Republic of Bulgaria
ECONOMIC
AND SOCIAL COUNCIL

OPINION

of

THE ECONOMIC AND SOCIAL COUNCIL

on

THE SOCIAL DIMENSIONS OF THE TREATY OF LISBON

(own-initiative opinion)

ESC/2/020/2010 – Commission on Social Policy
Commission on International Cooperation and European Integration

The 2010 action plan of the Economic and Social Council envisions the elaboration of an own-initiative opinion on the topic of: "**The Social Dimensions of the Treaty of Lisbon**."

With his Letter № 023-РД-06/08.02.2010, pursuant to Art. 15, Paragraph 1, Item 9 of the Regulations of the Economic and Social Council, The Chairman of the Economic and Social Council, Professor Lalko Dulevski assigned the elaboration of the opinion to the Social Policy Commission together with the Commission on International Co-operation and European Integration.

Pursuant to the decision issued at the joint meeting of both Commissions – Mrs. Ekaterina Ribarova, Member of the Council's Second Group: Organizations Representing Workers and Employees, was appointed rapporteur on this opinion.

Associate Professor Plamenka Markova from the Institute for Legal Studies at the Bulgarian Academy of Sciences was involved to participate in the preparation of this opinion.

At their joint meeting, held on 27 October 2010, Social Policy Commission together with the Commission on International Co-operation and European Integration discussed and approved the draft of this opinion and submitted it for discussion at a plenary session of the Economic and Social Council.

At their plenary session, held on 02 November 2010, with the participation of Staffan Nilsson – the President of the European Economic and Social Committee – Economic and Social Council approved this opinion.

TABLE OF CONTENTS

List of Abbreviations

EECT – Treaty establishing the European Economic Community
TEU – Treaty establishing the European Union
TEU-A – Treaty establishing the European Union – Version of the Treaty of Amsterdam
TEU-M – Treaty establishing the European Union – Version of the Treaty of Maastricht
TEU-N – Treaty establishing the European Union – Version of the Treaty of Nice
TEAEC – Treaty establishing the European Atomic Energy Community
TFEU – Treaty on the Functioning of the European Union
SEA – Single European Act
EEC – European Economic Community
EEA – European Economic Area
EESC – European Economic and Social Committee
EC – European Commission
ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms
EC – European Community / Communities
EP – European Parliament
ESC – Economic and Social Council of Bulgaria
TEU-L – Treaty establishing the European Union – Version of the Treaty of Lisbon
ILO – International Labour Organization
NA – Bulgarian National Assembly
OMC – Open Method of Coordination
UN – United Nations Organization
CFSP – Common Foreign and Security Policy
CE – Council of Europe
ECJ – Court of Justice of the European Union

1. Conclusions and recommendations

1.1. Main theses, observations and conclusions

1.1.1. The Treaty of Lisbon sets new social objectives and expands, although insufficiently, the social competences of the EU. New instruments of social policy are introduced or endorsed. The role of national parliaments and that of social dialogue in taking decisions concerning social issues is expanded. This provides new opportunities for individual Member States to influence the process.

1.1.2. The effect of the Treaty is not entirely straightforward. On the one hand, it envisions new rights, policies and mechanisms; on the other, it retains a number of restrictions, e.g. adopting resolutions with qualified majority vote, imposition of safety measures on Member States. This may lead to complex and sometimes potentially confrontational relations between Member States while discussing common policies and taking decisions in the field of social policy.

1.1.3. As a rule a considerable part of Bulgarian citizens are not well familiar with the content of the **Charter of Fundamental Rights of the European Union**. This also applies to other EU documents treating fundamental rights such as Directives, the Charter of the Fundamental Social Rights of Workers of 1989, as well as to UN, ILO, CE and national documents treating human rights – from the Constitution of the Republic of Bulgaria to a diversity of secondary legislation acts.

1.1.4. The implementation in Bulgaria of the **Charter of Fundamental Rights of the European Union**, which forms an integral part of the Treaty of Lisbon, cannot be evaluated unilaterally. The achievements on the level of national legislation are relatively good and most fundamental rights, which have previously existed in EU directives, have been transposed into Bulgarian legislation. At the same time, there are considerable difficulties with the implementation and the control of the implementation of these rights, especially those regulating labour and social issues.

1.1.5. The realization in Bulgaria of additional new EU objectives – especially combating social exclusion, promoting social justice and protection, gender equality, solidarity between generations, child rights protection, etc. – faces a number of difficulties. These difficulties are mainly of financial nature but also involve decades of malpractice and the existence of firmly rooted inhibitions and value systems.

1.1.6. In Bulgaria there is an accumulation of problems and society is constantly confronted with new challenges in areas for which the Treaty of Lisbon proposes new EU policies, such as healthcare, long-term care, pensions, and social exclusion. These are mainly areas where the fall-back is not only due to difficulties in financing existing policies and activities, but where there are

problems with the management of resources, lack or insufficiency in the motivation for work of the persons employed in these sectors, lack of innovation and unwillingness to adopt contemporary good practices.

1.1.7. Many of the problems arising from the **increased mobility** and the relatively **limited regulation** of its social impact at the European level affect Bulgaria where labour and social standards are quite low. Bulgaria is a country with low wages, the cost of labour is also low, the qualification of the workforce is decreasing due to various reasons related mainly to the inability of general and professional training systems to adapt adequately to the market economy, and to the emigration of economically active population. These problems are currently a source of discontent for Bulgarian citizens and may in future cause controversies with other Member States.

1.1.8. Bulgarian migrants continuously move to other Member States and more and more often encounter problems with the national social insurance systems. Moreover, not all migrants work under conditions adequate to the respective national social and labour standards, and many are employed in the informal sector.

1.1.9. So far public institutions in Bulgaria do not demonstrate their clear positions on common European policies – especially with respect to the energy policy and its social dimensions, to the policy for economic and social cohesion, to social impact of the free movement of services, as well as to other concrete policies on social issues.

1.1.10. The new role of the institutions in forming EU policies requires **more active participation of Bulgaria's national parliament – the National Assembly** as well as Bulgarian Members of the **European Parliament** in forming common opinions especially concerning the social and economic dimensions of the European energy policy, economic and social impact of climate change, the social impact of the free movement of services of public interest, the European regional policy, the economic and social cohesion policy, and public healthcare.

1.1.11. Although complaints concerning Bulgaria have been already filed with the ECJ, Bulgarian information sources do not cover sufficiently the progress of these proceedings, especially those involving social issues.

1.2. Conclusions and recommendations

1.2.1. With a view to improving the implementation of the fundamental rights of the EU citizens, **ESC advances the following general proposals**:

- The legislative and the executive powers together with the social partners and civic organizations should discuss and suggest strategies to raise citizens' awareness of EU fundamental rights stipulated in the Charter;

- National legislation should be examined and proposals for improvements should be formulated aiming to bring it fully in line with EU legislation and include exhaustively all fundamental rights, especially in the area of labour and social policy;

- Statutory mechanisms for the implementation, especially for exercising control on the implementation, of fundamental rights, as well as the sanctions imposed in case of infringement, should be analyzed and improved or replaced with new mechanisms;

- Existing procedural mechanisms for resolving court disputes concerning fundamental rights should be reviewed and possibly improved;

- Public authorities together with civic organizations should take action to increase public awareness concerning the practice of the ECJ on fundamental rights;

- Improved mechanisms should be discussed and proposed for the participation of social partners and other civic organizations in the preparation and implementation of regulations on fundamental rights in the areas of economic, labour and social policy, as well as in controlling compliance with them.

- The national strategy of the Republic of Bulgaria and the mechanisms for interaction with other Member States should be improved with respect to free movement within the EU and EEA, including common policies, social consequences, and the protection of fundamental rights;

- Social partners and civic organizations should discuss and adopt similar mechanisms for coordination with the organizations of other Member States, including to improve the **coordination between ESC and the European Economic and Social Committee and the national councils of other Member States** in the context of implementing fundamental economic, social and labour rights.

1.2.2. With a view to realizing the social objectives of the new Treaty of Lisbon at the national level **ESC proposes several fundamental measures** which should be undertaken by the state together with social partners and civil society:

- The impact and social dimensions of each new legislative act, both at the national and at the European level, should be analyzed better and assessed in advance and the opinions of the social partners and civil society should be taken

into consideration. The social consequences of legislative acts should be assessed on a regular basis;

- The possible impact of social policy on the economic development and competitiveness of the country should be analyzed by means of public discussions. Possibilities for rethinking current policies and mechanisms for the development of human capital should be explored in the context of the important impact of the quality of human resources on the competitiveness and economic growth, employment, social inclusion, improvement of the scope and observation of fundamental rights and equal opportunities, etc.;

- Public administration and organized civil society should explore new solutions for improving the balance between economic and social policy at the national level, as well as the solidarity in the improvement and implementation of EU policies;

1.2.3. **ESC holds** that Bulgaria's more serious commitment to European social norms requires more active participation of the structures of civil society in **an open method of coordination of current as well as future social policy**.

1.2.4. **ESC insists** that the Bulgarian state should undertake more effective measures and policies for solving the problems connected with the **social insurance of migrant workers and self-employed persons and their families**, especially with respect to problems arising from safety procedures employed by some Member States. ESC holds that the problems faced by migrants – employees or self-employed persons – should be addressed by the policies and initiatives undertaken by social partners – employer organizations, labour unions, and organizations of self-employed persons, as well as by civil society as a whole.

1.2.5. **ESC holds** that the majority of the problems arising from the increased mobility in the EU should be further discussed at the national level so that a **better balance of interests** is achieved and more competent opinions are expressed at the European level through the public institutions and the structures of civil society. Such discussions should focus on the legal protection of people in atypical employment, minimal wages, social insurance systems in the context of free movement, improvement of social and demographic policies, etc.

1.2.6. **ESC expects** Bulgaria to present clearer and more reasoned positions in EU decision-making processes in the field of social policy, as well as to encourage and if possible participate in initiatives of enhanced cooperation initiatives between Member States in the field of social policy.

1.2.7. With respect to the new role of institutions, **ESC holds** that the coordination between the National Assembly and Bulgarian civil society can be improved by intensifying the cooperation between the National Assembly and

ESC, by expanding the scope of issues discussed, by creating consultancy committees at the National Assembly, as well as by direct contact with individual organizations. ESC also holds that there is room for more intense contacts and consultation between Bulgarian MEPs and Bulgarian members of the European Economic and Social Committee. This is very important in the context of formulating EESC's opinions preceding debates in the European Parliament and the discussions of the Council of Europe.

1.2.8. **ESC proposes** to the Bulgarian government to provide for the participation of ESC members in consultative bodies that define the country's position on European policies.

1.2.9. **ESC proposes** to the Bulgarian government, after holding consultations with social partners and other civic organizations as well as a public discussion on the matter, to support the possible signing of a **Statement for balance between economic freedoms and fundamental social rights in the context of social progress as an Annex to the new Treaty**.

1.2.10. **ESC proposes** to the Bulgarian government to organize and conduct, by means of the respective executive bodies, including regional administrations, a National Campaign for Awareness of the Fundamental Rights of EU Citizens.

1.2.11. **ESC accepts** to undertake its own information campaign for raising awareness of the social and economic dimensions of the Treaty of Lisbon and the Charter of Fundamental Rights. This will include independent initiatives as well as participation in the common policy of EESC, preparation of proposals to EESC of special measures concerning Bulgaria, and/or international projects involving the participation of Bulgaria.

2. **Introduction and general context**

On 1 December 2009 the Treaty of Lisbon came into force. It will be remembered as the longest discussed treaty (nine years) since the beginning of European integration which started in the 1950s. Its first version was the Treaty establishing a Constitution for Europe but its rejection by two founding Member States, as well as the threat of rejection by others, necessitated the redrafting of the document as a new treaty. Some of the articles that paved the way to further centralization (federalization) of the European Union, and were disliked by most of the opponents of the Constitutional Treaty, were removed. Unfortunately, a significant part of the project for Constitution – the Charter of Fundamental Rights of the European Union – was removed from the main text, but it formed a separate document which came into force together with the Treaty of Lisbon on 1 December 2009. Nevertheless, the Charter of Fundamental Rights of the European Union functioned for a while as the apple of discord due to the resistance of several Member States to sign and ratify it. Apparently, citizens' fundamental rights in all their aspects still cause controversy among Member

States – especially when the operation of the Charter in a pan-European context is concerned. Another achievement of the Treaty of Lisbon is that it states the intention of the European Union to join the **European Convention for the Protection of Human Rights and Fundamental Freedoms** – although all Member States have already done this individually (a precondition for their membership in the Council of Europe).

The Treaty of Lisbon amends the EU and EC treaties without replacing them. The title of the Treaty establishing the European Community is replaced by Treaty on the Functioning of the European Union (TFEU).[1] It provides to the EU the legal framework and the instruments needed for the achievement of the following objectives:

2.1. A more democratic and transparent Europe, with a strengthened role for the European Parliament and national parliaments, more opportunities for citizens to have their voices heard and a clearer sense of who does what at European and national level. In this context there are the following amendments:

- The European Parliament is provided with important new powers regarding EU legislation, the EU budget and international agreements. In particular, the increase of co-decision procedure in policy-making ensures that the European Parliament is placed on an equal footing with the Council, representing Member States, for the vast bulk of EU legislation;

- National parliaments have greater opportunities to be involved in the work of the EU, in particular thanks to a new mechanism to monitor that the Union only acts where results can be better attained at EU level (subsidiarity). Together with the strengthened role for the European Parliament, it will enhance democracy and increase legitimacy in the functioning of the Union;

- A stronger voice for citizens: thanks to the Citizens' Initiative, one million citizens from a number of Member States have the possibility to call on the Commission to bring forward new policy proposals;

- The relationship between the Member States and the European Union become clearer with the categorization of competences;

- The Treaty of Lisbon explicitly recognizes for the first time the possibility for a Member State to withdraw from the Union.

2.2. A more efficient Europe, with simplified working methods and voting rules, streamlined and modern institutions for a EU of 27 members and an improved ability to act in areas of major priority for today's Union:

[1] Cf. Protocol 1, which amends the Protocols appended to TEU, TEC and TEAEC.

- Effective and efficient decision-making: qualified majority voting in the Council is extended to new policy areas to make decision-making faster and more efficient. From 2014 on, the calculation of qualified majority will be based on the double majority of Member States and people, thus representing the dual legitimacy of the Union. A double majority will be achieved when a decision is taken by 55% of the Member States representing at least 65% of the Union's population;

- A more stable and streamlined institutional framework: the Treaty of Lisbon creates the function of President of the European Council elected for two and a half years, introduces a direct link between the election of the Commission President and the results of the European elections, provides for new arrangements for the future composition of the European Parliament, and includes clearer rules on enhanced cooperation[2] and financial provisions;

- Improving the life of Europeans: the Treaty of Lisbon improves the EU's ability to act in several policy areas of major priority for today's Union and its citizens. This is the case in particular for the policy areas of freedom, security and justice, such as combating terrorism or tackling crime. It also concerns to some extent other areas including energy policy, public health, civil protection, climate change, services of general interest, research, space, territorial cohesion, commercial policy, humanitarian aid, sport, tourism and administrative cooperation.

2.3. A Europe of rights and values, freedom, solidarity and security, promoting the Union's values, introducing the Charter of Fundamental Rights into European primary law, providing for new solidarity mechanisms and ensuring better protection of European citizens:

- Democratic values: the Treaty of Lisbon details and reinforces the values and objectives on which the Union is built. These values aim to serve as a reference point for European citizens and to demonstrate what Europe has to offer its partners worldwide;

[2] As a special procedure for controlling the possibility for the emergence of situations impeding the implementation of the Treaty of Amsterdam, the rules for enhanced cooperation were introduced and never used during the first years of their existence. These provisions were expanded and set down in comprehensive sections of the Treaty of Nice, comprising the Common Foreign and Security Policy (CFSP). The modified procedure of Member States' right to veto the procedure of enhanced cooperation is replaced by TEC with suspending veto: every national government may demand from the Council to take decisions only after the European Council has approved them with qualified majority, except for the areas that fall under the exclusive competence of the European Council as well as with respect to defence or military matters. Moreover, the number of participating Member States is reduced to eight. Some euro-critics see in enhanced cooperation a legal footing for splitting up the Union into groups of Member States. Such a group if powerful enough to pass majority votes and adopt decisions may manage the EU without consulting other Member States. Others see in enhanced cooperation an opportunity for more flexibility.

- Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force. It concerns civil, political, economic and social rights;

- Freedom of European citizens: the Treaty of Lisbon preserves and reinforces the "four freedoms" and the political, economic and social freedom of European citizens.

- Solidarity between Member States: the Treaty of Lisbon provides that the Union and its Member States act jointly in a spirit of solidarity if a Member State is the subject of a terrorist attack or the victim of a natural or man-made disaster. Solidarity in the area of energy is also emphasized;

- Increased security for all: the Union gets an extended capacity to act on freedom, security and justice, which brings direct benefits in terms of the Union's ability to fight crime and terrorism. New provisions on civil protection, humanitarian aid and public health also aim at boosting the Union's ability to respond to threats to the security of European citizens.

24. Europe as an actor on the global stage. The Treaty of Lisbon gives Europe a clear voice in relations with its partners worldwide. It harnesses Europe's economic, humanitarian, political and diplomatic strengths to promote European interests and values worldwide, while respecting the particular interests of the Member States in Foreign Affairs.

A single legal personality for the Union will strengthen the Union's negotiating power, making it more effective on the world stage and a more visible partner for third countries and international organizations.

3. New aspects of social policy within the framework of the Treaty of Lisbon

European integration is a complex and multilayered process and the specific differences between individual policies are very important. The Treaty of Lisbon reforms some area and leaved others practically unchanged.

The following important aspects of social policy laid down by the new Treaty are discussed below:

- common objectives at EU the level
- EU competences in the field of social policy
- available policy instruments;
- decision-making procedures, institutional development and place in the architecture of the Treaty.

3.1. Common objectives at the EU level (including new aspects within the framework of the Treaty of Lisbon)

In the Treaty of Rome signed in 1957 social policy was considered adjunct to economic policy and depends heavily on it. It is left to the competences of the Member States. At this stage of the development of EU social policy there are only a few common objectives:

- non-discrimination of workers regarding employment, remuneration, other working conditions, and working hours (Art. 48 of EECT);

- Social security for migrant workers and their dependants (Art. 51, EECT);

- Promotion of improved working conditions and improved standard of living for workers (Art. 117, EECT);

- Promotion of close cooperation between Member States in the social field, particularly in matters relating to: employment, labour law and working conditions, social security, the right of association, and collective bargaining between employers and workers (Art. 118, EECT);

- Equal pay for men and women (Art. 119, EECT) and maintaining the existing equivalence between holiday payment schemes (Art. 120, EECT).

In the Single European Act of 1986 Member States set the additional common objectives for improving and harmonising the rules for *safe and healthy working conditions for workers* (Art. 118 a, EECT); enhancing the *dialogue between employees and employers/management* (Art. 118 b, EECT), and strengthening *economic and social cohesion* (Art. 130 a, EECT).

In the Treaty of Maastricht of 1992 the objectives are extended with promoting social progress (Art. B, TEU), a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity among Member States (Art. G, TEU)

The Treaty of Amsterdam of 1997 included the additional objective to encourage *coordination of national employment policies* in order to increase their efficiency by means of developing a *coordinated employment strategy* (Art. 3, TA).

The Treaty of Lisbon enlarges and regroups social objectives in Art. 3. It stipulates that the EU will promote the well-being of its peoples (Art. *3.1) and* will work *for the sustainable development of Europe, based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.* Competition here is just an attribute to the social market economy. Conversely, the Treaty of Nice, which

was in force up to the end of 2009, stresses the role of the internal market based on the principles of the open economy. The Treaty of Nice refers to "*high level of employment*" instead of "*full employment.*"

Additional new social objectives are to *fight against social exclusion and discrimination*, promote *social justice and the equality between men and women, and solidarity between generations and protect children's rights*, as well as *encourage economic, social and territorial cohesion* and *solidarity* among Member States (Art. 3.3 TEU).

Another innovation is the explicit anchoring of *social partners and the social dialogue* in primary legislation, in the Chapter on social policy, Art. 152, TFEU.[3] Until the coming into force of the Treaty of Lisbon, the Treaty of Nice in its chapter on social policy refers to the dialogue between management and labour as an objective[4] but never mentions explicitly social partnership.

The Treaty of Lisbon also contains a provision which has been described in the literature as a horizontal "social clause." Art. 9 of the TFEU expressly states that *in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*

It should be noted that "a high level of employment" is used here instead of "full employment" – used when defining the objectives of the EU in Art. 3 of the Treaty of Lisbon.

3.2. EU competences in the field of social policy

The Treaty of the European Economic Community provides for only one statutory competence of the European Union in the field of social policy and it is related to *social security for migrant workers* (Art. 48). Nevertheless, an extensive interpretation of the Treaty by the European Commission and the ECJ resulted in subsequent social legislation. Starting in the 1970s the EEC regulated general working conditions as well as health and safety at the workplace by means of unanimous Council decisions based on the provisions for subsidiary competence in Articles 100 and 253 of the EECT.

The role of social policy became more important with the adoption of the Single European Act and the inclusion of the new Art. 118 of the EECT (Art. 137 of the Treaty of Nice), which regulates the minimal harmonisation concerning health and safety of workers.

[3] In the draft Constitutional Treaty this provision is included in Chapter 6 dedicated to democracy.
[4] Cf. Articles 136, 138, and 139.

Later, the Treaty of Maastricht and the annexed Agreement on Social Policy (Social Policy Protocol) conferred the EU a wider range of competences in the field of social policy:

- working conditions;

- social security and social protection of workers;

- protection of workers where their employment contract is terminated;

- the information and consultation of workers;

- representation and collective defence of the interests of workers and employers, including co-determination, subject to Art. 2 of the Agreement on Social Policy).

Pay, the right of association, the right to strike and to impose lock-outs were expressly excluded from the scope of the Agreement.

The Treaty of Amsterdam conferred new competences in the are of social policy:

- actions against discrimination (Art. 13 TEU-A);

- combating social exclusion (Art. 132.2 TEU-A)

- the principle of equal opportunities and equal treatment of men and women at work including the right to equal pay for the same job (Art. 141.3 TEU-A)

- coordination of the employment policy (Articles 125-130 TEU-A).

Finally, the Treaty of Nice added measures for the improvement of *transnational cooperation* under Art. 137 of TEU-N as well as for *stimulating measures for combating discrimination* under Art. 13 TEU-N.

The Treaty of Lisbon introduces a systematic differentiation of competences between the EU and the Member States. Social policy becomes both part of the shared competences of the EU only in the areas specified in the Treaty, Art. 4.2.b,[5] TFEU and *supporting, complementing and coordinating competences* – Art. 5.3.,[6] TFEU.

[5] Art. 4 The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (b) social policy, for the aspects defined in this Treaty;

[6] Art. 5.1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro. 2. The Union shall

The Treaty of Lisbon conferred several new additional competences in the field of social policy. In the future the EU will be entitled to adopt provisions regulating the social security not only of migrant workers and their dependants but also of selfemployed migrant workers and their dependants (Art. 48.1 TFEU).[7] In addition, the EU is entitled to adopt social protection measures in order to guarantee the citizens' fundamental right to free movement and establishment on the territory of the EU (Art. 21.3 TFEU).[8] It should also be noted that the Treaty of Nice regulates the right to free movement and establishment, without including provisions regarding social insurance and protection – Art. 18.3.

At the same time the Treaty of Lisbon establishes several "*red lines*" which cannot be transgressed when determining EU competences in the field of social policy. In the process of drafting the initial Constitutional Treaty which was later adopted as the Treaty of Lisbon, the governments of several Member States, such as the UK, Ireland, Spain, Estonia, and the Czech Republic, opposed widening the scope of competences and using qualified majority for voting decisions in the field of social policy. As a compensation for some concessions they had made in the course of the negotiations they insisted that "red lines" are laid down in the Treaty. The UK and Luxembourg demanded the inclusion of a "*safeguard procedure*" concerning the *free movement of workers*. The new Art. 48.2 stipulates that if a Member State claims that draft European legislation would affect important aspects of its national social security system, in particular regarding the field of application, costs or financial structure, or could affect its financial balance, it may request the draft to be referred to the European Council. In this case the *ordinary legislative procedure shall be suspended*. After discussions, within four months of the date of suspension, the European Council shall:

---

take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. 3. The Union may take initiatives to ensure coordination of Member States' social policies.

[7] Article 48 (ex Article 42 TEC) The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and selfemployed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.

[8] *Article 21* (ex Article 18 TEC) 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

a) refer the draft back to the Council which shall terminate the suspension of the ordinary legislative procedure, or

b) refrain from taking any action of request the Commission to present a new proposal; in this case the initially proposed draft shall be deemed rejected.

In addition to this safety procedure regarding migrant workers, the governments of the Netherlands, Austria and Belgium took action which led to the adoption of the Protocol on *Services of General Interest*, annexed to Art. 14, TFEU. Protocol 26 specifies in its Art. 2 that the provisions of the Treaties do not affect the competence of Member States to provide, assign and organise non-economic services of general interest.

3.3. Available policy instruments

The main instruments of EU social policy are the European directives and regulations, so called secondary law. Regulations have direct effect immediately. In general, the directives are not directly applicable, but the ECJ held that some provisions may, exceptionally, to have a direct effect in a Member State, although the latter has not adopted prior act of transposition, where the following conditions:

- the time limit for transposition has expired and it has not been transposed into national legislation or has been transposed incorrectly.

- from the point of view of content the provisions of the directive are unconditional, clear enough and precise,

- the provisions of the directive confer rights to private persons

When all these conditions are met the respective person may use this provision before all public authorities. For public authorities here are considered all public organisations and institutions or organisations and institutions that have been conferred by the state rights beyond those regulating the relationships between private persons (ECJ Decision of 22 June 1989, Case 103/88 Fratelli Costanzo).[9]

[9] The court practice is based mainly on the principle of effective and equal application of Community law. However, according to ECJ settled case law, even where the respective provision of the directive does not confer any rights to private persons and only the first and the second conditions are met, the authorities of the respective Member State are bound to observe the non-transposed directive. The above court practice is based mainly on the enforcement of sanctions for infringement of the Treaty and the respective remedies. Conversely, a private person may not use the direct effect of a non-transposed directive against another private person (the so called horizontal effect) (Cf. settled case law, case Faccini Dori).

The European Community has enacted over 100 directives in the areas of general working conditions, health and safety at work and equality of men and women. The Community has also legislated a few social policy regulations, e.g. in the area of social security for migrant workers. In addition, further non-binding acts have been passed, such as communications and recommendations by the European Commission as well as resolutions and recommendations by the Council.

The Treaty of Lisbon codifies and substantiates three already existing social policy instruments.

First, it substantiates the *Open Method of Coordination* (OMC), which has had a treaty base since 1997, and which has been applied to ever more social policy fields since. The Treaty of Lisbon states more precisely the role of the European Commission within the OMC.[10] It can start initiatives that aim at establishing "guidelines and indicators," exchanging "best practice", and "periodic monitoring and evaluation"

The second policy instrument codified by the Treaty of Lisbon is the *Tripartite Social Summit for Growth and Employment* (Art. 152 TFEU).[11] The bilateral dialogue between employers and employees at the European level has been applied ever since 1985. The Tripartite Social Summit was held for the first time in 2003. It meets at least once a year and consists of the Council Presidency and the two subsequent Presidencies, the Commission and the social partners and aims to ensure effective participation of the social partners in implementing the economic and social policies of the EU.

The third instrument with new explicit treaty base is the *Charter of Fundamental Rights*, which was signed and proclaimed by the presidents of the European Parliament, the Council and the Commission in 2000.

[10] *Article 156* (ex Article 140 TEC): "With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to: employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, the right of association and collective bargaining between employers and workers. To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed. Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee."

[11] *Article 152*: "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue."

Commenting on the Charter requires an overview of fundamental rights in the EU prior to the coming into force of the Treaty of Lisbon

The protection of human rights was on of the main principles of European law even before TEU-L came into force.[12] Art. 6(2) of TEU-N stipulates that the EU will recognise fundamental rights that are based on the cconstitutions of Member States in the way they are guaranteed by the ECHR. This provision was first included in EU primary legislation by means of the TEU-M in 1992, TEU-A of 1997 provided that the jurisdiction of ECJ includes the implementation of Art. 6(2), TEU, with respect to the European institutions (Art. 46(d), TEC). These amendments to the Treaties were the first (incomplete) attempts to codify the doctrine of fundamental rights in the EU which has been gradually developed by ECJ since 1969 until today.

A) Protection of fundamental rights and its relationship with the supremacy of European law

The creation of the doctrine of human rights in the EU is sometimes explained with the desire to protect the *affirmed by sometimes contested supremacy of EU law over national law as well as constitutional provisions regarding human rights*. The essence of this issue is that ECJ cannot demand exclusive implementation of the principle of supremacy by national courts if the acts of European institutions are not subject to judiciary control concerning human rights. In order to reduce the risk for conflict between EU law and national constitutions ECJ has declared that it will be motivated by the constitutional traditions of the Member States. As representatives of academic milieus suggested this means that ECJ will base its practice regarding human rights on the strictest standards and levels of protection used by Member States. Court practice, however, is more often based on the ECHR due to the fact that ECJ sees itself as an instance responsible for determining the autonomous level of protection within the competences of the EU.[13] This approach does not eliminate completely the possibility for discrepancy between national and EU provisions but generally yields good results.

[12] In the context of the EU human rights are often termed “fundamental” rights. There is no conceptual difference between both terms and they are used interchangeably. However, distinction should be made between fundamental (human) rights (not specified in the Treaties) and the fundamental (economic) freedoms (specified in the Treaties). There are authors who see the economic freedoms as human rights, but this opinion is not universally recognised.

[13] The two most important cases concerning EU measures in the area of human rights are C 4/73, *Nold v. Commission*, [1974] ECR 491 and C 44/79, *Hauer*, [1979] ECR 3727 and involve ownership rights.

B) Scope of ECJ's jurisdiction with respect to human rights

It has been considered to what extent ECJ may rule on the human rights aspect of measures undertaken by Member States. Gradually, the Court expanded the scope of its competences adding to the acts of European institutions the acts of Member States when acting as commissioners of EU policies or resolutions or when they base their actions on derogatory rules related to fundamental economic freedoms, such as the free movement of goods. It should be stressed that this is still subject to the condition that these measures fall under the scope of EU law. So far there has been no incorporation of American-style "federal" human rights in the statutory legislation of the EU – if we can use such an analogy. The problem is that the "scope of EU law" is still a rather unclear and amorphous concept which varies with respect to each fundamental right. Moreover, the scope of EU law is expanding rapidly (e.g. the transfer of the policy for granting refuge and visas from the third to the first pillar[14]) and also gradually by means of secondary legislation.

C) Connection with the European Convention on Human Rights and Fundamental Freedoms (ECHR)

ECHR was a main source of EU court practice regarding human rights prior to the coming into force of the Treaty of Lisbon, regardless of the fact that at the time the EU was not yet party to the convention. It should be noted that ECHR does not regulate economic and social rights (the so called "second-generation" rights). Usually, ECJ adheres to the provisions of ECHR as a minimal level of protection and often goes deeper into the court practice of the **European Court of Human Rights**. The objective of ECJ is to avoid discrepancies with Member States that have ratified ECHR.

On the other hand, the European Court of Human Rights refrains from ruling on acts and measures of Member States in the area of EU law pointing to the equivalent protection provided by ECJ.[15] According to some Member States and representatives of the academic community the situation so far is unsatisfactory from the legal point of view (due to the existence of procedural and statutory gaps - *lacunae*) and from the point of view of political trust because all Member States have ratified ECHR. The inclusion of the EU to the Convention necessitates changes in it because so far it has been open only to states.

Following the coming into force of the Treaty of Lisbon the Charter of Fundamental Rights of the European Union acquired legal effect. It is not primary legislation (the way Treaties are) but it has legal effect as part of the Treaty of

[14] Cf. Section IV TEC concerning visas, refuge and immigration. The Court's jurisdiction concerning measures undertaken by Member States are limited, cf. also Articles 68(2) and 64 (1).
[15] The European Court of Human Rights has recently ruled that it may hold Member States accountable for EU measures that remain outside of the competence of ECJ, e.g. on provisions of contracts, Cf. *Matthews v. UK* (1999).

Lisbon. Art. 6 TEU-L stipulated that "the EU respects the rights, freedoms and principles defined in the Charter of Fundamental Rights of the European Union, which shall have the same legal effect as the Treaties. The provisions of the Charter, however, do not expand in any way the scope and areas of competence of the EU stated in the Treaties."

The Charter is one of the detailed acts defining human rights and includes civil, political, social rights, as well as rights related to the environment, culture and consumers. It should be clearly noted that *it binds European institutions and Member States while applying EU law*. It should not be concluded that the Charter changes the competences and functions specified in TEU-L. It is more accurate to say that Charter contains the responsibilities undertaken by Member States before other international organisations – UN, ILO, Council of Europe, etc. or rights that have been regulated in their national constitutions in such a way that they have become more visible and accessible to the citizens (rights-holders).

The rights, freedoms and principles contained in the Charter should be interpreted subject to the general provisions set down in Chapter VII, concerning its construction and implementation, and the explanations in the Charter referring to the sources of these provisions.[16] The Charter introduces new rights, including basic social rights, in its limited scope of application.[17] These rights entail e.g. the freedom to choose an occupation and the right to engage in work (Art. 15), equality between men and women in employment, work and pay (Art. 23), the right of collective bargaining and action (Art. 28), etc.

Fundamental rights in the area of employment and industrial relations are not identical across Member States. The different historical, legal and industrial traditions of different Member States have brought about differences in national legal systems and this stresses the need for standardisation of fundamental rights. Despite national differences, the analysis of fundamental rights in Member

[16] Article 53 Level of protection: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[17] Article 51. Scope: 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

States could yield a comprehensive list of these rights which ECJ could adopt as common rules for all Member States.

Moreover, ECJ may use a number of international sources of fundamental labour rights. The Social Charter of the Council of Europe is referred to in the founding Treaties. The ratification of the ILO Convention, especially the eight fundamental instruments refered to in the 1998 Declaration: e.g. Convention № 87 of 1948 (Freedom of Association and Protection of the Right to Organise) and Convention № 98 of 1949 (Right to Organise Collective Bargaining), Conventions 100 and 111 in the area of discrimination at the workplace, pay, Conventions prohibiting forced labour and child labour, created a common ground for human rights in the are of labour in all Member States,

While Member States declare by signing the Treaty of Lisbon that they accept the freedom to move and free competition, the Charter is the instrument by which the European Union recognises the supremacy of fundamental rights and their central place in the structure and mission of the EU. It also recognises that Member States may have different legal traditions concerning social citizenship which make part of the main constitutional order of the EU.

The fact that the Charter has a real legal status is very important because it will give ECJ the opportunity to take into consideration fundamental social rights in its decisions and thus perform the part of balancing factor.

Social basic rights are alien to some of the existing Member State constitutions, such as Austria and the United Kingdom. One major drawback, however, is that courts (the ECJ and national courts) cannot apply the Charter to laws, regulations or administrative provisions, practices or action in Poland and the United Kingdom. These two Member States chose to “opt out” from the legal applicability of the Charter.[18]

3.4. Decision-making procedures, institutional developments and potential shift between the “pillars”

Until the adoption of the Single European Act (SEA), social policy acts could only be agreed on *unanimously*. The SEA introduced qualified majority voting for the harmonisation of health and safety conditions at work and provided for the cooperation procedure.

[18] Article 1.1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

The Treaties of Maastricht and Amsterdam extended qualified majority voting to increasingly more areas and the co-decision procedure replaced the cooperation procedure in many areas. However, the following four areas still require unanimity:

- social security and social protection of workers;

- protection of workers where their employment contract is terminated;

- representation and collective defence of the interests of workers and employers, including co-determination;

- conditions of employment for third-country nationals legally residing on the territory of the EU.

There was a vivid debate among Member States whether the EU should employ a more active stance in social policy, specifically whether all areas in Article 137 TEC-N should be decided with qualified majority voting. However, no consensus was reached on these issues. The reluctance to promote a more pro-active EU social policy is mirrored in the Treaty of Lisbon, in which the four fields mentioned above still need unanimity. The only change of decision mode in the social policy area concerns social security for migrant workers prescribed in Art. 48, TFEU. Here, unanimity in the Council was changed to qualified majority voting. However, a safeguard procedure was inserted in order to curtail this innovation, similar to judicial cooperation in criminal law, but without the option of enhanced cooperation (for the procedure see footnote 2 above).

In line with the overall strengthening of the European Parliament, the Treaty of Lisbon provides for the cooperation of the EP and the Council regarding new measures and directives in the field of social policy (Art. 153 TFEU). This cooperation takes place in accordance with the *ordinary legislative procedure* (former co-decision procedure) (Art. 294 TFEU). In two areas, the Treaty of Lisbon also provides for the information of the EP without going into detail: agreements between management and labour (Art. 155(2));[19] and social policy coordination (Art. 156 TFEU).[20]

[19] Article 155 (ex Article 139 TEC) 2.Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed. The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

[20] Article 156 (ex Article 140 TEC) With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to: employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of

Lastly, the Treaty of Lisbon specifies the mode for establishing the Social Protection Committee, which has been anchored in primary law since the Treaty of Nice in 2001.[21] The Council decides "by a simple majority" (Art. 160(1) TFEU).

3.5. The importance of the Treaty of Lisbon from the perspective of social policy

3.5.1. The Treaty of Lisbon codifies and normalises a number of already existing practices.

First, the Open Method of Coordination is currently in place in several social policy areas – *health and long-term care, pensions, and social exclusion*. The Treaty of Lisbon codifies *the cornerstones* of these processes, such as guidelines, indicators, best practice, monitoring and evaluation; for social policy (Art. 156 TFEU) as well as for public healthcare (Art. 168 TFEU).

Second, *social dialogue* already takes place at the *EU level*, and the Tripartite Social Summit for Growth and Employment is held every year in spring. The dedication of a particular treaty article to social dialogue and the summit is thus only the formalisation of existing practices.

Third, the new EU competence regarding *social security provisions for self-employed migrant workers and their dependants* (Art. 48 TFEU) codifies the case law of the ECJ, which has found its way into secondary EC law (Cf. Regulation 1408/71).[22]

3.5.2. From a social policy perspective, the assessment of the Treaty of Lisbon is rather ambivalent. On the one hand, it enhances the social dimension of the EU by introducing new elements on different levels: new objectives, new competences, new rights, new contents, and new decision-making modes. Various new and regrouped goals in Article 3 TEU-L make clear that social objectives are being strengthened through the Treaty of Lisbon. There are

---

occupational accidents and diseases, occupational hygiene, the right of association and collective bargaining between employers and workers. To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed. Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

[21] The Social Protection Committee was created informally in 1999 as a group of high-ranking officers. In 2000 its existence was formalised by resolution of the European Council. Cf. /2000/436/EC/

[22] Regulation (EC) № 883/2004 and Regulation (EC) № 987/2009 have entered into force since the beginning of 2010 to replace Regulations (EEC) № 1408/71 and № 574/72.

several signs for this new weight of social policy. Economic, employment and social policy coordination are mentioned for the first time in the same article (Art. 5 TFEU). The current Title XI "Social policy, education, vocational training and youth" is changed to Title X "Social policy". In addition, qualified majority voting for *social security for migrant workers* could mean a smoother passing of new EU laws in this area. The horizontal social clause could mean in practical terms that every new legislative draft has to be checked against social objectives. EU law that is contrary to these objectives could be declared void by the ECJ.

3.5.3. On the other hand, the enhancement of the social dimension is for the most part of a rather symbolic nature and a number of "red lines", which are meant to preserve Member States' control over social protection systems, have been inserted. Decisions in the field of social policy in most cases will still require consensus which means long, difficult and probably not always successful negotiations for the adoption of common resolutions regarding social policy. There are no sufficient possible mechanisms for improving cooperation under Art. 43 TEU-L in order to overcome stagnation in the social area. Concrete instruments to fill broad objectives with life, such as "*full employment*" and "*social market economy*", are missing in the Treaty of Lisbon. It can be assumed that these objectives will be reflected in EU laws one day, but this is far from guaranteed. What is more striking are the "red lines". The safeguard procedure regarding social security for migrant workers could be an instrument to prevent further harmonisation, sealing again the status quo. Furthermore, the protocol on services of general interest could possibly have an effect on the ECJ jurisprudence concerning the intrusion of internal market freedoms into the organisation of the fundamental principles of social protection systems and health systems. However, the protocol does not define services of general interest.[23]

In many areas, it will ultimately depend on the ECJ whether the Treaty of Lisbon means a recalibration or reconciliation of economic and social policy objectives.

3.5.4. In particular, the Charter of Fundamental Rights of the European Union contains many social and labour rights which provide an opportunity for gradual harmonisation of Member States' legal systems in this area. It is known that some of the clauses of the Charter were attacked and individual Member States signed Protocols for its implementation on their territory. Moreover, in the process of preparation of this act in 2000 some of the initial ideas were rejected.

[23] The European Commission defined social services of general interest in two communications (2006, 2007) and the Biennial Report on social services of general interest (2008). The Commission distinguishes between services of general economic interest (telecommunications, electricity, gas, transport, postal services, public service broadcasting, waste management, water supply, waste water treatment) and non-economic services (police, justice, statutory social security schemes). According to the interpretation of the Commission, the latter group of services is not subject to specific EU legislation and is not covered by the internal market and competition rules. However, some aspects of these services may be subject to treaty principles such as non-discrimination (2007: 4-6)

Against this background, it should be remembered that the right to guaranteed minimal income for the citizens of all Member States was one of the central proposals – supported by the European Trade Union Confederation – which were rejected while the final text of the Charter was still taking shape.

Nevertheless, on 20 October 2010 the European Parliament issued a resolution recommending that all Member States should adopt minimal income – one of the most effective means of fighting against poverty. This income should equal 60% of the country's average wage,[24] which means in practice that for each Member State it will be different.

3.5.5. The Treaty of Lisbon received the support of European social partners and the European Economic and Social Committee. The latter initiated discussions in 2007 and 2008 in order to speed up the ratification of the Treaty. According to the Union of Industrial and Employers' Confederations in Europe (BUSINESSEUROPE): "The Treaty of Lisbon provides real opportunities for the EU to develop further the social achievements in full respect of national competences."[25] On the other hand, according to the other main partner – the European Trade Union Confederation (ETUC) – in there Treaty remained unsolved issues, especially the scope of decisions in the field of social policy which mist be made by means of qualified majority. ETUC is also of the opinion that there is a need for drafting a separate document, Protocol on Social Progress, which should find the balance between economic freedoms and social rights.

4. Challenges and problems faced by national policies and legislatures

4.1. General challenges and problems

4.1.1. As it becomes clear from the initial Treaties regulating the European Communities, a division of labour between the national and the supranational levels was intended. During this period – the late 1950s to the early 1980s – the European Communities was expected to play an important role in opening the markets and achieving massive economic growth, so as to produce resources which could be used in the institutionalised transfer of social security provisions, paid by national institutions for social protection. "Keynes at home, Smith abroad," in the apt words of British economist Robert Gilpin describing this liberalism.

4.1.2. This explains the weaknesses in the social provisions laid down in the Treaty of Rome: from the equal treatment of men and women (which was not targeted at providing directly more rights to citizens but rather at providing for

[24] For combating poverty the EU Parliament proposed 60% of average wage for minimum income in EU member states. Press release: http://www.eurparl.europa.eu

[25] Philippe de Buck, Director General of UNICE-BUSINESSEUROPE. Address to the ALDE Seminar on the Social dimensions of the Lisbon Treaty, held on 9 December 2009.

guaranteed levels of payment at European companies) to the coordination of social security regimes. All social provisions ever since contribute to the overcoming of non-tariff barriers to trade and the creation of a more developed economic order by removing the impediments to trade flows. Moreover, this supranational liberal order is based on national policies for "welfare states" which are not limited to the field of supranational social policy. This explains the small number of social provisions in the Treaty of Rome – social policy at that time was responsibility exclusively of the state. In other words this presupposes a clear division between competences at the supranational and national levels and agreed non-intervention in developing the market and its social correction. European law in the field of competition and the four freedoms during this period is trying not to interfere with the sovereignty of the state and the social sphere.

This line is pursued for almost thirty years (from the beginning of the 1950s to the end of the 1970s) – known in the word of the renowned French philosopher Raymond Aron as "the thirty glorious years" of economic growth and welfare state. Economic growth aided by the internal reserves of the already established in many countries market economy, the American Marshall plan, the relatively generous social policy of most EC Member States, as well as that of the European Free Trade Association (EFTA). The situation at the time did not require stricter social norms at the supranational level.

4.1.3. The considerable changes in the economic environment after 1970 until today, including oil crises and the processes of economic globalisation, caused a shift of perspective on the liberal compromise – integrated in the operation system of European Communities. Over the last decades, especially during the period between 2000 and now, the internal market (the free movement of services and people in particular) put to a serious test the social policy and the employment regimes in EU Member States. The last enlargement of the Union conducted at two stages – in 2004 and 2007 – considerably speeded up this process. In addition, there turn out to be even more important demographic factors – processes such as decreased birth-rate, population ageing, increased migration of people from developing countries, situated mostly outside of Europe, to EU Member States, and the more and more clear internal tension of the welfare state.

4.1.4. These as well as many more processes outside of the social sphere necessitated the constitutionalisation of the legal framework of the EU. In particular, the supremacy of European over national law, the direct effect of European statutes made the initial division of labour between national and supranational institutions unnecessary. If community law is more powerful that national law, then the provisions protecting fair competition (Articles 81 and 82 TEC) may indeed pre-empt national social norms provided by national legal systems. Therefore, the activity of the ECJ, unlike national constitutional courts, will be limited to looking for the balance between economic and social interests, in cases when they are set one against the other. This situation became even

clearer with the deepening of economic integration: form the adoption of the White Paper on the internal market to the Single European Act and the Treaty of Maastricht to the European Economic and Monetary Union – the integration of European economies advances with considerable speed with out being flanked by similar processes in the social sphere.

This is why the approval of the initial allocation of competences – the single market to the EC, social policy to the Member States – simply does not work any longer because social policy at the national level is no longer protected from the **overpowering** European economic policy – a situation which was reflected in many rulings of the ECJ.

4.1.5. The main challenge facing the solidary internal/national systems for social protection id the free movement of workers and services. Besides, the ECJ has not always acted as a deterrent and has only occasionally approved some form of immunity of national institutions and practices against the rules of the market. Such decisions can easily be overcome. On the other hand, Memebr States make efforts to mitigate the consequences on their social protection systems and sometimes they agree on changes in European legislation by which *they prevent new social programmes from being introduced*, which can later be contested before ECJ, or even choose *not* to observe certain decisions.

4.1.6. The free movement of people, goods, capital and services discovered many opportunities and brought significant advantages to individual citizens, despite the difficulties encountered by national social protection systems. However, if the increased mobility remains unregulated at the supranational level, it could at some point lead to serious damage to the national systems for social protection and even to their bankruptcy and incapability to cover even minimum requirements or implement even fundamental rights. This warning applies mainly for times of crisis.

This may explain some not very popular in United Europe (but supported at the national level) measures adopted by the governments of older and wealthier Member States, including: the imposition of a lengthy transition period for the free movement of people for newly acceded Member States (within the period 2004-2007) as well as not particularly elegant expulsion of citizens of newly acceded Member States who reside in the respective country for more than 3 months without having a job, a steady income, and often even a home.

This may explain also some of the positions (official and unofficial) as well as the actions or omissions of the EU as a whole and of individual Member States when a country is in need solidary support due to the fact that it is severely affected by the global financial and economic crisis. Such situations put to the test the fundamental principles that provide the groundwork for the European Union. A separate concern is the issue whether difficult situations in particular countries are actually a direct result of the crisis or of other external influences

and to what extent their hardships are the product of local often inadequate interpretation of European norms and most of all the irrational spending of European funds. The latter applies to countries from southern, central and eastern Europe – but also to Bulgaria.

This context throws new light on the ideas for changes in the Treaty of Lisbon that were proposed in October 2010 and involve strengthening of the budgetary discipline of the members of the Eurozone, imposition of sanctions in case of infractions, but also the creation of a crisis fund.

4.1.7. The main objective of a socially stronger Europe should be the development of adequate mechanisms for overcoming negative social consequences of free mobility. On the one hand, there are the *acquis communautaire* – a set of legal norms which have been developed precisely with this aim in mind – to add to the market a little social harmonisation. Some of these norm (such as the directives on atypical employment or against gender discrimination) address new social risks of the post-industrial society. At the same time, the circumstances demand more action which should be undertaken in the context of the present situation (especially taking the crisis into consideration):

- the creation and reinforcement of a common layer of labour-law guarantees, especially with respect to non-standard employment;

- agreement on common definitions and criteria regarding areas such as social security, services of general interest, etc., which are extremely sensitive to the increased mobility – finding the balance between eliminating local immunities and protectionism and retaining legitimate differences between Member States;

- establishment of common rules for minimal wages, on the one hand, and launching an initiative for common guarantee of minimal income, on the other, in order to protect the most vulnerable;

- actualisation and coordination of the social security regime for migrant workers;

- measures for avoiding social dumping.

4.1.8. The European Union should play a significant role in encouraging and facilitating the modernisation of the national social model, mainly in the context of the present demographic situation and deepening changes in family models. This could help meet more calmly the challenges presented by the national characteristics of some Member States. To a large extent this is already happening by means of certain instruments: mainly through the open method of coordination and different social processes.

One of the most recent institutional innovations was the adoption by the European Council of several pacts by which Member States agree to pursue common goals and reinforce their cooperation in the areas of youth policy (2005), equal opportunities and the work-life balance (2006), and family policy (2007). Although a certain amount of disappointment with the efficacy of these "soft" instruments can be observed, they still manage to provide a valuable institutional capital on which it will be possible to build later provided that Member States choose not to follow exclusively the classic community approach of regulation through legal norms.

4. 1.9. The Charter of Fundamental Rights of the European Union does not create any new rights, which means that it coming into force will not necessitate any new amendments to national legislations (including Bulgarian legislation). *The practical mechanisms for the implementation of those rights – especially the implementation of labour and social rights – as well as the control of their implementation* deserve closer attention.

4.1.10. For the first time, however, a judicial body – the ECJ – will be entitled to rule on fundamental social rights, based on the Charter. So far the Court has heard cases on social issues and has registered, howbeit informally, the stronger impact of economic freedoms. Characteristic of this development are cases, such as Laval, Viking, and Rueffert, which were well covered in the literature and show a disquieting tendency for social rights to be neglected by the effect of some fundamental economic freedoms.

It should not be forgotten that EU law is an autonomous legal order which is integrated in the national legal systems of Member States and applies directly without the necessity for any further measures. The reqirements of Art. 5(4) of the Constitution of the Republic of Bulgaria do not apply.

In this context it should be expressly noted that EU legislation is applied by the Bulgarian adjudication system to a limited extent, while the implementation of European norms is an integral part of the country's legal integration. The supremacy of EU law is confirmed in Declaration № 17 attached to the Treaty of Lisbon.

4.1.11. The stipulated in Art. 5 TEC principle of transferred competence retains the general competence in the legal regulation of Member States – leaving to EU institutions the right to step in only in the areas stipulated in the Treaty – including the social sphere. Alongside this, there is a whole system for jurisdiction control – national jurisdictions being entitled to apply EU law, while the supranational courts based in Luxembourg have limited but exclusive competence related mainly to controlling Member States and EU institutions. The lack of hierarchy between these two groups of adjudication systems presupposes the creation of a mechanism of cooperation between them. This mechanism relies on preliminary ruling proceedings which is based on two

principles – uniform implementation and interpretation of EU law and the protection of private persons.

The implementation of EU law by national courts requires excellent knowledge of the *acquis communautaire*. Moreover these norms must be applied in the light of the interpretation attributed to them by the ECJ.[26] This is a direct legal effect of the exclusive competence of ECJ to interpret EU legislation, and its function to guarantee for uniform implementation of EU legislation on the territory of all Member States using the mechanism of preliminary ruling.[27]

Bulgarian courts already use the preliminary ruling system in civil cases. The social partners should also utilize this mechanism when implementing European labour and social law in order to build up court practice based on the correct interpretation of EU law. It should be kept in mind that regarding proceedings on direct claims the interpretation of ECJ will be binding to the respective party. Yet, the monopoly of the ECJ should not be regarded as absolute. It is practically impossible to have every single legal dispute involving interpretation of EU legislation to be referred to ECJ.

The Treaty of Lisbon facilitates the procedures for individuals to contest resolutions of EU institutions, including on issues concerning employment or the social sphere. Pursuant to Art. 263 (4) TFEU Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

These are the most important issues concerning the social dimension of the Treaty of Lisbon. If Bulgarian citizens are better informed about the new aspects of primary EU legislation, this could give them a clearer understanding of the opportunities offered by the European Union as well as of the obligations imposed on them as European citizens.

[26] The legal system of the EU is also affected by changes after the ratification of the Treaty of Lisbon. It will be known as the Court of the European Union and will comprise three types of courts – court, common court, and specialised courts – pursuant to Art. 19 TEU. Cf. also Protocol 3 concerning the Statute of the Court of Justice.

[27] Cf. *Article 267* (ex Article 234 TEC) The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

4.2. Specific challenges and problems faced by social policy and legislature in Bulgaria

4.2.1. Unlike most Member States which made part of the European Union prior to 2004, Bulgaria is a country in which the development of social norms was not only a result of the effort of the national state and civil society. The transition to market economy that started in 1990 and continued for a long and torturous time practically destroyed the old social system, which although it possessed some advantages was not adequate to the market model. At the same time the liberalisation of the market also burst in without being paralleled by an adequate social policy and the creation of structures for social protection. When Bulgaria became a candidate for joining the EU and especially when the negotiations started in 2000, it became necessary to improve the level of working and social standards that were contained in Bulgarian legislation, as well as the quality of state policy in the areas of labour market and the social sphere. Although the first task was realised to a considerable extent, the second one – the policies themselves and their implementation are still far from the average standards for the EU. To Bulgaria membership in the European Union and becoming party to the Treaty of Lisbon are factors for the improvement of social objectives and standards at the national level. Officially, the country accepts all objectives set by the EU and it is logical to assume that it also accepts the new ones. The actual question is whether the state authorities are prepared to find the best means to realise these objectives in practice.

4.2.2. Despite the fact that Bulgaria has been a member of the EU for more than three years now, it still does not participate in the most suitable way in the formulation of common EU policies and the adoption of different decisions. It still does not show any clear national positions; there are no indications to any differences in opinion, or any attempt to defend its interests. This applies to also to policies in the field of the labour market and the social sphere. Bulgaria's hesitation to contradict and show a different opinion, even when this is necessary, could be explained with the fact that the country still feels new in the society of older members, it also feels small, and it knows that does not implement EU regulations in the best possible way, especially with regard to the management of EU funds. Nevertheless, this should not be the cause for such behaviour on part of Bulgaria and should not be the reason for the lack of a more active position, including in the areas of labour law and social policy.

4.2.3. Bulgarian society in general does not familiar with European norms, it does not know the fundamental rights of the citizens, including the rights under the Bulgarian Constitution and national legislation, a number of international acts like those of the UN, ILO, Council of Europe, etc. In this context, it is hardly surprising that most citizen are not familiar with the Charter of Fundamental Rights of the European Union, including labour and social rights stipulated therein. Moreover, there is a tendency to remain aloof and expect protection from an institution, NGO, trade union, etc. without taking any action themselves. Apparently, besides

raising peoples' awareness of their rights there is also need for mechanisms for becoming familiar with them.

4.2.4. Bulgaria is already known for its relatively well organised labour and social legislation but also with serious problems with its implementation, insufficient control and no observable effect. This applies to the informal economy as well as a part of the relatively formal sectors. Unfortunately the crisis provoked an increase in infringing practices or at least circumvention of the norms, regardless of whether the businesses actually have financial difficulties or not. It has become the rule to use so called "flexible" forms such as *official payment of salary at the statutory minimum level and paying the rest under the counter, unofficial agreement for payment of salaries with months of delay*, etc.

4.2.5. As was already noted, the expansion of the free mobility is not accompanied by the creation of necessary new social norms both on the EU and the national level. This explains part of the difficulties related to the practical achievement of social protection in the context of open internal market, free competition and free movement of goods, services, capital and people – which are characteristic of relatively new and poor Member States – irrespective of the fact that the legal system is fully in line with EU requirements concerning labour-law and social norms.

4.2.6. What is particular about Bulgaria is that it is a country with lower cost of labour which is a prerequisite for attracting capital investments, outsourced enterprises, and operations from wealthier Member States. Theses processes, however, are not so frequent in Bulgaria at the moment due to complicated administrative procedures, relatively small market, competition of neighbouring countries, continuous emigration of workforce, especially of qualified workers and specialists, as well as the impact of the global financial crisis. On the other hand, this does not mean that there is no potential for an increase in foreign investment in Bulgaria, especially is the cost of labour remains low. This can have a positive effect: the creation of new jobs; but it can also lead to controversies with the investors both at the national level and at the level of the civil society, especially in their relations with the trade unions. This is why it worth reconsidering the policies of attracting investment and the country's attractiveness also with respect to the social objectives of the Treaty of Lisbon, including attracting investment in new enterprises, green investments, etc.

4.2.7. For the time being Bulgaria is predominantly exporting workforce to other Member States. To a certain extent this relieved the national labour market, especially in the period 2003-2008. At the same time, it causes other problems. The first is related to the social protection of migrants, including self-employed migrants, because many of them are not employed in accordance with respective working conditions and the national standards of the hosting countries. The second problem is related to the "red lines," i.e. the safety clauses, and the possible imposition of more such restrictions especially with respect to the free

movement of people and the social protection of migrants. In this context, it is necessary to reconsider Bulgaria's immigration policy. As the Economic and Social Council has already indicated in its opinion on the National Strategy on Migration and Integration of 2008 – the country's policy in this direction pays more attention to providing qualified workforce from abroad rather than to the protection of working migrants.[28]

4.2.8. In a number of its opinions the Economic and Social Council has commented on the unfavourable state of human resources in Bulgaria and the prospects for developments in this direction.[29] At the same time, Bulgaria makes very little use of EU measures and mechanisms, such as the cooperation and coordination under youth and family policies, as well as the work-life balance, which acquire more importance in the Treaty of Lisbon. Their use could alleviate the consequences of some demographic processes. Concerning the initiatives for importing workforce in order to compensate for existing deficits, the situation with the labour market during the period 2008-2010 showed that such ideas might be a bit too early and that they could be planned better.

[28] Cf. Opinion of the Economic and Social Council on the National Strategy of the Republic of Bulgaria on Migration and Integration 2008-2015.

[29] Cf. **Opinions** of the Economic and Social Council: Strategic Priorities of Bulgarian Economy Within the Europe 2020 Strategy, 2010; The Labour Market Under Financial and Economic Crisis – Problems, Challenges and Opportunities, 2010; National Strategy of the Republic of Bulgaria on Migration and Integration 2008-2015, 2008. **Analysis** of the Economic and Social Council on the Impact on the Crisis on Achieving the Lisbon Employment Objectives, 2009.