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1. The European integration process and the welfare State: some introductory remarks (1)

Europe has been the cradle of the welfare state, as well as the place where the model has found its apex.

The establishment of schemes for the provision of social protection services to the population started at the end of the XIX century with the introduction of compulsory social insurance (2), first in Germany and, then, in other European States (3). After the Second World War the welfare state enjoyed its 'golden age' (Ferrera, 2005), even finding express recognition in the constitutions of some European States (Giubboni, 2003). At that moment, the provision of welfare services was not simply meant to address the huge material needs of peoples that had been badly affected by the war, but it represented a powerful tool to create stronger bonds between citizens and national institutions and, consequently, to uphold European States' democratic credentials.

Therefore, it is far from surprising that European States were extremely jealous to guard their 'social sovereignty' (Latham, 2000) against any external intrusion. These concerns were very much present also during the negotiations leading to the adoption of the Treaty of Rome of 1957 that established the European Economic Community ('EEC'). After an intense debate, the final decision was to exclude almost any possibility for the new subject to intervene in the social field (Scharpf, 2002). The only exception was the conferral to the EEC of those social powers necessary to ensure the functioning of the internal market. This led to a decoupling of the social and the economic spheres, leaving the former in Members States' hands, while opening the latter to the intervention of the EEC. The compromise embodied in the Treaty of Rome was not the consequence of the founding fathers' "social frigidity" lamented by some commentators, but rather a deliberate choice made to safeguard, and even strengthen, national welfare states. The accepted wisdom was that the economic benefits deriving from the establishment of an integrated market would have created the conditions for higher social standards.

The deterioration of the economic situation in the '70s exposed all the flaws of the original compromise, forcing a progressive abandonment of the 'double track' model. However, especially

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1. This paper constitutes the revised version of a presentation given to the Conference "After Lisbon: The Future of European Law and Policy" organized by the Institute of European Law on 25-26 June 2010. The paper is going to be published in Trybus, M. and Rubini, L. (eds.), *After Lisbon: The Impact of the New Treaty on the European Union and the Treaty on the Functioning of the European Union*, Edward Elgar, Cheltenham
 2. Ferrera (2005) points out that "[s]ocial insurance was a real institutional breakthrough in the history of the European nation State".
 3. Such as Austria (1887), Norway (1894); Finland (1895) and Italy (1898).

with regard to welfare services, the changes introduced so far have not substantially altered the imbalance between the social and the economic dimension that has marked the EU institutional setting since the beginning. Member States have fiercely resisted any attempt not only to confer proper redistributive functions to the EU, but even to work out some solutions to better manage the social implications of an integrated market (Ferrera and Sacchi, 2009). EU welfare competences remain fairly limited, as only Member States have the legal and financial capabilities to engage in redistributive actions.

The main challenges to Member States' 'social sovereignty' have taken an indirect form, stemming from the exercise by EU institutions of their economic functions. This is the case, for instance, with the 'infiltration' (Lyon-Caen, 1992) of internal market rules in the social sphere. Since the '90s, the Court has started to assess the compatibility of various aspects of national welfare regimes with the functioning of a competitive internal market. A first strain to national social regimes has come from the application of competition rules ⁽⁴⁾ to public insurance monopolies and to the principle of compulsory membership. Equally troublesome it has been the application of the norms on free movement of labour and services to welfare activities, such as, in particular, medical treatments ⁽⁵⁾. Other battlegrounds are now represented by the application of EU State aid norms to the compensations granted by national authorities to welfare services' providers ⁽⁶⁾, as well as by the recourse to the rules on freedom of establishment against the restrictions posed by Member States to the access of private enterprises to their domestic 'social' markets ⁽⁷⁾.

The interplay between internal market law and the welfare state has been difficult, as the intrusion of these norms is perceived as a force that can encroach upon domestic social solidarity institutions (Joerges, 2009). This type of narrative has gained wide acceptance and tends to overshadow the benefits that market integration has brought to national welfare states, increasing the resources at disposal of public authorities and, especially in some Member States, prompting the adoption of much needed reforms. Besides this, there has been the tendency to depict the Court as a 'market police force', downplaying all its efforts to reach a balanced compromise between the functioning of a competitive internal market and national welfare states.

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4. See, among the others, cases C-159/91 and C-160/91, *Poucet et Pistre*, Judgement of 17 February 1993; case C-244/94, *FFSA*, Judgement of 16 November 1995; case C-67/96, *Albany*, Judgement of 21 September 1999; case C-218/00, *Cisal*, Judgement of 22 January 2002; cases C-264/01, C-306/01, C-354/01, C-355/01, *AOK Bundesverband*, Judgement of 16 March 2004; case C-350/07, *Kattner Stahlbau GmbH*, 5 March 2009.
 5. Case C-158/96, *Kohll*, Judgement of 28 April 1998; case C-157/99, *Smits and Peerbooms*, Judgement of 12 July 2001; case C-385/99, *Müller-Fauré and Van Riet*, Judgement of 13 May 2003; case C-372/04, *Watts*, Judgement of 16 May 2006; case C-444/05, *Stamatelaki*, Judgement of 19 April 2007; case C-211/08, *Commission v. France* Judgement of 5 October 2010; case C-173/09, *Elchinov*, Judgement of 5 October 2010
 6. Case T-289/03, *BUPA*, Judgement of 12 February 2008.
 7. Case C-141/07, *Commission v. Germany (Hospital pharmacies)*, Judgement of 11 September 2008; case C-169/07, *Hartlauer*, Judgement of 10 March 2009.

Even taking a more balanced view of the situation, it can be hardly denied that, at the European level, the reconciliation between the market-inducing and the market-correcting functions is still to be attained. The European integration process is a destabilizing force to this regard, aiming at opening up systems that rest on a logic of closure (Liebfried and Pierson, 1995). As explained by Maurizio Ferrera, redistributive regimes presuppose “the existence of a clearly demarcated and cohesive community, whose members feel that they belong to same whole and that they are linked by reciprocity ties *vis-à-vis* common risks and similar needs” (Ferrera, 2006). Vice versa, the creation of an integrated market at the supranational level rests upon the removal of the restrictions created by spatial demarcations and closures having an eminently national character.

There is, thus, a clear need for a rebalancing of the economic and social dimension within the European legal order, so to buffer the disruptive effects of the internal market on the welfare state. The creation of a “more social EU” (Hatzopoulos, 2005) is a recurring mantra, but, notwithstanding some recent initiatives – such as the ‘Euro 2020’ strategy ⁽⁸⁾ (Frazer and Marlier, 2010) – that, if duly implemented, may help to change the situation, the reforms introduced so far have been less than effective to this end. The present paper seeks to assess if, and how, the Treaty of Lisbon deals with this issue. In the light of the absence of any meaningful reform with regard to EU social competences, the analysis will focus on two aspects. First, the increased relevance conferred to social objectives in the catalogue of aims to be pursued by the EU and, second, the granting of the same legal value as the Treaties to the Charter of Fundamental Rights and to the welfare rights contained therein. The objective will be to examine the content of these innovations, in order to establish their actual impact on the balance between economic and social interests.

2. From ‘undistorted competition’ to ‘a social market economy’: The new Article 3 TEU

2.1 Undistorted competition in the internal market: still an objective for the European Union

A first element of novelty introduced by the Lisbon Treaty that may affect the balance between the economic and the social dimension within the European integration process is the modification of the catalogue of aims to be pursued by the EU. The new Article 3 TEU omits the protection of undistorted competition from the list, while, at the same time, giving unprecedented visibility to a wealth of social objectives and values.

8. Communication of the European Commission (2010), *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, 3 March 2010, COM (2010) 2020. The Strategy has been approved by the Council on 17 June 2010 (EUCO 13/10).

In particular, paragraph 3 of the provision states that:

“the Union shall establish an internal market. It shall 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.” The same paragraph goes on with saying that the EU “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”.

The omission to the establishment of “a system ensuring that competition in the internal market is not distorted” was at first accidental, following the deletion of the entire Article 3 TEC ⁽⁹⁾, but it was eventually endorsed by the French delegation. According to President Sarkozy the omission marks “une réorientation majeure des objectifs de l'Union” ⁽¹⁰⁾, by forcing the European institutions – first and foremost the Commission – to find a new balance between competition and other non-economic objectives (Drexler, 2010).

However, the omission of undistorted competition from the catalogue of aims provided for by Article 3 TEU loses much of its strength if read in conjunction with Protocol (No. 27) on the Internal Market and Competition (hereinafter ‘Protocol’) annexed to the Lisbon Treaty (Säcker, 2008). The Protocol - which has the same legal value as the Treaties ⁽¹¹⁾ - makes clear “that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted”. By reasserting its intimate link with the internal market, the Protocol, notwithstanding the concerns expressed by some scholars (Weitbrecht, 2008; Riley, 2007)⁹, confirms that the protection of undistorted competition remains a fundamental objective of the European Union. The latter is indeed coessential to the establishment of the internal market (Tesauro, 2010; Drexler, 2010), i.e. to the fulfilment of an aim included in the list of Article 3 TEU. Each of these two elements, as emphasised by the then Commissioner for Competition Neelie Kroes after the approval of the Reform Treaty by the European Council, “simply cannot exist without the other” (Kroes, 2007).

9. It must be highlighted that Article 3 TEU functionally corresponds to Article 2 TEC, as it contains a catalogue of aims.

10. *Conférence de presse finale de M. Nicolas Sarkozy, Président de la République, à l'occasion du Conseil européen à Bruxelles, 21-22 Juin 2007.* Available at http://www.ambafrance-au.org/france_australie/IMG/pdf/Conference_de_presse_finale_de_Sarkozy.pdf (accessed 25 September 2010)

11. Art. 51 TEU.

Furthermore, it must be recalled that the Treaty of Lisbon confirms that the realization of the purposes set forth in Article 3 TEU entails the adoption of an economic policy based on the internal market and “conducted in accordance with the principle of an open market with free competition” (12). The Lisbon Treaty reiterates, thus, the importance of these values in the context of the European integration process. A conclusion that is not affected by the fact that the guarantee of the ‘open market economy with free competition’ does not figure in the introductory provisions on the EU objectives, as it was under the Treaty on the European Community, but only in the Title VIII on Economic and Monetary Policy. The clause retains indeed its value as a principle informing the interpretation of all economic relevant EU provisions (Drexler, 2010).

2.2 Internal market and social values: looking for a balance

Having determined that the choice to omit any reference to competition in Article 3 TEU will not do any harm to its status among the EU objectives, it has to be examined whether the changes introduced by the Treaty of Lisbon can still have an impact on the balance between the ‘economic’ and the ‘social’ in the application of internal market rules (Van Raepenbusch, 2006).

It is clear that the drafters of Article 3(3) TEU have been heavily influenced by the debate on the need to avoid that the application of internal market rules would come at the expenses of the functioning of national welfare systems. Dropping competition from the catalogue of aims and putting social objectives on a par with the establishment of the internal market are choices that reflect these concerns.

This state of mind can also help to understand the reference made by Article 3 TEU to the notion of “competitive social market economy”, a catch-all expression used by the drafters to give simultaneous recognition to both the social and the economic interests at stake. In this context, the concept recalls the notion of ‘European Social Model’, which has also been used to try to squeeze into a single word a wide array of diverging interests. As clarified by the European Commission already in 1994, the concept is a blend of different values such as “democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity” (13).

Social market economy is concept that has been coined by a German professor of economics, Alfred Müller-Armack, in 1946, as a third way between *laissez-faire* and planned economy. In the

12. Art. 119 TFUE.

13. White Paper of the European Commission, *European Social Policy. A Way Forward for the Union*, 27 July 1994, COM (94) 33 fin., at 3.

following years it gained wide acceptance on the German political arena, becoming the slogan for the economic policy of the Christian Democratic Party of Konrad Adenauer (Nicholls, 2000). Its realization presupposes a strong intervention by the State, which is called upon to maintain well-structured markets through the building and enforcement of a functioning legal regime, as well as to preserve the social balance through redistributive policies and the provision of adequate welfare services.

The presence of the concept among the aims to be pursued by the EU has been criticized by some commentators. Christian Joerges and Florian Rödl argued that the reference to the 'social market economy' is misplaced as it "is not an objective at all" and that this use of the concept risks depriving it of "a clear sense of meaning" (Joerges and Rödl, 2004). Moreover, they also underlined that the reference to the 'social market economy' made by Article 3(3) TEU stands in a vacuum, for it is not matched with the conferral to the European Union of the necessary means to achieve it. As seen above, the realization of a social market economy rests on the public authorities' capacity to intervene, *inter alia*, in the fields of taxation and social policy. Fields in which the European Union enjoys, even after the entry into force of the Reform Treaty, only a limited set of normative competences.

The latter argument exposes one of the defining features of Article 3(3) TUE, i.e. its predominantly defensive character. Here, social objectives are seen more as a limit to the application of internal market rules ⁽¹⁴⁾, rather than targets to be pursued through the adoption of specific legislative measures. The same goes for the decision to avoid any reference to the protection of competition: the ultimate aim was to reassess the relative character of this principle *vis-à-vis* other conflicting objectives. In other words, these are modifications that seem directed more to the EU Court of Justice than to the European law-making institutions.

It rests to be seen whether these changes can contribute to the quest for a balanced application of internal market rules. A concern that is not alien to the European judges, as demonstrated by their contribution to usher a new concept of 'internal market', no longer limited to the protection of the four fundamental freedoms and undistorted competition, but also encompassing all those values and interests, such as the social ones, that are linked to them (Tesauro, 2010). But the process is far from completed and greater efforts are required to work out a more principled approach. Article 3 TEU may help in this sense, as it gives to social objectives a constitutional status in the European legal order and, hence, a stronger position *vis-à-vis* internal market rules.

14. See, for instance, the reference to social solidarity, mainly in the form of intergenerational solidarity, usually seen as a "buttress" against the application of internal market norms. On this point see, Hervey, 2000.

3. A new Legal Value for the EU Charter of Fundamental Rights

A second innovation introduced by the Lisbon Treaty is the new legal status granted to the Charter of Fundamental Rights. Although the latter is no longer incorporated by text, as it was under the Constitutional Treaty, Article 6(1) TEU expressly gives it “the same legal value as the Treaties” (15). A change that is potentially relevant for the present analysis, as the Charter also contains a number of fundamental social rights, such as, just to mention those most closely related to the welfare state, the right to social security and social assistance, the right to health care or the right of access to services of general economic interest. These rights are contained in the fourth chapter of the Charter, tellingly devoted to the cornerstone of all European welfare systems, i.e. the principle of solidarity (16).

3.1 A lesser status for welfare rights in the Charter?

The incorporation of social rights in the Charter is accompanied by several limitations and caveats that reduce its innovative character and, consequently, its capacity to redress the imbalance between the economic and the social dimension within the European legal order.

The lesser status of social rights *vis-à-vis* civil and political rights within the context of the Charter is enshrined in the distinction between rights and principles. A differentiation purposely introduced to mark the difference between ‘classic’ civil and political rights, on one side, and social and economic ones, on the other. As explained by Lord Goldsmith, who was the UK representative at the Convention on the Charter, the latter, being mere principles, can “give rise to rights to the extent they are implemented by national law or, in the areas where there is such competence, by Community law” (Lord Goldsmith, 2001) (17). Accordingly, they are different from first generation rights, being only policy objectives “usually not *justiciable* individually in the same way as other rights” (Lord Goldsmith, 2001).

These arguments are strongly reminiscent of an approach that received broad support in the past and that found its zenith in the decision taken by the UN General Assembly in 1952 (18) to draft

15. Dougan, 2008 explains such a change as “another victim of the European Council’s decision to abandon the ‘constitutional concept’”: Baquero Cruz, 2008 argues that the demotion of the Charter “to a sort of purgatory” damages the visibility of fundamental rights in the European legal order, which was one of the main reasons behind the very decision to adopt the Charter.

16. On the concept, from a historical and philosophical perspective see Stiernø, 2005. For a legal analysis of the principle, see, *ex multis*, Ross, 2007.

17. *Contra* Kenner, 2003.

18. GA Res. 543 (IV) and 547 (VI) of 5 February 1952, 6 GAOR Supp. No. 20, at 36-37, UN Doc. A/2119 (1952).

two separate human rights covenants ⁽¹⁹⁾. In essence, only civil and political rights were considered to be immediate and absolute, while economic and social rights were held to be just programmatic and not giving rise to immediately enforceable obligations (Vierdag, 1978).

These assumptions have been proven oversimplistic and, in the end, fallacious, failing to recognize that each of these sets of rights gives rise to different types of obligations (Pisillo Mazzeschi, 2009). The decision taken by the Charter's drafters to call back in action the distinction looks, to say the least, outdated. Indeed, it seems to ignore the developments that have occurred over the last two decades on the international stage and that have led to the emergence of a new paradigm, non-hierarchical and based on the principle of indivisibility ⁽²⁰⁾. Furthermore, the approach is at odd with the mandate issued by the Cologne European Council of June 1999 when the decision to draft the Charter was finally taken. On this occasion it was decided that in the process "account should [...] be taken of economic and social rights [...] insofar as they do *not merely establish objectives* for action by the Union" ⁽²¹⁾.

Although far from satisfactory, it can be hardly denied that the approach *à la* Lord Goldsmith, according to which social rights are 'something less' than fully-fledged rights, finds support in some elements of the Charter. First and foremost the drafting technique used for many of these rights: Article 34, for instance, provides that "the Union recognises and respects the entitlements to social security benefits and social services [...]". The same language can be found in Article 36 on access to services of general economic interest. Moreover, the enjoyment of these rights ⁽²²⁾ is often subjected to the "conditions established by national law and practice", so to prevent the recognition of a free-standing nature to them (EU Committee of the House of Lords, 2008).

A similarly restrictive attitude towards social rights and, in particular, welfare rights, can also be found in the Explanations to the Charter, a document prepared under the responsibility of the Convention that drafted the Charter and later updated by the *Praesidium* of the European Convention (Baquero Cruz, 2008). The Explanation on Article 34, for instance, rather than spelling out the content of the right, is much more concerned with clarifying what the norm does not require, i.e. creating social security and social assistance services when they do not already exist. The relevance of these explanations from a legal standpoint might end up being higher than one can expect. Originally drafted as a mere interpretative tool, they have acquired a new, albeit not

19. *International Covenants on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, *entered into force* 23 March 1976; *International Covenants on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, *entered into force* 3 January 1976.

20. See *UN Vienna Declaration and Programme of Action*, World Conference on Human Rights, 25 June 1993, A/CONF.157/23, point 5.

21. Emphasis added.

22. Social security and social assistance (Art. 34), health care (Art. 35), access to services of general economic interest (Art. 36).

entirely clear, value with the entry into force of the Lisbon Treaty (Pernice, 2008). Article 6(3) TEU ⁽²³⁾ commands the judges – *in primis* the EU Court of Justice – to “pay due regard to the Explanations” when interpreting the norms of the Charter. It is a bizarre provision (Daniele, 2008), seeking to curb judges’ autonomy through the reference to an act that has never been proclaimed by the European institutions, let alone gone through a proper normative process. Once again, it is a provision that has an eminently defensive character. The ultimate goal is preventing the Court from granting to Charter’s rights, and especially social ones, a life of their own. Member States were indeed extremely concerned that European judges might end up using the provisions of the Charter on social rights as a Trojan horse for imposing further limitations on Member States’ social sovereignty.

As for the justiciability issue, it must be taken into account what provided for by Article 52(5) of the Charter. The norm stipulates that:

“the provisions of this Charter which contain principles may be implemented by legislative and executive acts [...] of the Union, and by acts of Member States when they are implementing Union law. They shall be judicially cognisable only in the interpretation of such acts and in the ruling of their legality”

The article had been first added *en route* to the incorporation of the Charter in the Constitutional Treaty and, then, retained when the Charter has been proclaimed for a second time by the European Parliament, the Commission and the Council just before the signature of the Lisbon Treaty. The norm seeks to add some ‘legal flesh’ to the distinction between rights and principles, by clarifying that the latter cannot be given direct effect (Baquero Cruz, 2008), i.e. cannot be considered as giving rise to directly enforceable rights (EU Committee of the House of Lords, 2008). Article 52(5) of the Charter is, thus, another norm dictated by Member States’ concerns about the role that the EU Court of Justice could play in interpreting Charter’s provisions, especially those on social rights.

At the end of this part of the analysis, it would seem logical to conclude that the granting of a binding legal value to the Charter would do little, if anything, to help the cause of the welfare State *vis-à-vis* the internal market. However, the conclusion seems too pessimistic, failing to give due credit to some other aspects that may help to redress the situation.

23. The same provision is also contained in Art. 52(7) of the Charter.

3.2 Some (limited) reasons for hope: welfare rights as a shield

A first element that must be taken into account is that, notwithstanding all the efforts spent by the drafters, the EU Court of Justice has still the possibility to recognise to social rights a different status from that suggested by the preceding analysis. Much will depend on where the European judges will draw the line between rights and principles, a controversial distinction (Hilson, 2008) on which the Charter does not shed any light. The problem cannot be solved, as seemingly done by Lord Goldsmith and others, by simply considering all social rights as belonging to the first group. As rightly pointed out by distinguished scholars, "good arguments can be made for ranging fundamental social rights in the 'rights' category, rather than in the 'principles' category" (Damjanovic and De Witte, 2009). It is a distinction that has been drawn *in concreto*, by taking into due account that a right may give rise to different types of obligations (Menéndez, 2003), some having an absolute character and others more programmatic in nature.

The new legal status acquired by the Charter after Lisbon could reinforce its role as a shield, i.e. as a balancing factor against the disruptive impact of EU law on domestic welfare institutions (Damjanovic and De Witte, 2009). The possibility for the Charter to perform such a defensive function has been recognised since the very beginning, when its legal value was far from certain (Poiarés Maduro, 2003). Now that the Lisbon Treaty has finally overcome this uncertainty, it can be expected that the Court will find into the Charter's provisions on solidarity rights an even firmer 'anchor' for the re-balancing of economic freedoms and social objectives. This should provide a stronger support to Member States when they claim exception from internal market rules in order to pursue social objectives (De Schutter, 2001).

Even a cursory look into the case-law of the Court reveals that there is still much work to be done in this respect, as shown by the *Laval* judgement⁽²⁴⁾. This decision, if compared with other cases where the Court has been called upon to strike a balance between economic freedoms and fundamental rights, demonstrates the existence of deep differences in the approach taken with regard to 'classic' civil and political rights and that adopted here. Unlike in the *Omega*⁽²⁵⁾ and *Schmidberger*⁽²⁶⁾ cases, the recognition of the fundamental nature of the right to collective action has not prevented the Court from giving relative priority to market freedoms over the latter.

Some commentators argue that the new status obtained by Charter's welfare rights will also strengthen their role on the legislative stage (Damjanovic and De Witte, 2009), although, as

24. Case C-341/05, *Laval*, Judgment of 18 December 2007, at 90. See also case C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union*, Judgment 11 December 2007.

25. Case C-36/02, *Omega*, Judgment of 14 October 2004.

26. Case C-112/00, *Schmidberger*, Judgment of 12 June 2003.

obsessively reiterated in several of its provisions ⁽²⁷⁾, the Charter cannot alter the allocation of competences established by the Treaty. According to these authors, the Charter may contribute to infuse social values into the EU legislative acts, as done in the Proposal for a Directive on the application of patients' rights in cross-border healthcare, presented by the European Commission on 2 July 2008 ⁽²⁸⁾. Although being an internal market act, the third recital of its Preamble makes express reference to "the right of access to healthcare and the right to benefit from medical treatment" as recognized by Article 35 of the Charter.

The rationale behind this use of the Charter is the same seen above, i.e. seeking to counterbalance the negative effects that an unfettered application of internal market law might have on welfare states. The problem is that, at least with regard to the Directive on patients' mobility, the reference to the social values of the Charter seems to be no more than a *façade*, finding little echo into the substantive part of the act (Baeten, 2009). What can be hoped for is that the acquisition of a new legal status by the Charter could help to redress this situation, by infusing greater substance into this practice.

An element that could help to this end is the 'horizontal social clause' introduced by the Lisbon Treaty and contained in Article 9 TFEU. This provision asks the EU to "take into account" requirements linked to a number of social objectives, such as the guarantee of adequate social protection or the fight against social exclusion, in defining and implementing its policies. In other words, the clause imposes to the EU legislator to perform, already during the legislative phase, the same balancing exercise that has been mainly used by judges in the application of EU law. It rests to be seen whether the clause, which has, once again, a predominantly defensive character, will actually help in infusing social values into EU normative acts, by anticipating the moment in which the balancing exercise is performed (Ferrera, 2010).

4. A new Legal Value for the EU Charter of Fundamental Rights

The creation of a 'more social Europe' or, at least, the need to rebalance 'the social and the economic' within the European legal order have been key issues in the debate over the future of the European integration process. The Lisbon Treaty seeks to answer to this need, but the results are far from fully satisfactory. Most of the reforms introduced to this regard have a predominantly defensive character, seeking to respond to Member States' concerns and to reassert the original

27. See Art. 51(2) of the Charter.

28. COM (2008) 414 def. The Directive is going to be adopted, after the approval, on the 28 of Parliaments' amendments by the Council.

allocation of competences in the social sphere. Barring few exceptions ⁽²⁹⁾, there is little going forward, little that may contribute to adjust the legal framework, so to create the conditions for an actual strengthening of the social dimension within the integration process.

This defensive stance is very much evident in the new Article 3 TEU: dropping competition from the catalogue of aims and putting social objectives on a par with the establishment of the internal market are choices that reflect Member States' concerns of seeing their social sovereignty further encroached by the application of internal market norms. The main, if not the only, aim of this reform is to curb the activism of the European judges in this field, as the visibility accorded to social objectives is not accompanied by any meaningful conferral of competences that may allow the EU to actually pursue them. A similar attitude emerges also with regard to the Charter's provisions on welfare rights. Their recognition is accompanied by a number of caveats and reservation that aim to limit EU Court of Justice's capacity to use them as a yardstick to evaluate the choices made by the Member States in this field.

This is not say that the Treaty of Lisbon is not going to have any impact on the relationship between the application of internal market rules and the welfare state. The recognition of a new status to social rights and values, through the new Article 3 and the conferral of a legal value to the Charter, is something that cannot be dismissed as having a mere aesthetic value. There is no doubt that it is an important element of novelty that may contribute to strive a better balance between market-inducing and market-correcting functions. However, it seems quite evident that the reform is far from completed and that much work remains to be done after Lisbon.

29. This being, for instance, the case of the new Article 14 TFEU, which confers to the EU the competence to establish principles and conditions for the operation of services of general economic interest in order to enable them to perform their mission. It is a modification that may be relevant also for welfare services, as some of these activities are considered as belonging to this category. However, the possibility to make actual use of this legislative power is subjected to a series of conditions purposely introduced to safeguard Member States' competence in this field. Moreover, the reference to 'regulation' as the only available act makes all the more difficult for the EU to resort to this power, as the act looks too rigid for such a sensitive sector. Another meaningful innovation introduced by the Lisbon Treaty to this regard is the recognition given to the soft-law mechanisms for the coordination of social and labour market policies (Art. 156 TFEU).

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