concerning sufficient resources and social assistance in social protection systems. Explicitly, the EPSR recognises in principle 14 that 'everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life' (section 5). EU action is also justified to balance economic integration through the internal market and the European Monetary Union (EMU). It would enhance the social cohesion within the EU and contribute to improve the legitimacy and sustainability of the European project for the citizens (section 4).

The introduction of a binding EU-level instrument on adequate national minimum income schemes raises the question about European solidarity through European funding, since the cost of bringing minimum income benefits to an adequate level differs between Member States and would especially put pressure on poorer Member States to close the poverty gap. At the same time, research shows that public support is high, including for an EU-level initiative that would require financial support for countries that face the most difficulties to deliver on improving the adequacy of benefits.

The study discusses a number of competence alternatives available under the Lisbon Treaty that could accommodate a legal instrument on minimum income, namely Article 153 (1)(c) TFEU in the field of social security and social protection for workers, Article 153(1)(h) in the field of integration of people excluded from the labour market and Article 175 TFEU on economic, social and territorial cohesion. The study concludes that an instrument under Article 153(1)(c) TFEU would not be in line with the right to a minimum income as enshrined in Article 14 EPSR because its personal scope is limited to 'workers'. Article 153(1)(h) TFEU instead could accommodate those persons who are not included in the labour market, therefore targeting a much broader audience. Alternatively, with the objective of improving

social cohesion and reducing disparities between Member States –and thereby also contributing to social upward convergence across the EU –, Article 175 TFEU could accommodate a solid legal instrument on minimum income that covers all persons at all stages of life as proclaimed by principle 14 EPSR. The study finds that because the objectives of both Article 153(1)(h) and Article 175 TFEU are complementary and their procedural provisions are compatible, a dual basis approach is not only possible but highly desirable to adopt an EU-wide instrument on minimum income that is compatible with the reading of principle 14 EPSR (section 7).

The study finds that a legal instrument on minimum income should be in the form of a ‘framework’ that sets core standards at the EU level that are to be operationalised by Member States. A framework provides the necessary flexibility to develop minimum income schemes that are country-specific and to adapt these core standards to national circumstances therefore respecting the principles of subsidiarity and proportionality (section 8).

An EU framework legal instrument could take the form of a Directive or a Council Recommendation. However, the discouraging results in fighting poverty by ensuring decent minimum income for all those in need until now show that soft law instruments and policy coordination mechanisms are insufficient to give enough nudge to Member States to make substantial progress on the prevention and reduction of poverty and social exclusion and the realisation of social rights (section 6). As such, the study strongly recommends advocating and working towards the adoption of an EU framework directive on minimum income that entitles individuals to enforceable legal claims to see their right to minimum income fulfilled (section 9).

Regarding the content of the directive, the EU-wide minimum income instrument should contain a definition of what characterises adequate income to live a life in dignity and to fully participate in the society, and what can be considered as accessible benefits to ensure broad coverage of all people who need the benefits for as long as they need them in different stages of their life. It further would need to spell out conditions to design minimum income schemes that support people to (re)integrate in the labour market for those who can, and to participate actively in the society (section 10).

Other elements of such an instrument are also referred to and shortly discussed in section 10. This section clarifies necessary elements on the content of the EU framework, including common definitions, clarification of the personal and material scope, a non-regression clause, common information requirements and adjudication procedures and bodies and a mechanism for monitoring and evaluation, including the principle of a structured and meaningful involvement of stakeholders.

Finally, the conclusions sum up the main findings and contextualise the initiative in relation to sustainable social protection systems and adequate minimum wages (section 11).

1 CONTEXT

Although in recent years, poverty trends had started to decrease modestly, over 109 million people are still at risk of poverty and social exclusion, more than one in five people living in Europe. As a consequence of the on-going **COVID-19 crisis**, millions of people's jobs, income and living standards are at risk, as they fall back on often inadequate unemployment benefits or income support, whilst they are faced with rising costs, rents and bills. Long-term unemployment may increase steeply in the coming years; it is also clear that there is a strong link between low income and vulnerability for the pandemic. The progress in recent years on poverty reduction in Europe is put at risk. Without strong and decisive action, millions more people throughout Europe risk being pulled into poverty.

To ensure an **adequate, accessible and enabling income support for all** – acknowledging the financial challenges that people are going through, and the need to guarantee their right to adequate income, is a key task for Member States to protect people at risk of poverty and social exclusion and to increase people's resilience towards crises. Notwithstanding the long-standing commitment of the Member States, through the 1992 Council Recommendation, little progress has been made on guaranteeing people the right to an adequate minimum income through soft instruments. The European Pillar of Social Rights' (EPSR) principle 14 recognises that **'everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life'**. At the beginning of 2021, the European Commission will present its Action Plan on the Implementation of the EPSR. Under the Portuguese Presidency an action plan will be adopted, that will clarify how the principles and rights of the EPSR will be implemented. Most of 2020 has been used to consult all relevant stakeholders. The close involvement of civil society organisations is crucial in this process, to make people's voices heard and to reflect the actual living and working conditions and the interests of the most vulnerable in the population.

The **German Presidency of the EU Council** creates a momentum to launch the discussion on the necessity and possibility of making progress on a European Union (EU) legal instrument in the form of an EU framework directive on minimum income. 'The phase we are in now is crucial for successfully translating the abstract nature of the EPSR into concrete results, i.e. to measurable minimum standards in individual areas... we must make progress in areas where there is already a broad consensus among the people, namely in the fields of securing livelihoods and fair wages... During Germany's EU Council Presidency, we therefore want to focus on making progress on an EU framework for fair minimum wages and another for national minimum income schemes. Both initiatives become even more relevant as we face an economic downturn. Reliable standards for minimum wage setting protect not only workers but also employment. And minimum income schemes act as stabilisers and foster rapid reintegration into the labour market. These objectives are already laid down in the EPSR. Member States would, of course, be free to decide how to meet the minimum standards' (Rolf Schmachtenberg in the Thematic Reader issued by the BMAS). The programme of the Presidency states: 'Poverty and social exclusion remain key challenges in Europe that are continuing to worsen in times of crisis. National minimum guaranteed income benefits in the Member States play an important role with respect to enabling those in need to participate in society and the labour market. We want to develop a framework for national minimum income protection systems in the EU Member States.'¹

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

The (draft) Council conclusions of 25 September 2020² refer to the Union framework on minimum income protection, that exists of the Council Recommendation 92/441/EEC, the Commission Recommendation 2008/867/EC, and relevant monitoring and policy coordination activities within the European Semester that are underpinned by the EU benchmarking framework on minimum income protection. The Council is of the opinion that its further elaboration could help close gaps still remaining in minimum income protection, help to reduce social inequalities and disparities within and among Member States, thus enhancing upward social convergence. Future work on the Union framework could also help strengthen the function of minimum income protection as an economic stabiliser in all EU economies, helping safeguard aggregate economic demand in times of crisis and beyond. The Council invites the European Commission to initiate an update of the Union framework to effectively support and complement the policies of Members States on national minimum income protection.

The **European Commission** is preparing proposals for an EU initiative to support upward convergence on minimum income, as part of an Action Plan for the implementation of the EPSR. On several occasions, Commissioner Schmit has made public references to the need for progress on poverty and an EU framework. EAPN, ETUC, the Social Platform, as well as European institutions such as the European Parliament and the EESC, strongly support the request for a stronger commitment at EU level, through the adoption of an EU framework directive on adequate minimum income.

2 STATE-OF-PLAY ON MINIMUM INCOME IN MEMBER STATES

For the last few years, the at-risk-of-poverty-and-social-exclusion rate (AROPE)³ has started to decline. According to the latest statistics available at EU level (2018), almost 110 million people (21.9%) were at-risk-of-poverty or social exclusion. Compared to the 2008 reference date, this represents a decrease of 8 million people, instead of a reduction of at least 20 million, as set by the Europe 2020 poverty target.⁴

The decline in AROPE is mainly driven by i) lower rates of people with low work intensity, although in 2018 still above pre-financial crisis levels and ii) lower rates of material deprivation, in 2018 below pre-financial crisis levels.

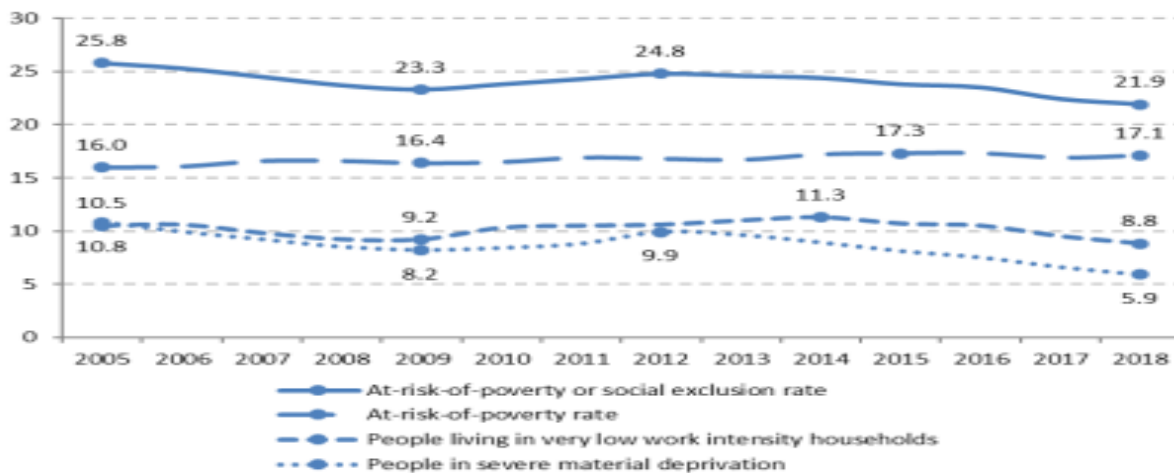
² <https://data.consilium.europa.eu/doc/document/ST-11084-2020-INIT/en/pdf>

³ **People at risk of poverty or social exclusion (AROPE)** are people who are at risk of poverty (AROP) and/or experiencing severe material deprivation (SMD) and/or living in households with very low work intensity (VLWI). People at risk of poverty are people living in a household whose equivalised disposable income is below 60% of the national equivalised median income (this indicator is therefore an income poverty indicator). People are severely materially deprived if they live in a household unable to afford at least four of the following items: 1) pay rent/mortgage/ utility bills on time; 2) keep home adequately warm; 3) meet unexpected expenses; 4) eat meat, fish or a protein equivalent every second day; 5) one week annual holiday away from home; 6) have access to a car for private use; 7) have a washing machine; 8) have a colour TV; and 9) have a telephone. People living in households with very low work intensity (i.e. (quasi-)jobless households) are people aged 0-59 living in a household where working age adults (18-59) worked less than 20% of their total work potential during the past year.

⁴ Draft Joint Employment Report 2020, https://ec.europa.eu/info/publications/2020-european-semester-joint-employment-report_en

The percentage of people at-risk-of-poverty remains high at 17.1% (slightly above 86 million people). In almost all countries income poverty in 2018 remained at higher levels than before the financial crisis of 2008 and the following years.

Percentage of population at-risk-of-poverty or social exclusion and subcomponents (2005-2018)



Source: EUROSTAT, SILC

However, the modest improvement of the poverty trends is endangered, since the COVID-19 crisis is expected to have a very negative impact on the numbers of people at-risk-of-poverty-and-social-exclusion, in all its subcomponents.

Although there is no uniform term and definition in the Member States for minimum income (see MISSOC), a consensus exists on a general definition and main characteristics of minimum income (see definition in the Commission staff working document on principle 14 EPSR⁵ the European Minimum Income Network (EMIN) definition, European Social Policy Network (ESPN) definition) and of minimum income schemes (MIS)).

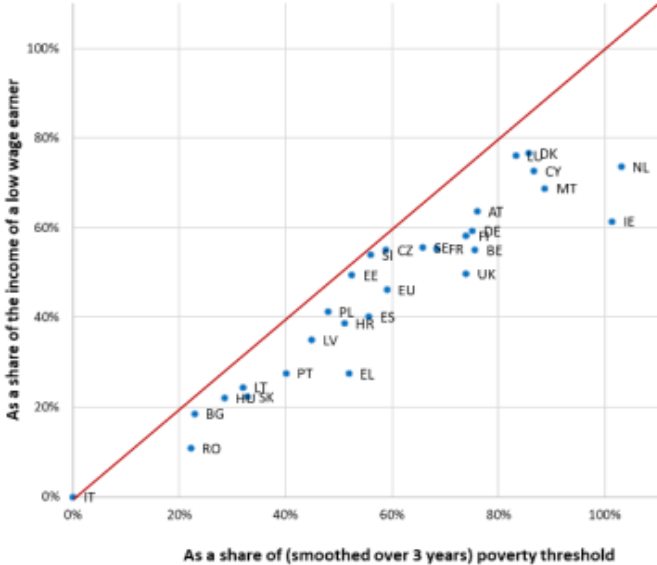
MIS are an integral part of comprehensive, rights-based and universal social protection systems; they are defined as income support schemes which provide a safety net for people, whether in or out of work, and who have insufficient means of financial support, and who are not eligible for insurance-based social benefits or whose entitlements to these have expired or are insufficient to live a life in dignity. They are last resort schemes, which are intended to ensure a minimum standard of living for the concerned individuals and their dependents.

Today, all Member States have some sort of Minimum Income in place, but show large differences in scope and design, adequacy, eligibility condition and link with active inclusion strategies. Most MIS fail

⁵ 'Minimum income aims at preventing destitution of people who are not eligible for social insurance benefits, or whose entitlement to such benefits has expired, thus combating poverty and social exclusion. Such benefits should also ensure a life in dignity at all stages of life combined with effective access to enabling services. They are non-contributory, universal and means-tested. They require people to be available for work or participate in community activities, if the individuals are capable.' <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0201&from=EN>

to provide people with a decent income at all stages of their life. On the basis of the SPC benchmarking exercise the assessment shows that, for a single person household in 2017, only the Netherlands and Ireland provide a minimum income above 60% of at-risk-of-poverty (AROP) threshold, for some type of households, whereas at the lower end, in Bulgaria, Romania, Hungary, minimum income does hardly reach 20% of AROP and less than 1/3 of low wages.⁶

Net Income of minimum income recipients as % of at-risk-of-poverty threshold (smoothed over 3 years) and of the income of a low wage earner (2017)



Source: Eurostat, OECD.

Notes: The charts concerns single childless persons. Net income of a minimum income recipient may also include other types of benefits (e.g. housing benefits) than minimum income. Information about IT does not include the newly introduced minimum income scheme, as it was not yet in place by the year 2017. Latest available information about income poverty thresholds in IE, SK, and UK is for 2016 income year. The low wage earner considered earns 50% of the average wage and works full time.

Source: Joint Employment Report 2020, p.129

Although most MIS are seen as universal schemes designed to lift all people in need out of poverty, **coverage** of the population is often limited by applying narrow **eligibility criteria** that exclude more or less wide proportions of the population. Coverage is low in certain countries, due to **income thresholds** to qualify for MIS that are extremely low, often below 40% of median income which is the absolute poverty line. In other countries coverage is reduced through excessive means-testing. With regards to **target groups** considered or excluded from the group of potential beneficiaries, reforms have been introduced in recent years that target income support to those deemed most in need, or to certain groups such as families with children (EMIN, 2017).

⁶ These findings are slightly different from the results of the ESPN research, due to different data sets regarding income calculation, household types and year of registration, but convergence in outcomes is striking.

The EMIN context report also mentions that **asylum seekers** and undocumented **migrants** are not eligible for minimum income, but also people who recently settled in the country do not have access. **Homeless people** have difficulties in accessing MIS, since they often cannot prove their residence. Minimum age requirements represent an issue of concern regarding access of **young people**. Another group often facing problems in accessing minimum income benefits are the **long-term unemployed** who have exhausted their right to unemployment benefits. This problem is linked to the critical transition from contributory allowances to non-contributory social assistance.

Non-take-up is seen as a serious problem that is not adequately addressed. It creates inequalities within the group of people in vulnerable situations who are entitled to benefits, between those who take them up and those who do not. EUROFOUND reported that an average of 40 per cent of people entitled to social benefits (including minimum income) do not claim them (EUROFOUND, 2015). This is due to various reasons, including the lack of awareness of the types of entitlements, restrictive and complex administrative procedures including between different government levels and the perceived stigmatisation attached to needing social assistance. The high level of non-take-up means that social benefits often fail to reach those most in need, generating increased societal costs as people fall further into hardship and deprivation.

In all countries, the receipt of social assistance benefits is linked to **activation strategies**. Access to minimum income is dependent upon job-search and being available to take up work. A clear trend in all EU Member States is increasing conditionality, which links benefits to participation in activation or training programmes or to work acceptance. In all countries non-compliance with the obligation to actively look for work can result in sanctions such as denying access, temporary suspension or even exclusion from the benefit. This results in increased hardship, as well as increasing pressure for people on MI to take up precarious, low paid jobs. Making rights conditional on 'behaviour' also undermines the scope of social rights.

In the EAPN report on the impact of COVID-19 on people experiencing poverty and vulnerability, the analysis shows the deficiencies of coverage and adequacy of the health, social protection and income guarantee systems of the countries analysed in the report, before the outbreak of COVID-19. The pandemic uncovered and deepened structural inequalities. The already existing inequalities and structural weaknesses meant that the spread of the COVID-19 virus and the avalanche of negative social consequences has disproportionately hit those already poor or at high risk of becoming poor and vulnerable.

3 WHY ARE DECENT MINIMUM INCOME SCHEMES IMPORTANT?

For *EAPN and EMIN*, there are a number of **convincing reasons to set up and further develop national MIS**.

- They are a pre-condition for and support the realisation of **social and human rights**. Denying people access to decent minimum income constitutes a violation of human rights. An extensive analysis on the human rights aspects can be found in the legal analysis in this report.
- Decent MIS ensure that people can remain active and can **participate in the society** and reconnect to the world of work when they can and are fit to work. They allow people to live a life in dignity, whereas inadequate minimum income schemes lock people up in dependency.
- They have **positive effects on the economy** as they contribute to redistributing income. As poor people spend the minimum income benefits they receive on the costs of living and

housing, and cannot afford to make savings, MIS operate as **automatic stabilisers** and function as an economic stimulus package. They maintain aggregate demand for consumption purposes.

- They also have numerous advantages for the **economic, social, and territorial cohesion** of European societies. This is particularly crucial in a context of increasing income and social inequalities, between and within Member States.

4 WHY SHOULD THE EU PLAY A ROLE?

The arguments used to justify EU action in matters of social rights in general, and the right to minimum income in particular, are twofold in nature.

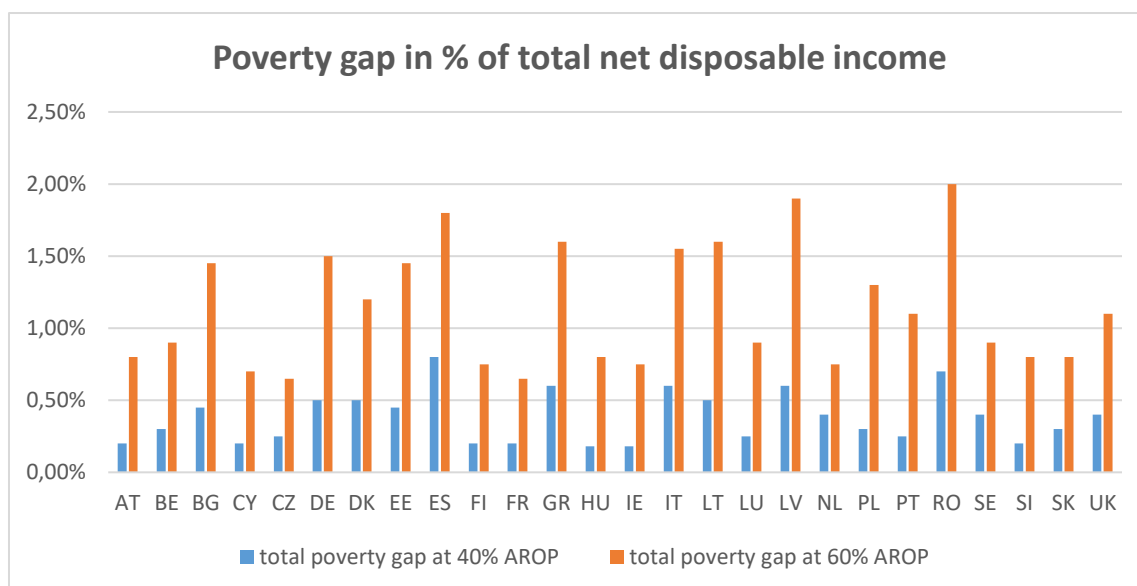
First, it is argued that EU action should progress on commitments made by the EU with regards to **human and social rights**, notably in the EU Charter of Fundamental Rights (CFREU). These commitments are also an integral part of the EU Treaties, visible in a number of provisions in primary law (for a more detailed analysis of fundamental rights and EU objectives, see further under the legal analysis in this report). They have been further developed in a number of legal documents by the different EU institutions. The initial high-level commitment to sufficient resources was made in the 1992 Council Recommendation. The latest commitment by all institutions to the right to a decent minimum income is enshrined in the EPSR principle 14. These commitments should now be translated into legally binding social standards for Member States, set at EU level. The EU in this way would make concrete the fundamental social rights that it already recognises in principle in the CFREU. The argument is **normative**: the EU and its Member States are legally and morally bound to respect human rights. It is also fundamentally **political**: it is about the appropriate balance between the various strands of EU action, the balance between the economic rights (such as free access to and a level playing field in an integrated EU market) and social rights (such as the right to a life compatible with human dignity). This approach would also enhance the legitimacy and political sustainability of the European project. The political argument lies along the lines of increasing the EU's credibility among its citizens, which shattered during the previous economic crisis, and risks reaching a no-return point if the 'wrong' decisions are taken during these new crises. At the same time, soft instruments fail to deliver on guaranteeing people an adequate minimum income and significantly reduce poverty.

Second, a well-known argument states that **economic integration** through the internal market and the Economic and Monetary Union (EMU) without accompanying social integration, induces downward pressure on social development in the most advanced Member States. Fears of social dumping and welfare tourism are causing considerable social and political tensions with regard to labour migration in more prosperous Member States. Ensuring that each Member State has a decent MIS would help counter these fears. In a positive way, EU support to improve income levels is likely to have a positive impact on the internal market by increasing its demand, particularly, in times of economic distress. Because of globalisation, digitalisation 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. Considering the level of unequal distribution of wealth throughout the EU which is underpinned by great disparities between Member States and that minimum income insufficiency is widespread across the EU by reason of scale and necessary effect, the EU is best placed to set some minimum requirements (Van Lancker and Farrell, 2018: 3-5).

On the basis of these arguments, *Vandenbroucke* makes the case for a Social Union (*Vandenbroucke*, 2014). The Eurozone must be supplemented with a genuine social dimension for it to be sustainable in the long term. The case for a European Social Union (ESU) is first and foremost based on a *functional* argument with regard to EMU. A consensus on common social standards in the Eurozone would allow Member States to repair the decreased stabilisation capacity of welfare states, and would prevent excessive social imbalances, that threaten the monetary union. A ESU would support national welfare states *on a systemic level* in some of their key functions (such as macroeconomic stabilisation) and guide the *substantive development* of national welfare states – via general social standards and objectives, leaving ways and means of social policy to Member States – on the basis of an operational definition of ‘the European social model’.

But also for the EU as a whole, the ***legitimacy of the European project*** requires a virtuous circle of growing pan-European and national cohesion. Sustaining such a virtuous circle should be the primary objective of a ESU. Although minimum income schemes represent only a very small part of national social welfare systems, a well-conceived notion of adequate minimum income assistance could generate upward pressure on the broader social protection systems and benefits, and on minimum wages in the labour market, and thus initiate a process of upward social convergence. *Vandenbroucke with Vanhercke* (2014) argue that a European framework with regard to minimum income protection would give substance and political salience to social rights in a ‘caring Europe’.

Cantillon et al (2014) make a **tentative calculation of the total cost** of an increase in minimum income to the 60% AROP threshold: it would amount to around €82 billion (or 1.46% of total disposable income in the EU), unequally divided between Member States for whom it would cost less than 1% of total disposable income (AT, CZ, CY, FI, FR, NL, SI), and Member States where the cost is between 1.5% and 2% (BG, ES, IT, LV, LT, RO). Moreover, comparison with existing minimum wages shows that without well-designed active inclusion policies, a financial inactivity trap would be created that causes disincentives to (re)enter the labour market. Any realistic proposal to eliminate poverty should ensure that in-work income exceeds out-of-work income, in order to maintain sufficient work incentives, i.e. that a positive hierarchy between minimum wages (statutory or set by social partners) and minimum income is being established. *Collado et al* (2019) calculated that closing the poverty gap for the whole population while maintaining financial participation incentives at the bottom of the income distribution, would require around twice the budget needed just to lift all disposable household income to the poverty threshold, as this requires additional investments in active inclusion strategies.



Source: own figure, based on Cantillon et al (2014), p. 179 (calculation on data EU-SILC 2008)

Given the heterogeneity between European Member States, any binding agreements on minimum standards/requirements for minimum income would have to be introduced flexibly and gradually, and implemented in unison with a convergence in activation measures and minimum wages (Vandenbroucke et al, 2013a). This is also in line with the requirements of Article 153 TFEU (see later in this paper, section 7). Moreover, since such a scheme – even if it is moderate in its initial ambition – requires a significantly greater budgetary effort on behalf of some of the poorer Member States in Eastern and Southern Europe, it raises the question about solidarity within the EU. In the poorer Member States ‘the rich’ are poorer than ‘the poor’ in the richer Member States (see annex 1, based on EU-SILC data 2010).

To implement such a scheme poorer Member States would have to demand a relatively greater additional (tax) effort from their middle income and higher income families than the richer Member States would have to require from their (more affluent) middle and higher-income households. This raises the issue of adequacy and progressivity of tax systems, but even countries with relatively fair taxation systems would be obliged to increase tax collection beyond what would be acceptable to finance adequate income levels for all. Hence, *Vandenbroucke* argues that ‘a minimal condition for a ‘caring Europe’ that attempts to upscale minimum income protection, is that it should help the poorer Member States, not just by opening up markets and implementing successful macro-economic policies at the EU level, but also by putting at their disposal generous Structural Funds for the foreseeable future. Fundamentally, enhanced solidarity within Member States cannot be decoupled from enhanced solidarity among Member States – and vice versa’.

Guaranteeing to all European citizens a basic level of income security would increase the legitimacy of the EU among citizens. Research shows that **public support** for social action at EU level in favour of minimum income is quite strong but differs between richer and poorer Member States and between different socio-economic groups within Member States (Baute, 2020). Empirical research based on the European Social Survey 2016 sheds light on public support for a European minimum income benefit. Respondents were asked to what extent they support a EU-wide social benefit scheme for all poor people, that would guarantee a minimum standard of living for all poor people in the EU, adjusted to reflect the cost of living in their country. The scheme would require richer EU countries to pay more than poorer countries. This proposal in the survey is not merely regulatory but also redistributive

across countries. Financial transfers between more and less affluent member states aim to compensate for the unequal efforts resulting from a binding EU framework on MIS. On average two in three respondents express their support for an EU-level framework for social benefit schemes in the Member States that would guarantee a minimum standard of living for the poor. This signals that Europeans are definitely open towards more EU initiatives with respect to minimum income protection. Yet, behind this relative strong support, support varies across EU member states. *Baute* (2019) shows that citizens in less developed welfare states are more strongly in favour of a European framework for adequate minimum income benefit because of high hopes for **upward social convergence**. In these countries, citizens expect that European integration will result in social progress, while in more developed welfare states, concerns about social dumping from southern and eastern Europe are prevalent. To accommodate both the social aspirations in less developed welfare states and the social concerns of the most developed ones, the EU-level initiatives on minimum income protection should go hand in hand with EU efforts to fight social dumping practices, for instance by developing a European framework on decent minimum wages.

5 BUILDING ON EXISTING EU AND INTERNATIONAL LEGAL FRAMEWORKS AND POLICY COMMITMENTS.

5.1 LEGAL FRAMEWORK: OBJECTIVES, VALUES AND FUNDAMENTAL RIGHTS

The social objective of the Union is also well-embedded in the values, general objectives and fundamental rights of the EU. As regards minimum income protection, this is more closely linked to the right to human dignity and social assistance and the objective of combating social exclusion, which is traceable in a number of primary law provisions:

Article 2 TEU enshrines the **values** of the Union which are linked to both fundamental rights (insofar as each chapter of the CFREU corresponds to a different value of the EU) and to the objectives of the EU since the EU shall attain its objectives in line with its values. Among these, there are the values of human dignity, equality and solidarity.

Article 3 TEU determines the **general objectives** of the Union. The general objectives of the Union are important insofar as the Union has functional competences, meaning that it may only act in order to attain one of these pre-agreed-upon objectives. In other words, the general objectives of the Union delimit the legitimacy of the Union to exercise its competences. These include the objective to combat social exclusion and, more generally, to become a social market economy.

Article 151 TFEU enshrines the **social objective** of the Union, which aims, *inter alia*, at improving the living conditions in the EU and at combating social exclusion. This provision is interesting for at least three reasons. First, it creates a link between the general objectives and the social competences of the Union, therefore defining the scope of the competences to actions necessary to attain the social objective. Second, it creates a link between the EU and the respect for the European Social Charter (ESC) which, as it is discussed in the following sections, is a more matured and progressive instrument on social rights, also regarding the right to minimum income. And third, it detaches the social objective of the Union from others such as 'market' and 'economic' interests.

The **2000 Charter of Fundamental Rights of the EU (CFREU)**, which became legally binding and part of primary EU law with the Lisbon Treaty (Article 6 TEU). The CFREU recognises, *inter alia*, the right to

human dignity (Article 1 CFREU) and the right to social protection and social assistance including the right to social and housing assistance to ensure a decent existence ‘for all those who lack sufficient resources in accordance with the rules laid down by Union law and national laws and practices’ (Article 34 CFREU).

The **European Social Charter** (ESC) recognises the right to social assistance in its Article 13. The case-law of the European Committee of Social Rights (ECSR) has repeatedly held that assistance should be granted to enable those in need to meet the basic needs and to live a decent life.⁷ The ECSR has measured this level as not being manifestly below 50% of the median equivalised income. While the ECSR allows Member States some room to justify a lower income, it has deemed unacceptable any income below 40% of the median equivalised income, as this is ‘manifestly’ below the poverty threshold.

The **2012 International Labour Organisation (ILO) Recommendation 202** concerning Social Protection Floors explicitly states that national social protection floors should at least comprise a set of basic social security guarantees, including ‘basic income security at least at a nationally defined level, for persons in active age who are unable to earn sufficient income, alongside other social security benefits including pensions, unemployment benefits, health-care benefits or family benefits’ as well as ‘basic income security, at least at a nationally defined minimum level, for older persons’.

The **2017 Interinstitutional Proclamation of the EPSR** operates as a collection of the current social acquis in the form of 20 principles that has been endorsed by all institutions. Among these, principle 14 firmly recognises the right of individuals to an adequate minimum income at all stages of life and to proper access to enabling goods and services. Principle 14 EPSR plays an important role regardless of being a soft-law instrument for several reasons. To begin with, the EPSR identifies the right to minimum income as such for the first time, where other instruments (such as the ones mentioned above) recognise a traditionally more general right to social assistance or even social protection. As such, it contributes to its concreteness, which facilitates being used by different bodies, particularly by the judiciary. The EPSR further strengthens links between different strands of fundamental rights, which is visible in the accompanying documents to the EPSR that conceive the right to a minimum income as related to rights in the ESC, for example. As a hybrid instrument, the EPSR also acts as an interinstitutional commitment and compass for the EU and Member States. This is further discussed in the following section.

5.2 EU POLICY COMMITMENTS: RECOMMENDATIONS AND STRATEGIES

Besides these values, objectives and fundamental rights, the social objective of combating poverty by means of (support for) adequate minimum income is also pursued through social policy instruments, such as Council and Commission Recommendations, the Social Open Method of Coordination (OMC), the Europe 2020 Strategy and the European Semester. It is in addition supported by various EU funds mainly linked to the implementation of these ‘soft policy instruments’.

⁷ 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.

The **1992 Council Recommendation**, on common criteria concerning sufficient resources and social assistance in social protection systems, recommends Member States to recognise the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity, states that implementation of such guarantee of resources comes within the sphere of social protection. The Recommendation defines various criteria for the design of the systems, comprising issues such as ‘individual right’, ‘no limit in time’, ‘right to sufficient resources and social assistance auxiliary to other social rights’, ‘accompaniment of this right by policies deemed necessary for the economic and social integration of those concerned’, the definition of a relative level sufficient to cover essential needs, supplementary amounts to cover special needs, and access to information and adjustment of benefits. The Council Recommendation recalls the need to implement such systems in a way to keep incentives to work and called on the MS to guarantee resources and benefits in social protection arrangements. In its paper on adequacy of income, EAPN strongly supports the Recommendation that is considered as still very relevant today (EAPN, 2020). The Recommendation also contains concrete steps for implementation, and a monitoring and evaluation provision.

The **2008 Commission Recommendation of Active Inclusion** makes a link between adequate minimum income benefits and decent wages and points to the need to design and implement an integrated comprehensive strategy for the active inclusion of people excluded from the labour market combining adequate income support, inclusive labour markets and access to quality services. Active inclusion policies should facilitate the integration into sustainable, quality employment of those who can work and provide resources which are sufficient to live in dignity, together with support for social participation, for those who cannot. The Recommendation also points to the need to safeguard an incentive to seek employment for persons whose condition renders them fit for work.

EU action in support of decent minimum income schemes builds on commitments made for poverty reduction in the context of **the Europe 2020 Strategy**. One of the five headline targets aimed to reduce by 2020 by at least 20 million people the number of those at risk of poverty or social exclusion. These headline targets have been translated into national targets. Since 2010, the **European Semester with its thematic focus on minimum income** has been the key EU policy coordination instrument to support progress in this field. Moreover, the Sustainable Development Goals driven Agenda 2030 aims at halving the number of people at risk of poverty by 2030, which would mean a decrease of 37 million in comparison with today.

Besides its function as a collection of the existing social rights in the EU, the EPSR is also an important institutional commitment undertaken over the last couple of years which serves as a way to steer institutions and Member States towards delivering social rights more effectively in the EU. In this vein, it is important to note that the **Commission Recommendation establishing the EPSR**, is accompanied by a number of interesting documents that should help deliver on the 20 principles. Among these, the explanatory documents clarify the meaning and scope of each of these principles and make links between the principles enshrined in the EPSR and EU legal competences. The EPSR is also accompanied by the Social Scoreboard which can serve as a compass to identify gaps and tackle problematic areas in the implementation of fundamental rights and track the effectiveness of existing policies in poverty alleviation.

5.3 EU INSTITUTIONS AND STAKEHOLDERS IN SUPPORT OF EU ACTION

The **European Parliament** in 2017 agreed on a **resolution** which calls on all Member States to ‘introduce adequate MIS, accompanied by back-to-work measures for those who can work and education and training programmes adapted to the personal and family situation of the beneficiary’. In several resolutions, the European Parliament supported the establishment of an EU target for MIS, to provide at least 60% of median income and a timetable to reach that goal. Parliament also called on the Commission to launch a consultation on the possibility of a legislative initiative on minimum income.

The **European Economic and Social Committee (EESC)** adopted a first opinion in which it called for an EU directive that would extend MIS to all Member States, while it linked such schemes to active labour market policies and the setting up of a European fund for an EU minimum income (EESC, 2013). It adopted a second opinion (EESC, 2019) for a ‘**European Framework Directive on Minimum Income**’, calling for a binding European framework for a decent minimum income in Europe, enabling MIS in the Member States to be extended across the board, supported and made ‘decent’. This ‘could take the form of a directive defining a reference framework for the establishment of an adequate minimum income, tailored to the standard of living and way of life of each country and taking account of social redistribution, taxation and standard of living factors based on a reference budget whose methodology would be determined at European level.’

In a recent resolution, the **European Trade Union Confederation (ETUC)** announced its intention to advocate for an effective EU anti-poverty action, to fully grant the implementation of principle 14 of the EPSR and fulfilling the objectives of the 2030 Agenda. This should be based on a European framework directive setting common principles and minimum standards for MIS that are highly inclusive, adequate, accessible and enabling, and on monitoring and benchmarking frameworks for assessing implementation in all Member States, that should be done in a participatory manner through social dialogue. The framework directive should be combined with solid inclusive, accessible and well-designed welfare systems, sustained by adequate financial resources provided by EU funds and specifically tailored recovery instruments, implemented via the European Semester and underpinned by collective bargaining, fair (minimum) wages, high job quality and security, fair working and employment conditions.⁸

The **Social Platform**⁹, in its position on adequate minimum income, calls for the adoption of an EU framework directive on adequate MIS that establishes common principles, definitions and methods, to achieve a level playing field across Europe. Such an EU directive on adequate minimum income should set common methodologies for defining adequacy, be supported by adequate and sustainable funding, provide regular adjustments and support to Member States. To ensure accessibility, the directive should have a rights-based approach, be available to everyone, benefits should be granted proactively and the scheme should not contain negative conditionality and provide adjudication and the right to appeal. For minimum income to be enabling, it should be rooted in an active inclusion

⁸ **ETUC** resolution, ETUC input on the right to adequate, accessible and effective minimum income schemes, extraordinary Executive Committee meeting, 23 September 2020, <https://www.etuc.org/en/document/etuc-input-right-adequate-accessible-and-effective-minimum-income-schemes-resolution>

⁹ **Social Platform**, An EU directive on adequate Minimum Income, Position paper adopted by Social Platform, September 2020 - <https://www.socialplatform.org/wp-content/uploads/2020/09/EUDF-Position-Paper-.pdf>

approach, provide access to services, be complemented by outreach activities and provide for engagement by civil society and people experiencing poverty.

EAPN has a longstanding history of engaging in defence of the right to an adequate minimum income for all people who need it, for as long as they need it. EAPN has been a leading advocate on minimum income and on exploring the need and basis for a framework directive. In 2010 EAPN issued the Working Document on a Framework Directive on Minimum Income, a Leaflet with the main demands on MI and the 2010 EAPN Adequacy of Minimum Income Policy Explainer; all three documents in the context of a campaign on MI. EAPN was also responsible for developing and coordinating the European Minimum Income Network (EMIN). In the context of two EMIN projects evidence for 32 countries was collected (including examples of promising practice and of progress made in view of having adequate minimum income schemes) and arguments to underpin the need for an EU-level obligatory framework on MI identified. In its position paper on adequacy of income, EAPN recently again made a strong case for a binding EU-level framework directive on adequate, accessible and enabling minimum income and spelled out the essential elements of such an EU framework directive (EAPN, 2020).

At the **conference on ‘Our social Europe. Strong together’**, organised by the German Presidency of the European Council on 16 September 2020, EAPN, Social Platform, Caritas Europa and Eurodiaconia called on the European Commission to propose an EU Framework Directive on Adequate Minimum Income and on EU Member States to guarantee everyone the right to an adequate, accessible and enabling minimum income, which is underpinned by a social and human rights approach. In a booklet, they explain why such an initiative must be launched and elaborate on the content of the request for an EU framework directive that should address the question of adequacy, coverage and take-up and should have a solid non-regression clause. They want to see targeted EU funding in support of such an initiative, indicators and benchmarks to follow-up, and the active involvement of civil society organisations and of people experiencing poverty.¹⁰

6 INSUFFICIENT PROGRESS BASED ON ‘SOFT-LAW’ INITIATIVES AT EU-LEVEL

Since the adoption of the Lisbon strategy, poverty reduction has been one of the EU’s main social goals, yet progress has been disappointing in most Member States (Cantillon et al, 2014, Cantillon et al, 2019). Today, the main tool at EU level to influence Member States’ policy regarding minimum income is through the European Semester: through the Annual Sustainable Growth Strategy and the Joint Employment Report, the Country Reports, the Country Specific Recommendations, the National Reform Programmes. However, even when recently some positive evolutions in the use of these instruments are noted by stakeholders with regards to incentives for Member States to improve their MIS, their evaluation demonstrates that there is disappointingly little progress on poverty reduction. Even the Joint Employment Report 2020 of the Commission recognises that there only is limited progress. EAPN, in its ongoing work on the European Semester, has critically assessed several cases where the attention given to adequate minimum income in Country Specific Recommendations is undermined by priority given to budget sustainability, consolidation of social protection benefits, increasing targeting and/or focusing the support on those most in need. EAPN concludes that the

¹⁰ <https://www.eapn.eu/conference-our-social-europe-strong-together-germanys-presidency-of-the-council-of-the-european-union/>

European Semester can and should be used as ‘tool’ to support the monitoring of progress but **cannot replace a binding and enforceable EU-level instrument on minimum income**.

Several other stakeholders (EP, EESC, ETUC) and researchers (Vandenbroucke with Vanhercke, 2014) also argue that EU soft-law approach and policy coordination mechanisms alone will not be sufficient to reach the goal. To create more ‘nudge’, an EU instrument with more binding power is needed to support the EU strategy to fight poverty.

The relatively weak results of the Country Specific Recommendations and the often non-justiciable social rights¹¹ justify taking stronger action in terms of governance that is capable of implementing said fundamental rights and values and deliver on the objectives of the Union. As such, this argument may serve to substantiate compliance with the principle of proportionality. To the end of looking into what else the EU could do to contribute to the policy objective to fight poverty and social exclusion, the next section first discusses the legal competences of the Union to take action on this matter.

7 THE LEGAL COMPETENCES OF THE UNION

Much of the discussion on a possible instrument on minimum income concentrates on the question of whether the EU has the competence to adopt a legal instrument on minimum income. In what follows a number of alternative competences are explored, considering their strengths and limitations.

7.1 THE SOCIAL COMPETENCES (TITLE X ARTICLE 153 TFEU)

According to Article 4(2) TFEU, the EU has shared competences in the field of social policy. Accordingly, 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 combating of social exclusion (Article 153(1)(j)). Article 153(2)(b) TFEU, however, does not include this field among those in which the EU may adopt minimum requirements for gradual implementation. It follows that the field of combating social exclusion cannot accommodate a legally binding instrument. 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) TFEU) 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’ (European Commission, 2012). As such, this competence field is limited to measures of coordination, such as the Social Open Method of Coordination. The field of combating social exclusion, however, is not the only field under Article 153 TFEU that may accommodate an instrument on minimum income.

Contrary to the field of combating social exclusion, the field of ‘social security and social protection of workers’ (Article 153(1)(c) TFEU) or ‘integration of people excluded from the labour market’ (Article 153(1)(h) TFEU) do not exclude harmonisation of laws (Article 153(2)(b) TFEU). As such, these legal bases could *a priori* accommodate a binding instrument on minimum income, such as a Framework Directive, as long as the objective of the instrument aligns with the specific field.

¹¹ Justiciability refers to the possibility of adjudicating a right in a judicial or quasi-judicial court. When a right is non-justiciable it means that the right holder’s claim either cannot be seen before an independent and impartial body, that the claim cannot be upheld, granted a remedy, or be enforced.

7.1.1 A legal instrument under Article 153(1)(c) TFEU on social security and social protection for workers

Some have argued that Article 153(1)(c) TFEU on social security and social protection for workers could serve as the legal basis to adopt legally binding provisions on the access of benefits that guarantee a minimum income (Kingreen, 2017).¹² Article 153(1)(c) TFEU mentions ‘social security and social protection of workers’ as a field in which the Union shall support and complement the activities of the Member States. The Union may adopt legally binding instruments in this domain, more specifically directives with minimum requirements for gradual implementation (Article 153(2)(b) TFEU). Article 153(2) TFEU further specifies that in the field of ‘social security and social protection’ the Council shall act unanimously, in accordance with a special legislative procedure after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. This procedure deviates from the ordinary legislative procedure in which the European Parliament and the Council act together as the legislators and which is applicable to other fields mentioned in Article 153(1) TFEU. In the ordinary legislative procedure, the Council acts with qualified majority and the European Parliament with simple majority (Article 16(3) TEU and Article 231 TFEU).

Furthermore, the provisions adopted pursuant to Article 153 TFEU shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly alter the financial equilibrium thereof (Article 153(4) TFEU).

The exact scope of the field ‘social security and social protection of workers’ is not specified. Since there is no reference to the law of the Member States for the purpose of determining the meaning and scope of these concepts, they must be given an autonomous EU interpretation which must take into account not only their wording but also the context and the objectives pursued.¹³

In order to determine whether Article 153(1)(c) can be used as a legal basis for a directive on minimum income, the material as well as the personal scope of this provision has to be established.

7.1.1.1 *The material scope of Article 153(1)(c): ‘social security and social protection’*

The material scope of Article 153(1)(c) refers to both ‘social security’ and ‘social protection’. However, the concept of ‘**social security**’ is not defined in the TFEU. For the definition of the scope of the term ‘social security’ inspiration can be drawn from the material scope of Regulation 883/2004 on the coordination of social security systems.¹⁴ This regulation was adopted to support the free movement of persons between the Member States. It covers all persons who are or have been subject to a social security scheme of a Member State, irrespective of whether they are or have been economically active.¹⁵ It is not the intention of this coordination system to harmonise or approximate the systems of the Member States in any way. The purpose is to coordinate the social security systems of the

¹² This study was carried out within the framework of the discussion on the right to free movement within the EU of people with low income and their possible claims to social security in the host country. It focused on the question whether the EU has a legal competence to introduce a national basic social safety net which could apply to persons who fall under the scope of some specific parts of German social security.

¹³ CJEU, C-610/18, *AFMB*, EU:C:2020:565, para 50.

¹⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166.

¹⁵ The legal basis for this regulation was Article 42 EC (now Article 48 TFEU) which is part of the chapter on the free movement for workers. This legal basis was complemented by Article 308 EC (now Article 352 TFEU) to allow the extension of the personal scope of this regulation to other persons than workers.

Member States in such a manner as to eliminate any negative consequences for the migrating individual that may arise from differences between the various systems.¹⁶

The material scope of this regulation is defined in Article 3. It refers to all legislation concerning benefits in case of sickness, maternity and paternity, invalidity, old age and survivors, accidents at work and occupational diseases, unemployment and pre-retirement as well as benefits concerning death grants and family benefits. This is an exclusive list, but it applies to general as well as to special schemes, whether contributory or not. However, social and medical assistance schemes are excluded. Still, benefits which have characteristics of both social security and social assistance are covered. Such benefits are called ‘special non-contributory cash benefits’, because they provide coverage against the risks listed in Article 3 while at the same time guaranteeing the persons concerned a minimum subsistence income in accordance with the economic and social situation in a Member State. They are subject to a special coordination regime laid down in Article 70 Regulation 883/2004, based on the person’s residence, provided they are listed in Annex X to this regulation.

The Court of Justice has given a very extensive interpretation of this material scope of Regulation 883/2004. It is settled case law that a benefit may be regarded as a social security benefit if it is granted to the recipients without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and if it relates to one of the risks expressly listed in Article 3(1) Regulation 883/2004.¹⁷ The distinction between benefits excluded from the scope of Regulation 883/2004 and those which fall within it is based essentially on the constituent elements of each particular benefit, in particular its purpose and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.¹⁸

This coordination regime only applies to ‘legislation’, a term which is broadly defined in Article 1(l) Regulation 883/2004. It includes all types of legislative, regulatory and administrative measures adopted by the Member States that have a direct or sufficiently relevant link with these branches of social security. However, contractual provisions, such as occupational pensions agreed between employers and employees, are excluded. Yet, the exclusion from the scope of this regulation of such contractual provisions, does not mean that they are excluded from the concept of ‘social security’. Indeed, these schemes offer an important supplementary protection to workers, which is recognised by Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights. Still, recital 2 to this directive seems to consider these schemes as part of the ‘social protection of workers’.

The **concept of ‘social security’** in EU law covers a wide range of schemes providing coverage against the risks listed in Article 3 of Regulation 883/2004, including those schemes that guarantee persons a minimum subsistence income.

The **concept of ‘social protection’** is not defined in the TFEU either. This term is also used elsewhere in the Treaties, such as in Article 9 TFEU which states that in defining and implementing its policies and

¹⁶ See for instance CJEU, C-388/09, *da Silva Martins*, EU:C:2011:439, para 70 and CJEU, C-515/14, *Commission v. Cyprus*, EU:C:2016:30, para 34.

¹⁷ See recently CJEU, C-679/16, *A (Aide pour une personne handicapée)*, EU:C:2018:601, para 31 and the case-law cited.

¹⁸ See for instance CJEU, C-503/09, *Stewart*, EU:C:2011:500, paras 35–36; CJEU, C-160/96, *Molenaar*, EU:C:1998:84, para 19 and CJEU, C-433/13, *Commission v Slovakia*, EU:C:2015:602, para 70.

activities the Union shall take into account requirements linked to, inter alia, guaranteeing adequate social protection. It is also used in Article 160 TFEU which mandates the Council to establish a 'Social Protection Committee'. This Committee was set up in 2000, as most recently updated by Council Decision (EU) 2015/773 of 11 May 2015, but it does not contain any definition of what is meant by social protection.

A definition of social protection can be found in Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS). It defines social protection as 'all interventions from public or private bodies intended to relieve households and individuals of the burden of a defined set of risks or needs, provided that neither a simultaneous reciprocal arrangement nor an individual arrangement is involved. The list of risks or needs that may give rise to social protection is, by convention, as follows: sickness and/or health care; disability; old age; survivorship; family/children; unemployment; housing; and social exclusion not elsewhere classified'. This definition is very broad and seems to include not only the social security schemes linked to the risks enumerated in Article 3 of Regulation 883/2004, but also needs linked to housing and social exclusion in general.

The term 'social protection' is also used in the Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies, without this concept being defined in the recommendation. Still, the preamble to this recommendation refers to social protection as 'an essential instrument of solidarity among the inhabitants of each Member State, in the context of the general right of all to social protection'. In addition, the recently adopted Council recommendation of 8 November 2019 on access to social protection for workers and the self-employed states in recital 8 that 'the key function of social protection is to protect people against the financial implications of social risks, such as illness, old age, accidents at work and job loss, and alleviate poverty and to uphold a decent standard of living'. The recommendation itself limits its scope to some branches of social protection and says that it does not apply to provisions of access to social assistance and minimum income schemes (see points 3 and 4). But the fact that the recommendation explicitly excludes social assistance and minimum income schemes means that the Council is of the opinion that in principle such schemes are covered by the concept of 'social protection', otherwise an explicit exclusion would not be necessary.

For a definition of the concept of 'social protection' reference can also be made to the **ILO Social Protection Floors Recommendation of 2012**. The Recommendation defines social protection floors as 'nationally-defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion' (Article 2). It uses a broad concept of social protection combines both social insurance schemes and social assistance schemes (as well as negative income tax schemes and public employment support schemes, Article 9).

From this we can conclude that the concept of 'social protection' can be interpreted very broadly covering the traditional branches of social security, schemes that are agreed between employers and employees, as well as social assistance schemes and other forms of support such as housing, intended to alleviate poverty and uphold a decent standard of living.

It follows from this analysis of the material scope of Article 153(1)(c) that a directive creating a framework for minimum income schemes would under this material scope.

7.1.1.2 Personal scope of Article 153(1)(c) TFEU: 'workers'

The personal scope of Article 153(1)(c) is limited to 'workers'. This concept is not defined in the provision either and since no reference to the law of the Member States is made, it must be given an autonomous EU interpretation. Various definitions of the concept of 'worker' may be found in EU law.

Some have argued that, in this context, the concept of 'worker' should be given a definition that is used for social security and social protection purposes and more specifically the definitions used in the above-mentioned EU social security coordination of Regulation 883/2004 are referred to (Kingreen, 2017). However, Regulation 883/2004 does not contain any definition of worker, since its personal scope is not limited to workers. It applies to all persons who are or have been subject to the social security legislation of one or more Member States, irrespective of their status. (Article 2). It may concern those who are covered as workers, or as self-employed persons or just as residents. The exercise of an economic activity as such is not required to be covered by the personal scope of Regulation 883/2004. Therefore, this regulation does not define who is to be considered as a worker. As stated above, because the personal scope of this regulation is not limited to workers, it was not only based on Article 42 EC (now Article 48 TFEU) but also on Article 308 EC (now Article 352 TFEU).

Nevertheless, for the implementation of the rules on the determination of the applicable legislation in cross-border situations, Regulation 883/2004 defines what is meant by 'activity as an employed person' and 'activity as a self-employed person'. It is 'any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situations exists' (Article 1 (a) and (b)). This means that in order to find out if a person exercises an activity as an employed person or as a self-employed person, we must look at how the Member State's social security legislation qualifies this activity.¹⁹ Those who do not fall within these national qualifications are not considered as exercising an activity as an employed or as a self-employed person.

We can also refer to the definition of who is to be considered a worker for social security purposes that was included in Regulation 1408/71,²⁰ the predecessor of Regulation 883/2004. The personal scope of Regulation 1408/71 was initially limited to workers and at a later stage extended to self-employed persons. Regulation 1408/71 contained a very complex definition of an employed or self-employed person in its Article 1(a). In essence, this definition requires that if a person is to be qualified as an employed or a self-employed person, he/she should be considered as such by the national legislation of the Member State concerned. The CJEU explicitly confirmed that the description 'employed person' or 'self-employed person' for the purposes of Regulation 1408/71 depends on the national social security scheme under which the person is insured²¹ and that it is up to the national courts of the Member States involved to determine on the basis of the legislation of these Member States if a person is covered by a scheme as an 'employed person' or a 'self-employed person'.²² This may relate to a broad category of persons, since it is not necessary, under this definition, to effectively exercise a professional activity, but only to be covered by a social security legislation of a Member

¹⁹ CJEU, C-340/94, *De Jaeck*, EU:C:1997:43 and CJEU, C-569/15, *X*, EU:C:2017:673.

²⁰ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149.

²¹ CJEU, C-340/94, *De Jaeck*, EU:C:1997:43, para 23 and CJEU, C-569/15, *X*, EU:C:2017:673, paras 23-25

²² See for instance CJEU, C-516/09, *Borger*, EU:C:2011:136.

State that is applicable to employed or self-employed persons or to be identified as such by the relevant scheme.

If we were to adopt these definitions in the social security regulations to determine what could be meant by ‘worker’ in Article 153(1)(c) TFEU, it would mean that the final answer to the question as to which persons would be covered by an instrument adopted on this basis, has to be found in the legislation of the Member States and in the way they define the scope of their schemes. It would imply that the personal scope of a legal instrument on minimum income would be limited to persons who are considered a ‘worker’ under the social security legislation of each of the Member States. The result would be that the personal scope of such a directive would differ between Member States, as indeed the personal scope of Regulation 1408/71 differed between the Member States. Consequently, such a legal instrument would not necessarily apply to all persons residing in a Member State, which would jeopardise the objective of guaranteeing a minimum income to everyone, as required by principle 14 EPSR.

As an alternative to the definition of ‘worker’ that was used in the EU social security coordination, we could also use an autonomous EU definition of ‘worker’ as used in the EU law on the freedom of workers (Article 45 TFEU) or in a number of EU directives on the employment rights of workers.²³

In order to widely guarantee the right to free movement and equal treatment, the Court of Justice has given a very broad interpretation to the concept of ‘worker’ in this context. Any person pursuing economic activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is that, for a certain period, a person performs services for and under the direction of another person (subordination), in return for which that person receives remuneration. The origin of the funds from which the remuneration is paid or the limited amount of that remuneration have no impact on a person’s status as ‘worker’.²⁴ In addition, EU citizens can retain their status as employee or self-employed person and the advantages linked to this status, *vis-à-vis* the Member States in which the citizens concerned had previously exercised economic activities. This is confirmed in Article 7(3) of the residence rights Directive 2004/38,²⁵ more specifically in the case where the Union citizen is temporarily unable to work as a result of illness or accident, or is in duly recorded involuntary unemployment or embarks on vocational training.

Thus, the EU autonomous concept of ‘worker’ has been given a wide scope. Nevertheless, such an EU concept of worker requires a link with the exercise of an economic employment activity. The use of such a concept of ‘worker’ for the purpose of Article 153(1)(c) as a legal basis for a legal instrument, would limit the possible scope of such a legal instrument to persons that can be qualified as such.

This conclusion has recently been confirmed by the Council recommendation of 8 November 2019 on access to social protection for workers and the self-employed. The legal bases used for this recommendation are both Article 153 and 352 TFEU. The reason for using this double legal basis, which was also proposed by the European Commission (2018a), was that Article 153 TFEU is not the

²³ See for instance the Working Time Directive 2003/88 (CJEU, C 151/02, *Jaeger*, EU:C:2003:437, paras 58-59) and the Collective Redundancies Directive 98/59 (CJEU, C-229/14, *Balkaya*, EU:C:2015:455, para 33).

²⁴ See for instance: CJEU, 53/81, *Levin*, EU:C:1982:105, para 17; CJEU, 66/85, *Lawrie-Blum*, EU:C:1986:284, para 17; CJEU, C-46/12, *L.N.*, EU:C:2013:97, para 39 and CJEU, C-270/13, *Haralambidis*, EU:C:2014:2195, para 34.

²⁵ Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158.

appropriate legal basis to cover the self-employed. For the European Commission as well as for the Council, Article 352 TFEU had to be added as a legal basis to justify the inclusion of the self-employed in the scope of this recommendation. This also follows from the third recital to the recommendation, which states: ‘Point (c) of Article 153(1) TFEU enables the Union to support and complement the activities of the Member States in the field of social security and social protection of workers. Union action can also be pursued to address challenges regarding access to social protection for people in self-employment on the basis of Article 352 TFEU, which contains a provision allowing the Council to adopt appropriate measures to attain objectives laid down by the Treaties where the Treaties have not provided the necessary powers.’ From this recital it is clear that in the view of the Council (who acted unanimously in this case) and the Commission, the reference in Article 153(1)(c) to workers, limits the power of the EU to adopt legal instruments under this legal basis only for those who can be qualified as workers, excluding even those who can be qualified as self-employed. In this view, economically inactive persons are clearly excluded from the scope of Article 153(1)(c).

7.1.1.3 Conclusion on Article 153(1)(c) TFEU

The material scope of Article 153(1)(c) is very broadly defined as covering ‘social security and social protection’ which includes the traditional branches of social security as well as social assistance schemes or other types of support to those in need. However, the personal scope of this provision is limited to those who can be qualified as workers, be it by the social security legislation of the Member States or under the EU autonomous definition of ‘worker’. But, since the objective of a legal instrument on a framework for minimum income schemes in the Member States should be applicable to all persons, in line with Principle 14 EPSR, irrespective of their qualification as a worker, we therefore do not consider Article 153(1)(c) TFEU as an appropriate legal basis for such an initiative.

A legal instrument on the basis of Article 153(1)(c) TFEU would have a rather limited personal scope that covers only workers. As such, this is not in line with Principle 14 EPSR, which encompasses the right to a minimum income for all persons at all stages of life, regardless of whether they qualify or not as a worker. **It follows that Article 153(1)(c) TFEU cannot be considered an appropriate legal base for and instrument on minimum income.**

7.1.2 A legal instrument under Article 153(1)(h) TFEU in the field of integration of people excluded from the labour market

Article 153(1)(h) TFEU, instead, could accommodate an instrument on minimum income with a much broader personal scope than Article 153(1)(c) TFEU. In fact, in the explanatory documents accompanying the EPSR, the Commission explicitly acknowledged that minimum income is part of the EU competence in the field of integration of persons excluded from the labour market, as it referred to this field, and not any other, as the EU legal powers regarding the right to minimum income (European Commission, 2018b).²⁶ In doing so, the Commission opened the door for a possible legal instrument on minimum income, for example, in the form of a directive, creating an EU framework.

It could be argued, that because this is directed to those excluded from the labour market, integration is narrowed to market activation. However, there is no substantial reason to believe that ‘integration’ in the context of Article 153(1)(h) TFEU is necessarily constrained to labour market activation and as

²⁶ Commission, ‘Monitoring the implementation of the European Pillar of Social Rights’ SWD(2018) 67 final.

such, this field could conglomerate benefits beyond those destined to labour market activation, therefore providing the possibility of extending the personal scope to those who are not fit to work or are no longer in the labour market due to age, such as pensioners. In fact, principle 14 EPSR supports this interpretation as it refers to a right to a minimum income for ‘everyone lacking sufficient resources [...] *at all stages of life*’ (emphasis added) that should be ‘combined with incentives to (re)integrate in the labour market’ ‘*for those who can work*’ (emphasis added). This reading suggests that integration is not necessarily limited to labour activation, particularly, in the case of those who cannot work. The wording of Article 153(1)(h) TFEU does not refute this broader interpretation or integration. The legislator could have explicitly envisioned integration into the labour market if a narrow interpretation were applicable. In fact, the German translation refers to ‘berufliche Eingliederung’ (professional integration). The fact that most of other translations (including the French and English versions, which are likely the ‘original’ ones) dropped the ‘professional’ suggests that it was the intention of the legislator to conceive integration beyond market activation. It follows, that **a possible legal instrument on minimum income should include provisions on incentives for market integration for those who can work, while the instrument might have a broader personal scope including those who cannot work, as long as they are all ‘people excluded from the labour market’.** A different reading would be contrary to the aim of securing a minimum income at ‘all stages of life’ (see supporting this argument Benz, 2019).

An additional added value for choosing this competence instead is that, in contrast to what is required in many other areas under the social policy title, such as the field of social security and social protection of workers, any legislative proposal pursuant to Article 153(1)(h) 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 European Parliament co-legislates in this case. Being the only 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.

Limitations of a legal instrument on Minimum Income under Article 153 (1) (h) TFEU

This is not to say, that a legal instrument on minimum income on the basis of Article 153(1)(h) TFEU would be completely uncomplicated. In fact, notwithstanding the possibilities, the limits to this provision (and overall to the social policy title) remain manifold.

In the first place, a legal instrument under these bases would still have a **limited personal scope to ‘people excluded from the labour market’, therefore excluding those included in the labour market.** 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, welfare state efforts to increase the take home pay of low wage earners and minimum income protection for jobless households (Cantillon and Vandenbroucke, 2014; Cantillon, 2011), 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. What is more questionable is what a person included in the labour market is. A narrow interpretation, which would favour a broader personal scope of a potential instrument on minimum income, would include strictly those in employment, whether employers, employees or self-employed. A broader interpretation of who is included on the labour market and thus excluded from a potential instrument on minimum income under the Article 153(1)(h) TFEU could include also those in unemployment or who maintain the status

of worker or self-employed. In any case, it would be unclear whether an instrument on minimum income under this basis would cover certain atypical forms of employment, such as platform work, zero-hour contracts of the gig economy, since their inclusion in the labour market is questionable. Given the increasing number of people facing in-work poverty, partly related to this relatively new employment phenomenon, **if minimum income truly aims at covering all persons at all stages of lives it should also cover those whose work-related income does not suffice to live a life in dignity. In order to overcome and to extend the personal scope of such an instrument to cover these later groups, the following section discusses the possibility of using a dual legal basis that combines Article 153(1)(h) TFEU with Article 175 TFEU.**

Personal scope aside, Article 153 TFEU imposes a number of limitations for EU action as regards: 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'.²⁷ How would these limit a potential instrument on minimum income?

Given that an instrument regarding 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 in principle have little impact on a possible instrument on minimum income.

It could, 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 vein, the first indent of Article 153(4) TFEU acts as a special constitutional saving clause that prevents the Union legislator from regulating 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 and the potential spill-over effect that increasing social assistance benefits might have on social security benefits, this limitation should not be quickly dismissed 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 MIS in place. As such, an instrument on minimum income would build on the existing foundations of the MIS and establish a methodology and adopt core standards of, *inter alia*, adequacy, coverage and transparency to guarantee a life in dignity. **An EU instrument on minimum income 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 attention. No doubt, as explained above, an instrument that requires Member States to lift the current protection floor will have a considerable financial

²⁷ 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] OJ L 113, preamble para 19.

impact on Member States, particularly with regard to the ‘poorer’ Member States (see above, section 4). However, the own wording of the provisions seems to suggest that there is room for financial impact as long as this is not ‘significant’ enough as to 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 destabilise the social security system of Member States (Repasi, 2013:15). It goes without saying that such an assessment would have to be part of an impact assessment accompanying any minimum income legal measure. In any case, a potential legal instrument 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 progressively in time (Benz, 2019). A framework that allows for country-specificities and is contextualised with the living standards of a given Member States (see below, section 10) which is gradually implemented through an agreed Action Plan, should assist in making this burden somewhat realistic so that the financial equilibrium of Member States is not altered in such a significant manner. Moreover, the AROP threshold is not far from what the European Committee of Social Rights (ECSR) has deemed adequate in its case-law.²⁸ Given that all Member States are signatories to the ESC (whether to the original text or the revised 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**. In any case, a potential MIS should include access to EU Funds, to help Member States in lifting the protection floor without undermining their financial stability and ensuring that the financial impact of lifting the social protection floors is somewhat balanced among the Member States. Recommendations within the Semester could also support increased financing, through better tax collection, action against tax evasion and avoidance and more progressivity of tax systems.

In addition, any provisions adopted pursuant to Article 153 TFEU shall not 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, an EU-wide instrument on minimum 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 when EU law contradicts other instruments of fundamental social rights, as it has been the case in the past (Rocca, 2016; Garben, 2018).²⁹ Hence, it would avoid any international rule of law conflict in the future. In any case, any EU instrument on minimum income should include a *non-regression clause* that prevents a race to the bottom (Corazza, 2011). Moreover, **it follows from the principle of subsidiarity and from the idea of ‘core standards’ that Member States are free, and even encouraged, to adopt higher or more stringent standards**, which is explicitly spelled out in Article 153(4) TFEU.

²⁸ 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).

²⁹ 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 100th ILC session’ (2011); ILO, ‘Observation (CEACR)-adopted 2012, published 102nd ILC session’ (2013).

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 benefits can be considered 'pay' and therefore be excluded from EU competence (Aranguiz and Garben, 2019). 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'.³⁰ 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.³¹ However, the Court has unequivocally held that what is important 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.³² As indirect as this employment relationship might be,³³ because an instrument on minimum income at the EU under this legal basis would inevitably be limited in its personal scope to people excluded from the labour market, **it cannot be argued that minimum income could qualify as 'pay'**. As such, an instrument on minimum income under this legal basis would also respect this constitutional saving clause.

Overall, while the social competences of the EU might be limited in many ways, it is clear from the above that Article 153(1)(h) TFEU can accommodate an instrument on minimum income, provided that it complies with the principles of subsidiarity and proportionality. The section 8 centres on this issue.

Article 153(1)(h) TFEU on the field of 'integration of people excluded from the labour market' can accommodate an EU legal instrument on minimum income that covers all persons who are not included in the labour market. Such an instrument would, however, not cover those included in the labour market.

³⁰ CJEU, C-395/08 - *Bruno and Others*, EU:C:2010:329, para 37; CJEU, C-268/06, *Impact*, EU:C:2008:223, para 125.

³¹ Including, *inter alia*, the following: Voluntary payments voluntary payments, - or supplementary pays 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 occupational pensions: CJEU, C-333/97, *Lewen*, EU:C:1999:512; CJEU, C-281/97, *Krüger*, EU:C:1999:396; CJEU, C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v Bötzel*, EU:C:1992:246; CJEU, C-285/02, *Elsner-Lakeberg*, EU:C:2004:320; CJEU, C-58/81, *European Commission v Luxembourg*, EU:C:1982:215; CJEU, C-12/81, *Garland v British Rail*, EU:C:1982:44; CJEU, C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v Bötzel*, EU:C:1992:246; CJEU, C-33/89, *Kowalska v Freie und Hansestadt Hamburg*, EU:C:1990:265, para 16; CJEU, C-187/98, *European Commission v Greece*, EU:C:1999:535; CJEU, C-342/93, *Gillespie and Others*, EU:C:1996:46; CJEU, C-132/92, *Birds Eye Walls v Roberts*, EU:C:1993:868; CJEU, C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, EU:C:1990:209.

³² CJEU, C-366/99, *Griesmar*, EU:C:2001:648, para 28. More recently CJEU, C-192/18, *European Commission v Poland (Indépendance des juridictions de droit commun)*, EU:C:2019:924.

³³ C-400/93 - *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155.

7.2 ECONOMIC, SOCIAL AND TERRITORIAL COHESION (TITLE XVIII - ARTICLE 175 TFEU)

Beyond the social policy title, an instrument on minimum income could also be adopted under other legal bases. An attractive option lies in the legal basis of economic, social and territorial cohesion (title XVIII TFEU). Article 175 TFEU gives the EU competence to adopt measures to strengthen the economic, social and territorial cohesion of the EU. In order to use this legal competence basis, a minimum income instrument would have the primarily objective to reduce socio-economic disparities across the EU by promoting upward convergence and a more harmonious development of the EU. This would require the EU to prove that such an instrument is likely to significantly contribute to social cohesion, which begs the question of what social cohesion entails.³⁴ According to Advocate General Bot, social cohesion is ‘a broad and overall concept with imprecise contours’ that are difficult to define.³⁵ Accordingly, the CJEU, has given extensive discretion to the legislator to act under this competence.³⁶ *Inter alia*, the CJEU has recognised that economic and social progress are part of the objectives of Article 174 TFEU and, hence, Article 175 TFEU should be used for the purpose of achieving economic, social and territorial progress.³⁷ In fact, two earlier initiatives conceived to combat social exclusion, FEAD and EPAP, were adopted under the auspices of social cohesion (Commission, 2010).³⁸ This argument is further reinforced by the fundamental value of solidarity, which appears alongside social cohesion in the general objective of the Union (Article 3 TEU). This link would also emphasise the need for transnational solidarity between Member States by, for example, linking a legal instrument on minimum income to EU Funds.

According to *Molle*, social cohesion could be understood as a way of decreasing inequalities when these become ‘politically and socially intolerable’, which translates into the need to act at the EU level because Member States are unable to tackle these inequalities by themselves (Molle, 2007:16). It follows **that an instrument on minimum income under this basis would have to demonstrate that and EU-wide minimum income framework is necessary in order to decrease inequalities across the EU**. As such, a potential legal proposal should be accompanied by a thorough impact assessment that evidently identifies these ‘intolerable’ disparities as well as provide sufficient data to substantiate the claim that an instrument on minimum income genuinely contributes to social cohesion in the EU.

Besides satisfying the objective of the given competence, there are a number of counterarguments that some may raise regarding the use of this specific legal basis for an instrument on minimum income at the EU level. For example, it may be argued that Article 153 TFEU represents the more specific provision and, as such, following the principle of *lex specialis derogat lex generali*, the more specific provision is the one that should in principle prevail (Conway, 2012: 153). This principle has also been

³⁴ Note that similar arguments to the ones presented in this section were originally used for an earlier and a forthcoming contribution (Aranguiz and Garben, 2019; Aranguiz and Garben 2021).

³⁵ Opinion Advocate General Bot CJEU, C-166/07, *Parliament v Council*, EU:C:2009:213, para 82.

³⁶ CJEU, C-166/07, *Parliament v Council*, EU:C:2009:499, para 53.

³⁷ CJEU, C-420/16, *Izsák and Dabis v Commission*, EU:C:2019:177, para 68. C-149/96, *Portugal v Council*, EU:C:1999:574, para 86.

³⁸ Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived [2014] OJ L 72.

recognised by the CJEU on a number of occasions.³⁹ And yet, this principle has not precluded the CJEU in the past from using general rules when a more specific provision exists as long as the conditions for using such a competence are met and the more general basis are not used to circumventing a specific derogation.⁴⁰ Following a similar reasoning, *Flynn* has argued that it is ‘perfectly proper’ to use Article 175 TFEU as long as the measure that is being proposed fits within the social cohesion base (*Flynn*, 2019:48).

This suggests that **as long as the minimum income instrument is framed with the general objective of reducing disparities and promoting an overall harmonious development of the Union, it should not be a problem to choose Article 175 TFEU as the legal basis instead of the more specific Article 153 TFEU.** It is important to stress here that **Article 153(1)(h) TFEU and Article 175 TFEU share the same procedural requirements.** They both require the ordinary legislative procedure, where the European Parliament and the Council co-legislate after consultation with the Economic and Social Committee and the Committee of Regions and decisions require a Qualified Majority Voting in the Council for its adoption (Article 289 TFEU). As such, it cannot be argued that the use of the social cohesion field is circumventing a stricter legislative procedure such as the special legislative procedure where the Council legislates only in consultation with the European Parliament (Article 289 TFEU) or a higher majority threshold, such as unanimity.

Similarly, there is a caveat in Article 175 TFEU that reads ‘without prejudice to the measures decided upon within the framework of the other Union policies’. Just as for other similar provisions (see for example Article 153(1)(h) TFEU ‘without prejudice to Article 166’), this caveat should not be interpreted as making Article 175 TFEU subordinated to other policy areas. Rather, it should serve to guarantee that any action under this competence does not contradict other measures under other Union policies. A legal instrument on minimum income supposes no danger on other policy areas, if anything, it complements other areas such as measures under the social policy title. It follows that a legal instrument on minimum income would comply with this caveat of Article 175 TFEU.

On top of this, some could argue that a minimum income instrument would not qualify as a ‘specific action’ under Article 175 TFEU. However, the CJEU was in the past confronted with a similar issue, and while its answer was rather ambiguous,⁴¹ in his opinion, Advocate General Bot supported a wide interpretation of what constitutes a ‘specific action’ should be understood widely, including action in any given form.⁴² If this would not have been the intention of the Treaty drafters, Article 175 TFEU could have been formulated more strictly, as it is the case for example, in areas of education (Article 165 TFEU), culture (Article 167 TFEU) and tourism (Article 195 TFEU) where EU has competence to

³⁹ Case C-252/05 - *Thames Water Utilities*, EU:C:2007:276, paras. 39-51; Case C-444/00 - *Mayer Parry Recycling*, EU:C:2003:356, paras. 51-57

⁴⁰ CJEU, C-376/98, *Germany v Parliament and Council*; EU:C:2000:544, paras 77-79; CJEU, C-92/14, *Gauweiler and others* EU:C:2015:400, paras 52; CJEU, C-493/17, *Weiss and others*, EU:C:2018:1000, paras 61-62. Opinion shared also by the Advocate General in CJEU, C-620/18, *Hungary v Parliament and Council*, EU:C:2020:392, paras. 73-85.

⁴¹ ‘Title XVII of the EC Treaty provides adequate legal bases allowing for the adoption of means of action which are specific to the Community, administered in accordance with the Community regulatory framework and the content of which does not extend beyond the scope of the Community’s policy on economic and social cohesion’. CJEU, C-166/07, *Parliament v Council*, EU:C:2009:499; para 46.

⁴² Opinion Advocate General Bot CJEU, C-166/07, *Parliament v Council*, EU:C:2009:213, para 38 and paras 91-92.

adopt 'complementary actions' but harmonisation is specifically excluded.⁴³ It follows that a potential instrument on minimum income could qualify as a 'specific action' and therefore, there should not be an objection to using this legal basis.

A different counterargument to using Article 175 TFEU could be to argue that because coordination and funding are explicitly worded in the provision, the competence of the EU is limited to this kind of actions. The same wording of the provision where it refers to 'actions outside the funds', suggests that action beyond coordination and funding is also possible as long as it is adopted with the objective of developing economic, social or territorial cohesion (Repasi, 2017: 25-26). Consequently, action in the form of, for example, a framework directive should not be understood to be off-limits.

Others may argue that Article 175 TFEU is limited to serve region-specific problems, and as such, a more general instrument that aims at reducing disparities between Member States and not so much between regions, could not fall under this legal basis. However, one could respond to this counterargument that minimum income schemes between different regions are considerably disparate, particularly in the case of decentralised systems (such as Spain or Austria) where there remain vast differences between the level of social assistance offered by the different regions. As such, a potential instrument on minimum income would implicitly target region-specific deficiencies. Moreover, there are at least two existing instruments namely the European Social Fund (ESF) and the European Globalisation Adjustment Fund (EGF) that were adopted under the auspices of social cohesion, that go well beyond regional integration. The latter even introduced an amendment after the financial crises where the regional limitation was specifically dropped.⁴⁴ **In addition, given that Article 174 TFEU explicitly refers to strengthening economic, social and territorial cohesion *in order to promote the Union's overall harmonious development*, the positive effects of a potential instrument under this basis should be measurable at the EU level** (Repasi, 2017: 22-23). Consequently, it can hardly be argued that the legislator is limited to region-specific problems.

Overall, **reviewing the evidence it would appear that Article 175 TFEU can provide a solid and sound legal basis for the adoption of a comprehensive instrument on minimum income provided that its objective is to improve social cohesion and reduce disparities between Member States** and that there is enough evidence (which could be included in the impact assessment accompanying the proposal) to substantiate this claim. But what would be the benefit of choosing Article 175 TFEU instead of Article 153(1)(h) TFEU? The advantage, in this case, would be that Article 175 TFEU is not constrained to the personal limitation of Article 153(1)(h) TFEU to targeting people excluded from the labour market, and as such, an instrument on minimum income under this basis could *a priori* target a broader audience, including workers and the self-employed. This would suggest that when their work-related income does reach the adequacy standard, they, too, would have the right to claim benefits so they can reach that threshold (see below on adequacy and thresholds, section 10).

⁴³ CJEU C-217/04, *United Kingdom v Parliament and Council*, EU:C:2006:279, para 44; CJEU, C-270/12, *United Kingdom v Parliament and Council*, EU:C:2014:18, para 104 ff.; CJEU, C-376/98 - *Germany v Parliament and Council*, EU:C:2000:544, para 85.

⁴⁴ Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 [2013] OJ L 347; See particularly Article 2(a) of Regulation (EU) No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006 [2013] OJ L 347.

The downside, on the other hand, could be to prove sufficient intolerableness of socio-economic disparities between Member States, which, if not substantiated thoroughly, could make the act vulnerable to be challenged.

Another possible downside could relate to interpretative issues. While the objective of Article 153 TFEU is purely social, and is also linked to important social instruments such as the ESC by virtue of Article 151 TFEU, Article 175 TFEU also encompasses an economic component: ‘social, *economic* (emphasis added) and territorial cohesion’. As such, where the potential instrument had to be interpreted it might be read in line with the interest of economic cohesion as well and not solely on the social interest of citizens. In the past, the objective that the competences seek to attain has played an important interpretative role before the CJEU and as such,⁴⁵ it is of utmost importance to choose the competences on the basis of the objective that an instrument aims to attain.

With the objective of improving social cohesion and reducing disparities between Member States, **Article 175 TFEU could accommodate a solid legal instrument on minimum income that covers all persons at all stages of life** as proclaimed by principle 14 EPSR.

7.3 USING DUAL BASIS FOR A LEGAL INSTRUMENT ON MINIMUM INCOME

Under EU law, the possibility exists of using a dual legal basis with the purpose of complementing one another. This has in the past been used, for example, for adopting Regulation 883/2004 or the recent Recommendation on access to social protection for workers and the self-employed, with the goal of extending the competences usually directed to ‘workers’ (either in Article 48 TFEU for the Regulation or Article 153(1) (c) TFEU) to the self-employed by combining it with the residual legal basis under Article 352 TFEU.

It could be argued, therefore, that **Article 153 TFEU and Article 175 TFEU could be combined in order to expand the personal scope of the initiative**. Using a dual legal basis, however, must be done in compliance with a number of requirements. These requirements were outlined in *Titanium dioxide* and establish that, in order to use a dual basis,⁴⁶ there should be no hierarchy between the competences being used, nor should there be a separable aim. This would mean, that **a legal instrument on minimum income that is based both under Article 153(1)(h) TFEU and Article 175 TFEU would have to seek to fulfil a single-prominent aim that requires the adoption of a measure based on two relevant provisions**. For example, the instrument could **aim at improving the living conditions of the EU population** (which requires on the one hand reintegrating people into society and on the other, reducing disparities between Member States).

From a procedural point of view, the case-law of the CJEU requires that the dual basis at stake does not have contradictory legislative procedures that would either require a much higher threshold for its

⁴⁵ There is a clear example in the infamous case of *Laval* where the Court interpreted the Posting of Workers Directive as a maximum harmonising of labour standards rather than a social minimum Directive. CJEU, C-341/05, *Laval un Partneri*, EU:C:2007:809.

⁴⁶ CJEU, C-300/89, *Commission v Council*, EU:C:1991:244, paras 20-26.

adoption (unanimity instead of QMV) or that would undermine the role of the Parliament (from co-legislator to consultation). This means that the provisions being used would have to share the same legislative procedure, be it the special or ordinary legislative procedure. Because both Article 153(1)(h) TFEU and Article 175 TFEU require instruments to be adopted according to the ordinary legislative procedure, a legal instrument on minimum income under both these provisions would also comply with the procedural requirements.

Considering the above, there is no reason to believe a potential legal instrument on minimum income could not be adopted using both competence basis. Not only would this comply with the dual basis requirements set in the case-law of the CJEU, but it could tackle some of the weaknesses of using a single legal base, by allowing for a broader personal scope that includes also those not excluded from the labour market, and by avoiding any interpretative issues in the future that might jeopardise the 'social' by favouring only 'economic' cohesion.

Both competences under Article 153(1)(h) TFEU and Article 175 TFEU can fulfil (partly) the objective sought by a legal instrument on minimum income and could in fact accommodate such an instrument. Using only one of the two provisions would entail that either the minimum income legal instrument cannot cover those included in the labour market (in the case of Article 153(1)(h) TFEU) or that the social component in the case of Article 175 TFEU is narrowed to social cohesion. However, because the objectives of both provisions are complementary and, as such, a legal instrument would seek one main goal (to improve the living standards of the EU population) and because both competences require the same procedures to adopt an instrument, **a dual basis approach is possible. Not only it is possible but it is desirable as it would allow for an EU-wide instrument on minimum income that is in line with the right to a minimum income as seen by the EU (Principle 14 EPSR).**

8 WHY A FRAMEWORK?

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**. 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 deemed more effective in attaining the objective of the instrument. As such, a legal instrument on minimum income is confined to the minimum required to achieve these objectives.

In light of this, it is important to earmark the main objectives of a potential instrument. As explained above, a legal instrument on minimum income at the EU would serve a threefold purpose: normative, functional and political (see above, section 4). 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. An exploratory assessment of the potential to foster social cohesion in the Union should definitely be included in the impact assessment that precedes any legislative initiative.

In this regard it is important to highlight the choice of choosing a 'framework' instrument. A framework refers to legal instruments that set the core standards but the operationalisation of these is left to

Member States.⁴⁷ This emphasizes the importance of the *subsidiarity principle* and that a ‘one-size-fits-all’ approach does not exist (Van Lancker, 2010). As stressed above, the choice of a framework and ‘core standards’ emphasises **that Member States remain free, and are even encouraged, to adopt higher or more stringent standards**. This is explicitly spelled out in Article 153(4) TFEU.

This practice is also endorsed by the Council, who in the Resolution on certain aspects for EU social policy in 1994 elaborated that a framework for social legislation should:

‘take account of the situation in all Member States when each individual measure is adopted and neither overstretch any one Member State nor force it to dismantle social rights, — avoid going into undue detail but concentrate on basic, binding principles and leave the development and transposition to the Member States individually and, where this is in accordance with national traditions, to the two sides of industry, — be flexible enough and confine themselves to provisions which can be incorporated into the various national systems, — include clauses which allow the two sides of industry room for manoeuvre on collective agreements, — contain review clauses so that they can be corrected in the light of practical experience’⁴⁸

As such, a framework should leave to Member States the responsibility to implement agreed common core 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 legal instrument 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 framework 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 framework in understanding the right to minimum 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 and move towards reducing disparities between Member States (Goedemé et al., 2015).

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 for sturdier commitments to achieve set goals, such as the headline target of the Europe 2020 Strategy or Sustainable Development Goals 1. A legal framework that sets core standards through methodologies to benchmark a decent standard of living but leaves abundant room for Member States to decide on how to structure MIS and to contextualise what a decent standard of living is in each country context, can hardly be argued to be disproportionate. A thorough proportionality 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 legal instrument would be limited to**

⁴⁷ See for example: Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L 68.

⁴⁸ Council Resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union [1994] OJ C 368.

establishing core standards through a framework for Member States to develop a MIS that can effectively improve the living standards of the population as well as securing a number of procedural and transparency requirements. The latter could include clear and transparent minimum income setting mechanisms, non-discrimination clauses, provisions on dissemination of information or the prohibition of unnecessary administrative burdens (such as proof of a rental contract). In order to do so, two important pillars must be considered: Adequacy (mostly in terms of securing an adequate income level) and accessibility (which should aim at lifting unnecessary constraints to access MIS). The specific methodology is further discussed below (see section 10).

By setting measurable core standards and not just minimum standards, the risk of a race to the bottom also decreases. As such, choosing a legal framework instead of a minimum standards directive becomes crucial both to address concerns of proportionality as well as fears of regression regarding social standards. In any case, the legal instrument would still include a non-regression clause.

A framework provides Member States the necessary flexibility to develop MIS that are country-specific while complying with some general 'core standards' set at the EU level.

9 THE CHOICE OF INSTRUMENT

According to the above, it should be clear that a legal instrument on minimum income is possible under the current Treaty framework. A legal instrument under these bases, could take the form of a directive as it is envisioned in Article 288 TFEU and 153(2)(b) TFEU more specifically. According to this, a directive is a binding instrument upon the Member States, that in this case would require Member States to guarantee a minimum income that is sufficient to live a life in dignity. However, the specific choice of form and method is left to the national authorities to determine in the specific transposition.

A **Directive on Minimum Income** would not only represent a stronger commitment towards the right to a minimum income and ensure that Member States remain within the parameter of a certain framework (see below on content), but also give meaning to the well-embedded Union objective to combat social exclusion and move towards becoming a true 'social market economy' (Article 3 TEU) while respecting the values of human dignity, equality and solidarity (Article 2 TEU) but also substantiate the horizontal social clause (Article 9 TFEU) and the social objective of the Union (Article 151 TFEU). Moreover, a directive on minimum income would serve to respond to the normative query of implementing the right to social assistance (Article 34 CFREU and 13 ESC), as well as materialise the right to human dignity (Article 1 CFREU) by enabling citizen's participation in society and implement the EPSR (see section 5 in this regard). In addition, a directive entitles citizens to the right to enforce their rights before a court, which would guarantee the right to effective remedy (Article 47 CFREU) as well as ensure that provisions go beyond the deontic realm to become truly justiciable. This means that in the form of a directive, a legal instrument on minimum income would entitle individuals to legally claim their right to minimum income before a court. Moreover, an instrument in the form of a directive would also allow the Commission to initiate an infringement procedure against a Member State that fails to implement the legal instrument on minimum income (Article 263 TFEU)

Given the little progress made thus far towards substantially alleviating poverty by means of soft-law instruments (see section 6), it is difficult to argue that the principle of proportionality would not be

satisfied. **Considering the above, this expert study makes the case for a binding instrument in the form of a framework directive on minimum income.**

A different concern, however, relates to whether sufficient political consensus can be gathered for a binding instrument of EU law. In the absence of sufficient political agreement for a framework directive, the possibility exists of adopting a new or updated **Council Recommendation** instead. This form of legal instrument is enshrined in Article 292 TFEU and much like a directive, a Recommendation also aims at triggering change at the Member State level and could be based under the same legal bases. Whereas both instruments are considered legal acts of the EU (Article 288 TFEU) the difference when compared to a directive lies on its legal nature, which in the case of the recommendation is non-binding, meaning that a recommendation would not be enforceable by law. Regarding its content, a Directive or a Recommendation could be practically identical, with the exemption of the provisions regarding the national transposition of the directive, which is not necessary in the case of recommendations. Other than that, the core content of an instrument could remain the same (see section 10).

While a Council recommendation might facilitate the adoption of an instrument on minimum income and therefore increase its political feasibility, one might wonder how a new recommendation might prove different from the 1992 Council recommendation on access to sufficient resources, which has not delivered, or at least not sufficiently, in terms of poverty reduction. Whether a new Council recommendation would have the potential to trigger actual change could ultimately depend on the content of the instrument as well as on the political will to implement it. A key element in this regard could relate to the instalment of a thorough **monitoring system** that urges Member States and the Commission to evaluate progress towards the objective and principles of the same instrument (see below, section 10). This monitoring system could resemble that of the Council Recommendation of November 2019 on access to social protection for the workers and the self-employed. Such a monitoring framework would require the Commission and the Social Protection Committee to develop agreed common quantitative and qualitative indicators to assess the implementation of the recommendation. This assessment is further supported by statistical data and progress reports submitted by the Member States with the view of informing policymaking.⁴⁹

This monitoring system could eventually be included in the process of the **European Semester** which could fulfil a twofold purpose: on the one hand to bring some fair balance between the different policy areas in the European Semester and therefore contribute to its progressive 'socialization'. On the other, it could avoid unnecessary bureaucratic burden on national authorities in their reporting duties.

⁴⁹ See Arts. 17-22 of the Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01 ST/12753/2019/INIT [2019] OJ C 387.

10 SOME REFLECTIONS ON THE ESSENTIAL ELEMENTS OF CONTENT OF AN EU FRAMEWORK.

MIS need to be adequate, accessible, and enabling

EAPN and EMIN have identified **adequacy, accessibility and enabling character** as the three key policy design criteria for MIS and benefits. Meanwhile, these criteria have become quite consensual in the EU institutions dealing with social policies, when they address the essential features of decent MIS.⁵⁰

The three criteria are introduced below (see also EAPN, 2020 and EMIN 2019). Only when these three criteria are met, MIS provide households living in need with the financial and psychological security they need in order to feel empowered and to be able to engage in pathways towards decent and adequate employment. These MIS also ensure the inclusion, access to rights and participation of all those people for whom decent employment is not (or no longer) an option.

10.1 ADEQUACY

Adequate income means sufficient income for a dignified life. But there is no strong international consensus on what level of income corresponds to an adequate living standard and how this differs across households and countries. A frequently used key concept in the development of fundamental rights to guarantee a decent living standard at the (inter)national, regional and local level is the concept of *human dignity*. It is also the leading concept behind Articles 14, 15 and 17 of the EPSR.

In 2019, the Social Protection Committee (SPC) finalised an exercise on *benchmarking minimum income*, in which it developed a framework to compare the performance and design of MIS across Member States to foster social convergence in the framework of the European Semester process. To assess the adequacy of minimum income protection, two policy lever indicators are used: 1. the income of minimum income beneficiaries as a share of the national poverty threshold (over 3 years) 2. the income of minimum income beneficiaries as a share of a low wage (earnings at 50% of average wages).

The **AROP, set at 60% of the median equivalent disposable household income**, is the most commonly used indicator in assessing income adequacy and poverty in Europe. If the goal of a minimum income scheme is to prevent people from falling into poverty, then it is only logical that adequacy is measured against the AROP threshold. This represents a reliable and robust indicator, recognised by the CJEU⁵¹ and consistently used by the ESC.⁵² The case-law of the ECSR considers that minimum income can only be seen as appropriate when the monthly amount of assistance benefits, including medical assistance, is not manifestly below the poverty threshold that is established at 50% of median equivalised income (CoE, 2018). The ECSR provides some margin for Member States to justify benefit schemes that lie

⁵⁰ See Council Conclusions on strengthening minimum income protection to combat poverty and social exclusion in the COVID-19 pandemic and beyond, July 2020, 9241/20 SOC 429

⁵¹ CJEU, C-168/18, *Pensions-Sicherungs-Verein*, EU:C:2019:1128, para 44-46.

⁵² ECSR, 'Conclusions XIX-2, Luxembourg' (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.

below the AROP threshold as long as it is not ‘manifestly’ inadequate, below 40% of the median equivalised income.⁵³ 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 EU framework would be careful to adjust adequacy to the specific country.

This relative poverty threshold depends on the median level of welfare in a country, but it is not clear to what extent it refers to an adequate living standard in the different member states. Despite its widespread use and advantages, the AROP indicator also has *well-known shortcomings*. The AROP indicator is comparable in a procedural way, but it does not reflect the same level of living standard across countries. The AROP lacks an empirical and normative underpinning of what an acceptable minimum income entails in different countries, with varying social contexts and for different household types. Research shows that the AROP does not represent the same level of income adequacy across different EU Member States and different subgroups in the population. In the poorer European countries, such as Hungary and Greece, and especially in Romania and Bulgaria, people with an income at the poverty threshold cannot even adequately fulfil basic physical needs such as food, clothing and shelter. On the other hand, in richer Member States such as Finland and Belgium, the poverty threshold seems to represent what is needed to participate adequately in society quite well. Compared to differences in 60% of median incomes across Europe, cross-national variations in the out-of-pocket costs that households face to fulfil their needs are clearly much smaller. Moreover, AROP tends to neglect differences in household economy scale between groups in society, especially in terms of tenure status and age, and across countries. It also does not take into account the public provision or subsidisation of essential goods and services such as education, health care, public transport etc. (see Goedemé et al, 2019a). Although the indicator allows for studying the size and characteristics of the groups living on a very low income, within and between countries, and provides useful information on the extent to which social and fiscal policies are targeted at the bottom of the income distribution, when evaluating the adequacy of minimum income support, or in a public debate about an appropriate level of minimum income support, the ‘arbitrariness’ of the level of the poverty threshold can be problematic.

Because guaranteeing a minimum income above the AROP does not necessarily allow for a life in dignity, Member States should be urged⁵⁴ to use national **reference budgets (RB)**⁵⁴ to contextualise the AROP to assess the adequacy of minimum income (Penne et al, 2020). By doing so, Member States could contextualise this threshold to a factual national reality and tailor a general methodology to the

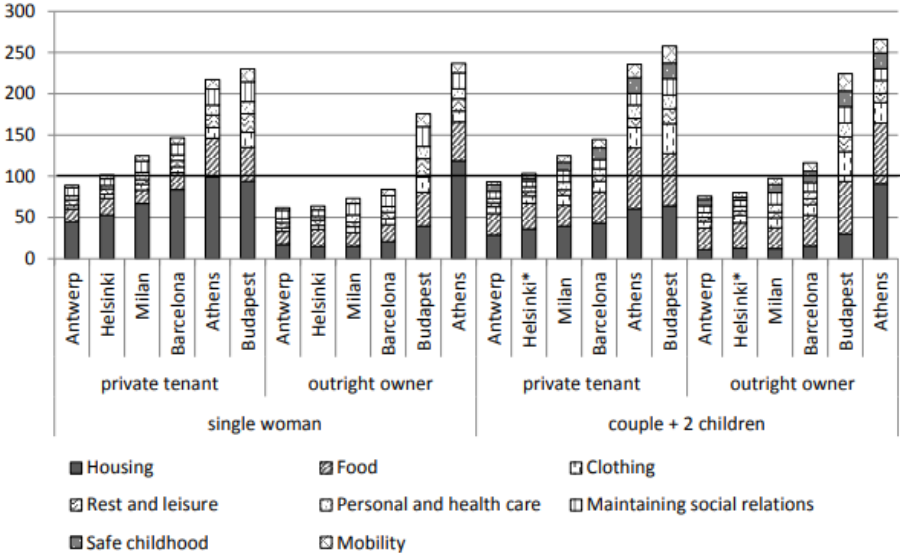
⁵³ See as regards regard the ECSR’s history of allowing for some flexibility: ECSR, ‘Conclusions XIV-2, Statement of Interpretation on Article 4§1’ (1998) p 50-52; ECSR, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ 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 it is, therefore, unacceptable. The ESC has consistently held that minimum income shall be of at least 50% of the median equivalised income, as calculated on the basis of the AROP value. Where the threshold lies between 40% and 50% the aggregation of other benefits is considered. But 40% falls ‘manifestly’ under the poverty line and any benefit aggregation would not suffice to bring the situation into conformity. Any minimum income below 40%, therefore, is considered unacceptable.

⁵⁴ 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 at the minimum for a decent standard of living and to allow people to adequately participate in society. 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.

specificities of each country as well as concrete living conditions of different household compositions. Contextualising the AROP threshold 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. Reference budgets, a longstanding research tradition that explores what different households need to live in dignity, can be important tools to enhance substantive comparability by representing a context-specific benchmark that illustrates what an adequate minimum income means in the different Member States. When constructed in a cross-nationally comparable way (Goedemé et al, 2019), they show how adequate living standards differ across the EU, and, as a consequence, contribute to the discussion on poverty concepts and poverty measurement. Moreover, RB 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 RB-based methodologies to contextualise MIS and secure a life in dignity that allows also for social participation, has recently been confirmed by several actors (Commission, 2019; Dassis, 2019; Van Lancker and Farrell 2018). Two related EU funded projects (Goedemé et al, 2015a; Goedemé et al, 2015b) made some considerable progress in the construction of *cross-national comparable RB* in Europe. These RB are based on a theoretical framework (Storms 2012) inspired by the *theory of human need* (Doyal and Gough 1991) which discusses a list of ten intermediate needs that should be fulfilled for adequate social participation: adequate housing, food, clothing, health and personal care, maintaining social relations, safety in childhood, rest and leisure, mobility and security. These needs are translated into concrete baskets containing lists of essential goods and services. This RB methodology is useful for the contextualisation of other poverty indicators.

Figure 3. Total reference budgets of a single woman and a couple with two children (private tenant or outright owner) expressed as percentage of the at-risk-of-poverty threshold in six cities, 2014



Notes: *In Helsinki the children of the couple are assumed to be of 4 and 10 years old instead of 10 and 14 years old. At-risk-of-poverty threshold retrieved from Eurostat on 25/08/2016. Values refer to 2014 (EU-SILC 2015), except for Milan (EU-SILC 2014).

Source: Goedemé et al, What does it mean to live on the poverty threshold. Lessons from reference budgets, in Decent incomes for all, ed. Cantillon et al. Oxford University Press, 2019

Penne explores the possibilities of how RBs could be used as an informative benchmark for the European 'at-risk-of poverty' threshold, rather than developing an alternative poverty indicator (Penne, 2020). She highlights three points of strength of RB in comparison with existing social indicators, notably the at-risk-of-poverty indicator. Firstly, the internal validity of the indicator (empirically based, transparent, concrete and acceptable benchmark for adequate minimum income levels), combined with a clear normative interpretation of what is needed to adequately participate in society in the different EU Member States. Secondly, RB have a clear advantage for policy makers in assessing both *ex-ante* the social impact of specific measures, as well as in monitoring *ex post* changes in social policy. Finally, the RB indicator provides opportunities for maximising substantive comparability (capturing the same level of living standard in different social contexts), of a minimum income benchmark at EU level.

However, Penne also points at three main limitations: firstly, current EU-RB are not fully comparable, and need improvement, especially with regard to data collection, pricing and lifespan assumptions; secondly, the use of a RB methodology for poverty measurement requires detailed microdata with information on economic resources, as well as the needs and essential expenditures of households. Finally, RB are constructed for a limited number of well-defined household types and cannot easily be extrapolated to the population as a whole.

Hence, researchers (Goedemé 2019, Penne, 2020) conclude that, due to their complexity, limits to data availability and the current level of methodological development, RB cannot replace any of the existing indicators of poverty or social exclusion. However, RB can help to put into context the AROP indicator and provide policy makers with a stronger tool for discussing and designing the adequacy of social policies and delivering on the adequacy of incomes. This paves the way for EU policy makers to extend the use of RB as policy indicators to monitor implementation of the EPSR in a cross-nationally comparable way. The legal instrument should moreover serve as an incentive to prioritise research on cross-country comparable RB by giving a clear mandate to the indicator sub-group and the SPC to further develop this methodology and reach an agreement within a reasonable period (Storms et al., 2014; Goedemé et al., 2015; Goedemé et al., 2019).

The EU legal instrument should spell out that adequacy of minimum income should be defined as income that is sufficient to ensure a life in dignity, on the basis of the 60% median income threshold, underpinned by using (cross-national comparable) reference budgets.

Finally, to ensure decent minimum income benefits, the legal instrument should specify that the level of benefits should be regularly/ annually reviewed and systematically adjusted, linked to real increases in the cost of living. In order to avoid real losses in purchasing power, adjustments should at least provide for inflation compensation. The benchmarks used for adequacy should also take into account special and/or increased need for individuals and households, due to their individual characteristics or to the composition of the household, for example people with disabilities with substantial extra costs.

10.2 ACCESSIBILITY

Accessible MIS can be defined as providing comprehensive coverage and guaranteeing access for all people who need the schemes for as long as they need the support. Accessible MIS have clearly defined criteria, they are universal, non-contributory and means-tested. They do not discriminate

against any particular group and have straightforward application procedures. They avoid *institutional* barriers such as bureaucratic and complex regulations and procedures and they have the minimum required conditionality. They avoid *implementation* barriers by reaching out to and supporting potential beneficiaries to overcome personal barriers such as lack of information, shame or loss of privacy.

This criterion **focuses on ensuring universal access and comprehensive coverage** for all people who need MIS, for as long as they need the support. Four main aspects of the accessibility dimension of MIS can be identified: 1. eligibility criteria 2. degree of universality 3. administrative procedures and 4. non-discrimination provisions. Their concrete design parameters decide on the actual accessibility of MIS for those persons who need them (Maucher, 2020).

At EU level there are **no agreed indicators or benchmarks** with regards to accessibility of MIS. However, the SPC exercise on benchmarking MIS comprises reflections on eligibility criteria. Some quality context information of means-testing and residence requirements was collected. The main requirements for access to MIS in most countries are linked to citizenship and residence, age, lack of financial resources, not having assets above a certain limit, and having exhausted all rights to other benefits. The degree of universality of MIS depends to a large extent on the strictness of means-testing, including the income threshold and the incomes included in the test. For the European Commission, conditions related to time of residence are a matter to follow up in the Country Specific Recommendations⁵⁵. Moreover, discrimination of specific groups in the population (homeless people, Roma...) should be at all times excluded. Minimum age requirements should be avoided. Income thresholds to qualify for the eligibility criteria should be defined at a reasonable level. Smooth transition should be ensured between contributory benefits and minimum income to ensure that no one is left without an income. Time limits should be excluded.

The legal instrument should clarify that MIS must establish individual **legal entitlements for all EU citizens and third country nationals with a legal residence, in need of assistance and for as long as they need it**, and that schemes should be accessible in a **non-discriminatory and non-stigmatising way, without undue excessive and unreasonable conditionality on their rights**.

10.3 ENABLING CHARACTER OF MIS

As a third policy lever, the SPC benchmark framework for decent MIS focuses on the link with inclusive labour market policies and access to affordable and quality services. For this policy lever, no performance indicators have been identified.

For minimum income to be enabling, it must have people's empowerment, participation and well-being at its core and facilitate access to quality services and inclusive labour markets, in line with the **2008 Commission Recommendation on active inclusion**. This also means that the design of MIS must prevent inactivity traps and provide incentives to take up work for those who are able. At the same

⁵⁵ See Recommendation for a COUNCIL RECOMMENDATION on the 2020 National Reform Programme of Lithuania, Poland and Spain and delivering a Council opinion on the 2020 Stability Programme of Lithuania, Poland and Spain COM/2020/509 final, COM/2020/515 final and COM/2020/525 final

time, it must enable social participation in the society for those who are not able to (re)join the labour market.

The legal instrument should spell out a link to the active inclusion strategies, as intended by the 2008 Commission recommendation. Taking a purely punitive stance undermines a rights-based approach, leading to extreme deprivation, increased health risk, further isolation and exclusion and increasing distance from the labour market among individuals who already find themselves in particularly vulnerable situations. **A positive approach** should be advocated to address social and health needs of people facing complex obstacles to accessing the labour market. This should consist in **individualised support to access key rights through an integrated case management approach**, covering supportive activation measures combined with help to access basic rights to key quality social and essential services, minimum income and social protection. For people unable to re-integrate in the labour market, strategies should facilitate their participation in the society by other ways than productive work.

10.4 FURTHER CLARIFICATION ON THE CONTENT OF THE INSTRUMENT

For any legal instrument, framework directive or Council Recommendation

As it is customary for instruments of EU law, **the aim and objective of the legal instrument on minimum income would have to be clearly identified in its first Article**. This Article will be key in interpreting the instrument in the future and could make a real difference in cases of conflicting interests. Particularly, an instrument that uses the dual legal basis of Article 153(1)(h) TFEU and Article 175 TFEU would have to pursue an aim compatible with both legal bases. As discussed above, this could be the case of ‘improving the living standards of the EU society’ which requires to integrate people excluded from the labour market (Article 153(1)(h) TFEU) as well as social cohesion for the overall harmonious development of the EU (Article 175 TFEU).

Equally important is to include **definitions** of those areas that the legal instrument aims at targeting to ensure a consistent implementation of the instrument. This should include definitions of the following: minimum income, AROP, AROPE, minimum income schemes, adequacy, accessibility, the enabling character of MIS, reference budgets, excluded from the labour market, sufficient resources.

Besides the definitions above, **two separate provisions should clarify what the personal and material scope of the legal instrument on minimum income are**. Regarding the former, the personal scope of a legal instrument on minimum income should clearly state that all persons who lack sufficient resources at all stages of life should be able to access a MIS that is sufficient to ensure a life in dignity.⁵⁶ As regards the material scope, this could be defined by the general approach to MI mentioned above: minimum income aims at preventing destitution of people who are not eligible for social insurance benefits that are sufficient for a life in dignity, or whose entitlement to such benefits has expired, thus combating poverty and social exclusion. Such benefits should also ensure a life in dignity at all stages of life combined with effective access to enabling services. They are non-contributory, universal and means-tested. They require people to be available for work or participate in community activities, if the individuals are capable’

⁵⁶ In this regards it is important that the point 15 of the preamble of the EPSR establishes that the principles therein concern all EU citizens and third-country nationals with a legal residence.

In order to ensure that a legal instrument on minimum income is always interpreted in line with fundamental rights, it is important that the preamble of this legal instrument **explicitly refers to Articles 1 and 34 CFREU**. On a similar fashion, the instrument should explicitly state that the legal instrument on minimum income is seen as an **action towards attaining the objectives of the Union (Article 3 TEU), and particularly its social (Article 151 TFEU) and social economic and territorial cohesion objective (174 TFEU)**.

The legal instrument should require Member States to provide **common information requirements**, on the availability of easily understandable and transparent information on the minimum income benefits, on their eligibility conditions, on application procedures etc.

A non-discrimination clause that prohibits any form of discrimination in any ground such sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation as enshrined in Article 21 CFREU.

The instrument should foresee **common requirements for monitoring and evaluation of minimum income benefits**, including the principle of involvement of stakeholders including civil society organisations and people experiencing poverty and social exclusion. The instrument should also require the European Commission's and SPC's involvement with regard to developing and monitoring qualitative and quantitative indicators, as well as work towards developing cross-country comparable reference budgets. Monitoring and evaluation could be done by using the European Semester framework.

Even when introduced gradually and flexibly, from certain Member States the introduction of decent MIS will require a considerable effort in terms of redistribution. It is important that Member States – especially those for that face particular difficulties to reach the objective – could receive **financial support** for the implementation of the legal instrument on adequate minimum income. Such funding could be provided through the EU structural funds, particularly the ESF+, as this instrument aims at enhancing the cohesion of the Member States, or through the Recovery and Resilience Facility that supports the Annual Sustainable Growth Strategy. Alternatively, a new funding instrument could be envisaged.

A robust **non-regression clause** must be included in view of existing MIS, to avoid that the implementation of the Framework Directive would result in a decrease of existing benefit levels or a degradation of other criteria of Minimum Income Schemes which are already in place in a Member States.

In case of a framework directive, the directive should also contain a requirement for **independent bodies and procedures** to adjudicate in cases of dispute between the administration and recipients. This concretely implies the possibility of appeal against decision of social administration. As such the directive would comply with the right to effective remedy (Article 47 CFREU).

11 CONCLUSIONS

There are many important **reasons** for the European Union to engage in the development of a legally binding instrument in support of adequate, accessible and enabling minimum income schemes in the Member States at this time. Nearly 30 years on from the 1992 Council Recommendation, the current political context, combined with the challenges resulting from the COVID-19 crisis, present new

opportunities to take a new step in the process of EU support to decent income. The reasons for EU intervention are **normative, political and functional**, and relate to the human and social rights commitments of the EU and its Member States but also to the need to ensure an equal balance between economic and social integration at EU level. A binding EU instrument on decent minimum income would reduce the existing disparities among Member States, help to ensure social cohesion and upward social convergence and support internal demand by securing people a decent income. It would give a boost to the legitimacy of the EU by securing people's social right to an adequate income and by giving concrete shape to the EPSR.

The most appropriate **legal base** for such an instrument would be article 153 (1) (h) TFEU, in combination with article 175 TFEU. The preferred instrument would be that of a directive setting a framework for the minimum income schemes in the Member States (therefore called 'a **framework directive**'), rather than a Council Recommendation, since the discouraging results in fighting poverty by ensuring decent minimum income for all those in need until now show that soft law instruments and policy coordination mechanisms have been insufficient to give enough nudge to Member States to make substantial progress. The directive would provide a framework for gradual improvement of MIS in terms of adequacy, accessibility and its enabling character, whilst fully respecting the principles of proportionality and subsidiarity, for EU support to Member States' action in this field.

In order to strengthen the feasibility of an EU framework directive, important issues must be solved with regard to the **financial cost of implementation**, especially for certain 'poorer' countries. Therefore, the EU framework directive must be linked to EU funding, such as the Cohesion Funds and in particular ESF+, the Recovery and Resilience Facility or to new specific EU funding in support of adequate and accessible MIS. At the same time, the European Semester process and in particular Country Specific Recommendations should be used, to support to **reform tax/benefit systems** in the Member States, in order to reduce poverty and inequality, through increased tax collection/and progressivity.

It is important to conceive the efforts to put into place an EU framework directive on MIS, in relation to the broader picture of **decent incomes for all**. This means that the directive must be brought in line with the future EU initiative that will be taken on decent **minimum wages**. In fact, research (Cantillon et al, 2015, Collado et al, 2019) shows that low minimum wages act as a glass ceiling for benefits such as minimum income. There should be a clear positive hierarchy between the level of minimum wages and of minimum income, to encourage reintegration in the labour market for those people who are capable to work, in line with the active inclusion strategy, whilst ensuring a life in dignity for everybody. To avoid the fact that low minimum wages would block efforts to ensure decent minimum income levels, minimum wages in certain Member States should be gradually increased. The 1992 Council Recommendation on sufficient resources as well as the 2012 ILO Convention 202 on national floors for social protection make it clear that minimum income is considered as the **basic level of social protection systems**, on top of which other social protection benefits are defined for people in need of support. Therefore, the establishment of an EU framework directive on minimum income must be seen as a contribution to the assessment of the quality and generosity of social protection systems of the Member States.

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ANNEX 1

Income distribution, required 'internal' solidarity effort vs. existing pan-European solidarity.

	<i>Poverty Threshold (a)</i>	Top 1st quintile (b)	Top 4th quintile (c)	Effort 60% (d)	Effort 40% (e)	Structural Funds (f)
Romania	2.122	2.055	5.764	4.0%	1.3%	3,0%
Bulgaria	3.528	3.439	9.239	3.6%	0.9%	3,2%
Latvia	3.580	3.491	10.133	4.6%	1.2%	3,5%
Lithuania	3.615	3.574	10.322	3.3%	1.0%	3,4%
Hungary	4.011	4.699	9.423	1.3%	0.2%	3,2%
Estonia	4.490	4.846	12.237	2.8%	0.7%	3,3%
Poland	4.540	4.762	11.755	2.3%	0.5%	3,4%
Slovakia	4.983	5.933	11.934	1.7%	0.4%	3,3%
Czech Republic	5.793	7.239	13.602	1.1%	0.2%	3,3%
Portugal	5.838	6.138	15.557	2.4%	0.6%	1,8%
Greece	7.559	7.528	19.590	3.0%	0.8%	1,3%
Spain	7.995	7.831	21.163	3.8%	1.4%	0,5%
Malta	8.007	8.688	20.061	1.9%	0.4%	2,4%
Slovenia	8.227	9.655	19.041	1.7%	0.3%	1,7%
Italy	9.119	9.477	23.119	3.0%	0.9%	0,3%
Ireland	9.707	10.451	26.220	1.9%	0.5%	0,1%
UK	10.241	10.760	27.205	2.6%	0.7%	0,1%
Finland	10.275	11.710	23.869	1.8%	0.3%	0,1%
Belgium	10.398	11.404	24.821	1.9%	0.4%	0,1%
Germany	10.634	11.734	26.430	2.5%	0.6%	0,1%
France	10.704	12.176	26.448	1.5%	0.3%	0,1%
Denmark	10.713	12.256	24.320	2.7%	1.0%	0,0%
Sweden	10.897	12.416	24.943	2.5%	0.8%	0,1%
Netherlands	11.293	13.455	26.800	1.6%	0.5%	0,1%
Austria	11.451	13.318	27.201	1.6%	0.3%	0,1%
Cyprus	11.840	12.630	29.433	2.1%	0.3%	0,6%
Luxembourg	16.048	17.461	39.905	1.6%	0.3%	0,0%

(a) poverty threshold at 60% of median equivalent disposable income, in PPP, EU-SILC 2010

(b) first quintile top cut-off point, equivalent disposable income, in PPP, EU-SILC 2010

(c) fourth quintile top cut-off point, equivalent disposable income, in PPP, EU-SILC 2010

(d) average distributive effort required to eliminate poverty risks below 60% threshold, expressed in non-equivalent income and as a percentage of the total disposable income, EU-SILC 2009

(e) average distributive effort required to eliminate poverty risk below 40% threshold, expressed in non-equivalent income and as a percentage of the total disposable income, EU-SILC 2009

(f) importance of the Structural Funds (2006-2013), on a yearly basis in % of GDP (David Allen, 2010, pp. 246-247)

Source: Vandenbroucke et al (2013) p.303

LIST OF ABBREVIATIONS

AROP	at-risk-of-poverty
AROPE	at-risk-of-poverty-and social-exclusion
AT	Austria
BE	Belgium
BG:	Bulgaria
BMAS	German Federal Ministry of Labour and Social Affairs
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the EU
CY	Cyprus
CZ	Czech Republic
CoE	Council of Europe
EAPN	European Anti-Poverty Network
ECSR	European Committee of Social Rights
EESC	European Economic and Social Committee
EMIN	European Minimum Income Network
EMU	Economic and Monetary Union
EPAP	European Platform Against Poverty and Social Exclusion
EPSR	European Pillar of Social Rights
ES	Spain
ESC	European Social Charter
ESF	European Social Fund

ESSPROS	European System of integrated Social Protection Statistics
ESU	European Social Union
ETUC	European Trade Union Confederation
EU	European Union
FEAD	Fund for European Aid for the Most Deprived
FI	Finland
FR	France
ILO	International Labour Organisation
IT	Italy
LT	Lithuania
LV	Latvia
MI	Minimum Income
MIS	Minimum Income Scheme
MISSOC	Mutual Information System on Social Protection
NL	the Netherlands
Social OMC	Open Method of Coordination for Social Protection and Inclusion
RB	Reference Budget
RO	Romania
SI	Slovenia
SPC	Social Policy Committee
TEU	Treaty of the European Union.
TFEU	Treaty on the Functioning of the European Union