European agreements as founding sources of transnational complementary social security schemes: Analysis of the various problems and possible solutions.

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SUMMARY: -1.Introduction; -2.European social dialogue and sectoral and intersectoral collective bargaining according to EU legislation; -3.European agreements as "sui generis" acts or as collective agreements; -4.The legal effects of the European agreements implemented through a Council decision. Effects between the signatory parties; -5.(Follows) Effects of the agreements implemented by a Council Decision; -6.The UEAPME with particular reference to the project in question; -7.The necessary requirements to transform an agreement into a Council Decision; -8.Issues of subjects excluded from the scope of article 153 TFEU; -9.The legal effects of agreements implemented according to national practices; -10.Some final thoughts/considerations on the agreements of article 155 TFEU; -11.Feasibility of a European framework agreement establishing a supplementary pension scheme at EU level: The question of its legal basis and EU competence on this subject and the issue of the legal basis with reference to the subject of the agreement; -12.Can such a (legislative) initiative fall within the competence of the European Union; -13.Social security and social protection in letter c) article 153.1 TFEU; -14.Complementary pension as deferred wages: Observations on the prohibition of article 153 TFEU to deal with wages; -15.European social security system and the principles of subsidiarity and proportionality; -16.Assumptions to assign a double legal basis to the Council Decision (here: Directive) implementing the agreement; -17.(Follows) The hypothesis on the feasibility of an intermediate solution for a field of application of the agreement limited to some States. Evaluations on a possible and realizable reinforced cooperation; -18.(Follows) Enhanced cooperation and prohibitions referred to in article 326 TFEU; -19.(Follows) Procedural issues in the case of enhanced cooperation with reference to a proposal for a Directive based on article 155 TFEU; -20.The Pension Fund Directive (2003/41/EC): A difficult compromise; -21.Problems and possible solutions for the creation of a European pension scheme in the light of Directive 2003/41/EC and for the near future; -22.Concluding remarks and outlook.

ABSTRACT: The present study seeks to indicate the social partners in the specific role of complementary/transnational social security schemes as the most appropriate actors to manage that part of social protection left uncovered by public social security. It will be argued that the European social model could be saved only if social protection is taken away from the logic of the market and pure profit. Values such as solidarity, lack of profit supported by the belief that social protection is not a bargain, non-risk selection and social dialogue are the foundations of the European social model towards a "Europeanization" of social protection as a solution more appropriate for the future of the European Union

Key words: european social policy, social rights, european social agreements, complementary social sceurity, social protection, social dialogue.

1.Introduction.

Article 153.1 TFEU, lett. c[2], while providing for the possibility of introducing legislation on "social security and social protection for workers"[3], has never been used with reference to this matter. Furthermore, paragraph 5 of art. 153 TFEU[4] explicitly excludes from its scope of application measures concerning remuneration. According to the Court of Justice of the European Union (CJEU),

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[2]C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss.

[3]D. LIAKOPOULOS, Balance between social rights and economic freedoms in the EU case law, in International and European Union Legal Matters-working paper series, 2011.

[4]For analysis see: C. BARNARD, S. PEERS, European Union law, op. cit.

supplementary pension provision must be considered as deferred remuneration[5]. To this problem is added that the same article 153 requires a unanimous vote of the Member States, in the case where it was used as a legal basis for measures concerning social security and social protection of workers. It would be very difficult to reach the consensus of all the States of the Union on such an initiative. Our goal is to explore the possibility of using a possible enhanced cooperation in order to implement the agreement to a limited number of countries, identifying which rules of Directive 2003/41/EC[6] could represent an obstacle to the realization of the envisaged regime and therefore assuming what exemptions the European agreement establishing it should provide, in order to allow this social security scheme to operate simultaneously under the same conditions in the various national laws.

2.European social dialogue and sectoral and intersectoral collective bargaining according to EU legislation.

Article 155 TFEU allows the social partners in the Union to conclude even legally binding agreements that would fully satisfy the ambition to make the system of compulsory membership[7].

As for the sectoral social partners, we can say that more than 40 sectoral social dialogue committees have been created[8]; they now cooperate closely with the European Commission (EC) for the elaboration of strategies and initiatives in various subjects and represent, in fact, all the economic sectors of the Union. Furthermore, almost ninety sectoral and cross-sectoral organizations are officially consulted by the EC under article 154 TFEU[9]. It will therefore be self-evident that it is precisely sectoral organizations which could theoretically conclude an agreement aimed at creating the social security system.

Agreements concluded at Union level shall be implemented in accordance with the procedures and practices of the social partners and the Member States or, in the areas covered by article 153 TFEU, and at the joint request of the signatory parties. The Council shall act unanimously when 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) TFEU[10].

Only 19 agreements[11] have been concluded by the european social partners: 8 implemented according to national procedures and practices[12], one of which was subsequently implemented by a

[5]C. BARNARD, S. PEERS, European Union law, op. cit. T.H. FOLSOM, Principles of European Union law, including Brexit, West Academic, Minnesota, 2017, pp. 278ss.

[6]Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, OJ L 235, 23.9.2003, p. 10-21. G. BABER, The free movement of capital and financial services. An exposition? Cambridge Scholars Publishing, London, 2014.

[7]See, T.H. FOLSOM, Principles of European Union law, including Brexit, op. cit.

[8]See, C. DEGRYSE, P. POCHET, Has european sectoral social dialogue improved since the establishment of SSDCs in 1998?, in Transfer, 17(2), 2011, pp. 146ss. E. PERIN, E. LÉONARD, European sectoral social dialogue and national social partners, in Transfer, 17(2), 2011, pp. 160ss. T.J.PROSSER, E. PERIN, European tripartism: Chimera or reality? The "new phase" of the european social dialogue in the light of tripartite theory and practice, in Business History, 57 (3), 2015, pp. 378ss, pointing out not only the problems of implementation, but also the lack of relevance for employment conditions that the actual topics dealt with show.

[9]See in particular from the CJEU the next cases discussed under art. 154 TFUE: C-17/17, Hampshire of 6 September 2018, ECLI:EU:C:2018:674; C-2/17, Crespo Rey of 28 June 2018, ECLI:EU:C:2018:511; order C-137/15 P, Plaza Bravo of 17 November 2015, ECLI:EU:C:2015:771; C-527/13, Cachaldora Fernàndez of 14 April 2015, ECLI:EU:C:2015:215. All the above cases published in the electronic Reports of the cases.

[10]In particular see the next cases from the CJEU: C-338/17, Guigo of 25 July 2018, ECLI:EU:C:2018:605; C-133/17, Podilă and others of 27 April 2018, ECLI:EU:C:2018:203; C-431/16, Blanco Marquès od 15 March 2018, ECLI:EU:C:189; C-306/16, Maco Marques da Rosa of 8 November 2017, ECL:EU:C:2017:844, C-441/14, DI of 19 April 2016, ECLI:EU:C:2016:278, all the above cases published in the electronic Reports of the cases.

[11]Framework Agreement on Telework (between UNICE/UEAPME and CES) of 16 July 2002; Agreement on the European license for drivers operating a cross-border interoperability service (between CER and EFT) of 27 January 2004; Framework agreement on stress at work (between UNICE-UEAPME and CES) of 8 October 2004; Health protection agreement for workers using crystalline silica products (between Euromines, IMA-Europe with EMCEF and EMF) of 25 April 2006; Agreement on harassment and violence in the workplace (between BusinessEurope, CEEP and UEAPME with CES) of 27 April 2007; European agreement for the creation of hairstylist certificates (fra Coiffure EU with UNI europa) of 18 June 2009; Framework agreement on inclusive labor markets (between CEEP, BusinessEurope and UEAPME with CES) of 25 March 2010; Agreement on certain minimum conditions for the standard contracts for players in the professional football sector in the European Union and in the rest of the territory of UEFA (between EPFL and ECA with FIFPro) on 19 April 2012. See, G. MEARDI, Union immobility? Trade Unions and the freedoms of movement in the enlarged EU, in British Journal of Industrial Relations, 50 (1), 2012, pp. 100ss.

[12]Framework agreement on parental leave (between UNICE and CEEP with CES) of 14 December 1995; Framework agreement on part-time work (between UNICE and CEEP with CES) of 6 June 1997; European Agreement on the Organization of Working Time for People of Seafarers (between ECSA and ETF) of 30 September 1998; Framework agreement on fixed-term work (between UNICE, CEEP and CES) of 18 March 1999; European Agreement on the organization of working time for mobile workers in the civil aviation sector (between EEA, ERA, IACA with ETF and ECA) of 22 March 2000; Agreement on certain aspects of working conditions concerning mobile workers in charge of interoperable cross-border rail services (between ERC with ETF) of 27 January 2004; Agreement of 19 May 2008 concluded by ECSA with ETF on the Maritime Labor Convention 2006;

Council Decision, adding to the other 11 of this second category[13]. The inter-confederal agreements are 8[14], while those at sectoral level are 11[15]. With reference to these agreements, it should be noted here that the Communication of the EC of 1993[16] has evoked a new kind of subsidiarity in the field of social policies; this new "horizontal" subsidiarity[17], which would be added to the traditional EU subsidiarity principle in the distribution of competences between Member States and the EU (vertical subsidiarity) would be the possible alternative of regulating social issues or through a legislative approach Traditional EU, or through agreements of the European social partners[18]. According to the principle of horizontal subsidiarity, the social partners would legitimately acquire the role of third actor in the formation (and implementation) of social policies alongside the EU institutions and the Member States[19]. More in general, various EC Communications have sought to clarify the scope of the European social dialogue provided for by the combined provisions of articles 153-155 TFEU[20]. In particular, as regards the representativeness of the sectoral social partners, it is important to cite the Decision 98/500/CE of 20 May 1998[21] with particular reference to the criteria of representativeness of the sectoral social partners aspiring to take part in the Sectoral Social Dialogue Committees.

With regard to the initiative of the European social partners to conclude an agreement under article 155 TFEU, it is clear from the outset that despite the doubts of the doctrine[22] (even if the 98

Framework agreement on modified parental leave

[13]BusinessEurope, UEAPME and CEEP with CES) of 18 September 2009; Agreement on the implementation of the framework agreement on the use of sharp objects in the hospital and health sector (between HOSPEEM and EPSU) of 26 October 2009;

[14]Accordo europeo su alcuni aspetti dell'orario di lavoro per il trasporto terrestre (fra EBU, ESO con ETF) del 15 febbraio 2012; Accordo europeo per la sicurezza sul lavoro per il settore degli acconciatori (fra Coiffure EU con UNI Europa Hair & Beauty) del 26 aprile 2012; Accordo sulla pesca marittima (fra Europeche e Cogeca con ETF) del 21 maggio 2012.

[15]Framework agreement on parental leave (between UNICE and CEEP with CES) of 14 December 1995; Framework agreement on part-time work (between UNICE and CEEP with CES) of 6 June 1997; Framework agreement on fixed-term work (between UNICE, CEEP and CES) of 18 March 1999; Framework agreement on modified parental leave (BusinessEurope, UEAPME and CEEP with CES) of 18 September 2009; Framework Agreement on Telework (between UNICE/UEAMPMI and CES) of 16 July 2002; Framework agreement on stress at work (between UNICE-UEAPME and CES) of 8 October 2004; Agreement on harassment and violence in the workplace (between BusinessEurope, CEEP and UEAPME with CES) of 27 April 2007; Framework agreement on inclusive labor markets (between CEEP, BusinessEurope and UEAPME with CES) of March 2010. Agreement on the European license for drivers carrying out a cross-border interoperability service (between CER and EFT) of 27 January 2004; Health protection agreement for workers using crystalline silica products (between Euromines, IMA-Europe with EMCEF and EMF) of 25 April 2006; European agreement for the creation of hairstylist certificates (fra Coiffure EU with UNI europa) of 18 June 2009; Agreement on certain minimum conditions for the standard contracts for players in the professional football sector in the European Union and in the rest of the territory of UEFA (between EPFL and ECA with FIFPro) on 19 April 2012; European Agreement on the Organization of Working Time for People of Seafarers (between ECSA and ETF) of 30 September 1998; European Agreement on the organization of working time for mobile workers in the civil aviation sector (between EEA, ERA, IACA with ETF and ECA) of 22 March 2000; Agreement of 19 May 2008 concluded by ECSA with ETF on the Maritime Labor Convention 2006; Agreement on the implementation of the framework agreement on the use of sharp objects in the hospital and health sector (between HOSPEEM and EPSU) of 26 October 2009; European Agreement on certain aspects of working time for land transport (between EBU, ESO with ETF) of 15 February 2012; European agreement for safety at work for the hairdressing sector (between EU Coiffure with UNI Europa Hair & Beauty) of 26 April 2012; Agreement on sea fisheries (between Europeche and Cogeca with ETF) of 21 May 2012.

[16]Commission Communication of 14 December 1993 on the implementation of the Protocol on social policy presented by the Commission to the Council and the European Parliament (COM (93)) 600 def.

[17]See, G. CASALE, G. ARRIGO, International labour law, ed. Giappichelli, Torino, 2017.

[18]For details see: A. BRUGNOLI, A. COLOMBO, Government, governance and welfare reform. Structural changes and subsidiarity in Italy and Britain, Edward Elgar Publishers, Cheltenham, 2012.

[19]A. DUFRESNE, Trade union support and political blockage: The actors' viewpoint, in European Journal of Industrial Relations, 18 (2), 2012, pp. 108ss.

[20]According to the principle of horizontal subsidiarity, the social partners would legitimately acquire the role of third actor in the formation (and implementation) of social policies alongside the EU institutions and the Member States. However, as was later clarified by an opinion of the European Economic and Social Committee (Opinion of the Economic and Social Committee on the "Communication on the implementation of the protocol on social policy presented by the Commission to the Council and the European Parliament" 94 / C 397/17, OJ 397/40 of 31.12.94, pp. 40-49), the EU rules and the criteria established for the application of the traditional principle of subsidiarity are not referred (or referable) to horizontal subsidiarity. More precisely, the guiding criterion of "effectiveness" on which the traditional vertical subsidiarity between States and the EU is based, could not be applied to the horizontal one. In fact, the involvement of social partners in the formation of social policies should be assessed on the basis of other fundamental principles, and the criteria for applying horizontal subsidiarity have never really been established. The aforementioned Communication COM (93) 600; Commission Communication of 18 September 1996 on the progress and future of social dialogue at Community level (COM (96) 448 final; Commission Communication of 20 May 1998 adapting and promoting social dialogue at Community level /COM (98) 322 final Communication from the Commission of 26 June 2002-European social dialogue, a force for modernization and change (COM (2002) 341 final. European Commission: Communication of 12 August 2004-Partnership for change in an enlarged Europe-Reinforcing the contribution of the European social dialogue COM (2004) 557

[21]98/500/EC: Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level (notified under document number C(1998) 2334), OJ L 225, 12.8.1998, p. 27-28. For details see: S. SCHIARRA, Solidarity and conflict: European social law in crisis, Cambridge University Press, Cambridge, 2018.

[22]For example Siweck and Betten. Siweck believes that the function of negotiation is precisely that of allowing agreements to intervene when the legislative process is stranded. Siweck adds: "On voit cependant ill commented on the part of the social partners for the benefit of the project for the

Communication had admitted it[23]), a prior consultation of EC are significantly increased. The most important criterion to be met to obtain recognition of representativeness is the presence of a mandate by the national members. Some employers' organizations such as UNIEUROPA participate at the same time in various Sectoral Social Dialogue Committees[24]. They are referred to in point C) of paragraph 1 of article 153 TFEU. The recent European agreement concluded without consultation between the European Barge Union (EBU), the European Shippers Organization (ESO) and the European Transport Workers' Federation (ETWF) is proof of this: this agreement has been incorporated into a proposal for a Directive presented on July 7, 2014 from EC[25].

From the combined provisions of the rules contained in articles 154 and 155 TFEU, four possible types of European agreements could be presented. The scenarios are as follows: an agreement could stem from a previous EC consultation and then implemented by a Council Decision on EC proposal (scenario 1); an agreement could stem from a previous EC consultation, and implemented through national rules (scenario 2); an agreement could arise without being a previous EC consultation; but the social partners, once concluded, need to implement it through a Council Decision (on a proposal made by the EC) (scenario 3); finally, the agreement is autonomously concluded and implemented by the social partners through national rules (scenario 4).

3.European agreements as "sui generis" acts or as collective agreements.

One wonders if the agreements mentioned in art. 155 TFEU are traditional collective agreements or should be considered sui generis instruments[26].The distinction between the contractual party and the regulatory part should be normal and therefore the latter should be included in the agreement[27]. For Hecquet these agreements are not collective agreements, but only private contracts[28]. Also according to Lo Faro and Kampmeyer they are not collective contracts, first of all because the signing parties would not have representation; secondly because such acts would rather serve to represent the normative will of the EC to intervene in social policies. They would ultimately be special acts invented by the EU institutions to better achieve their goals[29]. Lhernould[30], Franssen[31] and other authors believe that they are collective contracts[32]. Franssen, for example, maintains that the characteristics of such agreements fall within the definition of collective agreement[33] given by Recommendation ILO

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future of the commissions here déboucheraient par la suite sur des directives européennes". On a similar line Betten, which does not consider possible an independent initiative of the social partners aimed at concluding an agreement that should then be implemented through a Council Decision, because in this case the social partners would have the power (inadmissible for him) to decide the programmatic agenda of European legislation. Betten instead admits the possibility of independent initiatives for those agreements that do not aim to be transposed into a Council initiative. J.L. SIWECK, Le dialogue social au niveau communautaire: d'où vient-on, où en est-on?, in Revue du Marchè Commun et de l'nion Europèenne, 1999, pp. 250ss.

[23]L. BETTEN, The democratic deficit of participatory democracy in community social policy, in European Law Review, 23 (1), 1998, pp. 30ss.

[24]See, S. SCHIARRA, Solidarity and conflict: European social law in crisis, op. cit.

[25]The 1998 Commission Communication underlines the importance of social partners' initiatives at all levels and clarifies its obligation not to interfere with the free choice of the parties negotiating pp. 15 and 18

[26]Proposal for a Council Directive implementing the Europe Agreement between the European Barge Union (EBU), the European Organization of Captains (ESO) and the European Transport Workers' Federation (ETF) concerning certain aspects of the organization of the timetable working in inland waterway transport COM (2014) 452 final 2014/0212 (NLE).

[27]But since in some legal systems, as in the British one, the distinction between contractual effects and regulatory effects does not exist, no legal effect is produced by such agreements (called in Gentlemen's Gentlemen's Agreements) or towards the parties, or towards of employers and workers to whom they are addressed. Also according to Sciarra, the European agreements are only "Gentlemen Agreements". S. SCIARRA, Collective agreements in the hierarchy of european community sources, in P. DAVIES, A. LYON-CAEN, S. SCHIARRA, S. SIMITIS, Liber amicorum Lord Wedderburn of Charlton, Clarendon Press, Oxford, 1996. pp. 202ss.

[28]P. DAVIES, A. LYON-CAEN, S. SCHIARRA, S. SIMITIS, Liber amicorum Lord Wedderburn of Charlton, op. cit., pp. 202ss.

[29]M. HECQUET, Essai sur le dialogue social européen, ed. LGDJ, Paris, 2007, pp. 88ss. E. KAMPMEYER, Protokoll und Abkommen über die Sozialpolitik der Europäischen Union, Heymanns Verlag, Köln, 1998, pp. 90ss. A. LO FARO, Regulating social Europe. Reality and myth of collective bargaining in the EC order, Hart Publishing, Oxford & Oregon, Portland, pp. 68ss.

[30]J.P. LHERNOULD, La négociation collective communautaire: Petit manuel de la diversité, in Droit Social 2008 No.1,

[31]E. FRANSSEN, Legal aspects of the european social dialogue, ed. Intersentia, Antwerp, Oxford, 2002

[32]E. KAMPMEYER, Protokoll und Abkommen über die Sozialpolitik der Europäischen Union, op. cit.. C. WELZ, The european social dialogue under articles 138 and 139 of the EC Treaty: Actors, processes, outcomes, in Kluwer Law International, Alphen aan den Rijn, 2008, pp. 306ss. J.P. LHERNOULD, La négociation collective communautaire: Petit manuel de la diversité, op. cit. E. FRANSSEN, Legal aspects of the european social dialogue, ed. Intersentia, Antwerp, Oxford, 2002, pp. 103ss

[33]Lo Faro, denying the representativeness of the European social partners, also denies the existence of the European agreements as such. Kampmpeyer agrees with Lo Faro's position and adds that they can not be called collective agreements because of the formulation of the European Charter of Social Rights of 1989. The latter in fact distinguishes between contractual relations between European social partners (no.12 (2)) and collective agreements between national social partners (no.12 (1)) without naming the "European collective agreements" at all. Finally, like Lo Faro, he argues

91[34] and in the definition already given to them by the CJEU in the *Albany*[35], *Brentjiens* and *Drijende Bokkenv* cases[36]. In fact, it is difficult to establish whether these agreements can be defined as typical collective agreements as conceived in the continental systems of industrial relations. These rulings-which dealt with the legitimacy of a Dutch collective agreement with the EU competition law referred to in (today) article 101 TFEU[37]-had specifically referred to the Union's social objectives of article 2 and 136 of the (then) TCE, and had connected the latter with the instruments of article 139 (today 155 TFEU) in order to achieve these objectives. It should not be underestimated, given the lack of the word "collective". Someone simply defined them as European Agreements[38] or hybrid agreements[39]. It should also be borne in mind that the European social partners also contributed to creating a terminological confusion, calling them "agreements" in some common texts when they were not, and vice versa[40]. In the *Albany*[41], *Brentjiens* and *Drijende Bokkenv* cases[42], the CJEU has not only explicitly referred to the European collective agreements as a reference for defending the national ones; in its subsequent judgments already analyzed, it also dictated the requirements of nature and object[43]. Well, as regards the nature of the agreements signed by representatives of employers and employees, the European social partners do not have such subjects as direct members, but it could not be argued that they do not represent them, from the moment they received a mandate to negotiate national social organizations.

As for the object, if these agreements negotiated the working conditions or the improvement of the social situation of the workers exactly as in the cited judgments, they should be considered as collective agreements. We therefore associate with Franssen's position when he refers to the definition given by the CJEU[44].

In this regard, the 2004 Communication of EC "Partnership for change in Europe"[45] encourages the

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that the European Union does not have a harmonized system of industrial relations and labor law. See, A. LO FARO, Regulating social Europe. Reality and myth of collective bargaining in the EC order, op. cit. P. STANGOS, Les rapports entre la Charte sociale européenne et le droit de l'Union européenne: le rôle singulier du Comité européen des Droits Sociaux et de sa jurisprudence, in Cahiers de Droit Européen, 49, 2013, pp. 320ss.

[34]Recommendation ILO of 6 June 1951. Under which, in article a2, collective agreements should be in writing, deal with working conditions and terms of employment and concluded between a group of employers "and workers" organizations. For details see: E.C. LANDAV, Y. BEIGBEDER, From ILO standards to European Union law. The case of equality between men and women at work, Martinus Nijhoff Publishers, 2008. J. ORBIE, L. TORTELL, The European Union and the social dimension of globalization: How the European Union influence the world, ed. Routledge, London & New York, 2009, pp. 128ss.

[35]CJEU, C-67/96, Albany of 21 September 1999, op. cit. See, R. DUKES, The labour constitution. The enduring idea of labour law, Oxford University Press, Oxford, 2014.

[36]J.P. LHERNOULD, La négociation collective communautaire: Petit manuel de la diversité, op. cit. E. FRANSSEN, Legal aspects of the european social dialogue, op. cit. See also: CJEU, C-67/96, Albany of 21 September 1999, ECLI:EU:C:1999:430, 05751; joined cases C-115/97 and C-116/97, Brentjens of 21 September 1999, ECLI:EU:C:1999:434, I-06025; C-117/97, Mosbaek v. Lønmodtugernes Garantifond of 17 September 1997, ECLI:EU:C:1997:266, I-05017; C-219/97, Drijende Bokkenv of 21 September 1999; ECLI:EU:C:1999:437, I-06121. For details see: I.E. WENDT, EU competition law and professions. An uneasy relationhsip?, ed. Brill, The Hague, 2012. J. NOWAG, Environmental integration in competition and free-movemnet laws, Oxford University Press, Oxford, 2016, pp. 220ss.

[37]For analysis see: L. LOVDAHL GORMSEN, A principled approach to abuse of dominance in european competition law, Cambridge University Press, Cambridge, 2010. R. NAZZINI, The foundations of European Union competition law: The objective and principles of article 102, Oxford University Press, Oxford, 2011. R. O'DONOGHUE, J. PADILLA, The law and economics of article 102 TFEU, Hart Publishing, Oxford & Oregon, Portland, 2013. P. NIHOUL, The ruling of the General Court in intel: Towards the end of an effect-based approach in european competition law?, in Journal of European Competition Law & Practice, 5, 2014, pp. 52ss. J. BOURGEOIS, D. WAELBROECK (eds), Ten years of effects-based approach in EU competition law: State of play and perspectives, ed. Bruylant, Bruxelles, 2012. J. DREXL, W. KERBER, R. PODSZUN (eds), Competition policy and the economic approach: Foundations and limitations, Edward Elgar Publishers, Cheltenham, 2011. L. LOVDAHL GORMSEN, Are anti-competitive effects necessary for an analysis under article 102 TFEU?, in World Competition, 36, 2013, pp. 224ss.

[38]J. MORIN, The european social dialogue: A general introduction. European framework agreements and telework, Roger Blanpain & Kluwer Law International, New York, 2007, pp. 12ss.

[39]P. POCHET, European social dialogue between hard and soft law. Paper prepared for the EUSA Tenth Biennal International Conference in Montreal, Canada. May 17-19, 2007. Observatoire Social Européen, Bruxelles, pp. 4ss.

[40]However, a definition of hybrid agreements could also be applied to those agreements that derive from a strong Commission impulse and which are then implemented by a Council decision.

[41]CJEU, C-67/96, Albany of 21 September 1999, op. cit.

[42]CJEU, C-116/97, Brentjens of 21 September 1999, op. cit., C-219/97, Drijende Bokkenv of 21 September 1999, op. cit.

[43]A. OJEDA AVILÉS, Applicability of european collective agreements, in Collective bargaining in Europe, Comisión Consultiva Nacional de Convenios Colectivos. Ministerio de Trabajo y Asuntos Sociales (Spain) 2004. pp. 439ss.

[44]E. FRANSSEN, Legal aspects of the european social dialogue, op. cit.

[45]Communication from the Commission-Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM/2004/0557 final. For more details see. A. SCHÁFER, S. LEIBER, The double voluntarism in EU social dialogue and employment policy, in S. KRÖGER, (ed.): What we have learnt: Advances, pitfalls and remaining questions in OMC research, in European Integration online Papers (EIoP), 13 (1), 2009.

social partners to use appropriate legal terminology when they negotiate a common text and plan the next appropriate procedure. In any case, despite the undeniable linguistic confusion, one should remember that one of the pillars of contract law is the existence of a real desire of both parties to sign one against the other. This contractual will would not emerge in a common document defined as "agreement" if it then had all the characteristics of the so-called "new generation texts"[46] such as guidelines and declarations. Therefore, the argument of terminological confusion could not be used to doubt the nature of those agreements provided for in the second paragraph of art. 155 TFEU[47]. It is true that these agreements have often been used as instruments of the EC in order to pursue "own" objectives and that in this case they would not correspond to the typical nature of collective agreements as an expression of autonomy of the social partners (Lo Faro, Kampmeyer and Pochet)[48]. In this case, there would be some difficulty in defining those agreements as true collective agreements. However, it should be noted that the EC's own consultations, even if they were instrumental in using the European social partners in order to intervene in sensitive matters, do not hesitate to use the term "collective agreement" for the initiatives (agreements) of the social partners: an example is precisely that 2004 consultation on the portability of supplementary pension rights, where the EC called for a "collective agreement at European level"[49] of the European social partners under article 155 TFEU paragraph 2[50].
Even more so if the initiative were spontaneous, without any sword of Damocles coming from EC[51], or without "a negotiation in the shadow of the law"[52], such agreements should be considered as collective agreements. A final observation is added: article 28 of the Nice Charter[53] affirms the right to negotiation (and collective action) "at the appropriate levels" after having said that this right must comply with European Union law and with national laws and practices. In the notion of "appropriate level" it is not believed that the European Union level can be excluded.

4.The legal effects of the European agreements implemented through a Council decision. Effects between the signatory parties.
Although the discussion on the legal effects between the signatory parties (internal effects) does not have a practical interest for those agreements implemented by a Council Decision, but only for those implemented autonomously by the social partners, this theme is considered as common to both types of agreements[54] and therefore will be addressed now. The discussion on "if" such agreements produce binding legal effects between the parties, will depend on the aforementioned questions concerning their nature: contractual or no[55]. If we agree that they are contractual in nature, it should normally be concluded that such agreements, once signed, should produce binding (contractual) effects at least for the signatory parties. For Britz and Schmidt[56] who consider such acts not only contractual, but also as traditional collective agreements, the binding effects produced between the parties would represent only the contractual part of these. This conclusion was reached by Britz and Schmidt with reference to the relationship between the parties[57], even though the most important issue of their normative effect remains open. If it were assumed that these agreements have binding

[46]E. KAMPMEYER, Protokoll und Abkommen über die Sozialpolitik der Europäischen Union, op. cit.
[47]E. KAMPMEYER, Protokoll und Abkommen über die Sozialpolitik der Europäischen Union, op. cit.
[48]See, A. LO FARO, Regulating social Europe. Reality and myth of collective bargaining in the EC order, op. cit. E. KAMPMEYER, Protokoll und Abkommen über die Sozialpolitik der Europäischen Union, op. cit., P. POCHET, European social dialogue between hard and soft law. Paper prepared for the EUSA Tenth Biennal International Conference in Montreal, op. cit.
[49]Communication 916 of 12 September 2003, (SEC 2003/916), par. 16ss.
[50]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[51]R. BLANPAIN, European labour law, Wolters Kluwer, New York, 2008. pp. 700ss.
[52]B. BERCUSSON, Restoring balance economic power in Europe, F. DORSSEMONT, T. JASPERS, A. VAN HOEK, Cross border collective actions in Europe: A legal challenge, ed. Intersentia, Antwerp, Oxford, 2007, pp. 22ss.
[53]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[54]For at least two reasons: first, because theoretically this discussion concerns the inherent nature of both types of European agreements; second, because if the request to implement an agreement by a Council Decision were rejected, the question of its legal effects between the signatory parties would also concern this type of agreement.
[55]J. KENNER, EU employment law. From Rome to Amsterdam and beyond, Hart Publishing, Oxford & Oregon, Portland, 2003, pp. 252ss.
[56]G. BRITZ, M. SCHMID, The institutionalized participation of management and labour of the management and labour in the legislative activities of the European Community: a challenge to the principle of democracy under Community law, in European law Journal, 6 (1), 2000, pp. 67-68.
[57]R. BLANPAIN, European labour law, op. cit., pp. 708ss.

legal effects between the signatory parties, which rules would regulate their relations? First of all, it should be emphasized that the main organizations of the European social partners have their headquarters in Brussels, and the agreements are normally concluded in Belgium. At this point, the Belgian law should be applied. The prevailing opinion seems to be in favor of Belgian private law[58]. Blanpain's position is less realistic, according to which if the applicable law was the Belgian one-provided that the social partners do not choose another jurisdiction-, the relationship between the contractual parties should be subject to the Belgian law of 5 December 1968 on the joint commissions and collective agreements[59].
Scenario 1 is one in which an agreement arose from a previous EC consultation and then implemented by a Council Decision on Hecquet's proposal clearly argues that only Belgian private law should be applied at this stage[60]. Franssen also argues that the Belgian law of contracts is the only applicable one, considering that the Belgian law concerning joint commissions and collective agreements of 1968 is restricted to those social partners who satisfy those requirements which are, in fact, only proper to the social belgian partners (such as the requirement to be represented at the Belgian Central Economic Council and the National Labor Council)[61].
In fact, when Blanpain tries to interpret the autonomous agreement on teleworking of 2002[62]-part of those agreements, that is, which are implemented without a European legislative act-he believes that the agreement in question produces only moral consequences on the parties involved and that it is not possible to have it observed by judicial means[63]. Since the reasons for excluding this reasoning also for those parties concluding other agreements - including those for which the parties will request their implementation through a Council decision-would tend to conclude that in principle Blanpain considers these agreements not binding between the signatory parties, precisely because it would not be possible to resort to judicial procedures to make it perform[64]. However, he argues that if the parties decided to oblige each other under the Belgian law, the latter should then be the 1968 law on collective agreements.

5.(Follows) Effects of the agreements implemented by a Council Decision.
Pursuant to art.155.2 TFEU second part: "(agreements concluded at Union level are implemented) (...) in the areas covered by article 153 TFEU, and at the joint request of the signatory parties, on the basis to a Council decision on a proposal from the EC. The European Parliament is informed"[65]. The main questions concerning this way of implementing these agreements derive from the presumption that a European agreement implemented by a Council Decision will become a legislative act in the EU legal order. Consequently, its rules will be incontestably binding and applicable erga omnes. Despite these advantages, this type of agreement presents many questions. The two issues concern here the issues on which the social partners could negotiate and the real autonomy of the social partners with respect to certain controls made by the EC before proposing the agreement to the Council as a legislative proposal. The issue of the absence of Parliament as an active actor in the decision-making process will be mentioned when it comes to the *UEAPME* case[66]. The term "Decision" is undoubtedly unfortunate, given that the european legal order already regulates the Decision as a normative act pursuant to article 288, par. 4 TFEU. The EC has interpreted the term in a different way: according to its Communication of 1996[67] and the one concerning the proposal of Directive on fixed-term work[68], with the term "Decision" all the binding EU acts regulated in the article

[58]R. BLANPAIN, The european social model, ed. Instersentia, Antwerrp, Oxford, 2006, pp. 220ss.
[59]R. BLANPAIN, European labour law, op. cit.
[60]M. HECQUET, Essai sur le dialogue social européen, op. cit., pp. 88ss.
[61]E. FRANSSEN, Legal aspects of the european social dialogue, op. cit.
[62]R. BLANPAIN, The European Social Model, ed, Instersentia, Antwerp, Oxford, 2006, pp. 220ss.
[63]R. BLANPAIN, European labour law, op. cit.
[64]R. BLANPAIN, European labour law,
[65]R. BLANPAIN, European labour law, op. cit.
[66]For details see: G. SGUEO, Beyond networks. Intelocutory coalitions, the european and global legal orders, ed. Springer, 2016.
[67]Reply from the Commission of 7 August 2006, JO C 305 of 15 October 1996 p. 46, COM (1999) 203 final, p. 10
[68]Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, OJ, L 097, 15/04/2003 P. 0048-0052, par. 10ss. For analysis and details see: U.D. ENGELS, European ship recucling regulation: Entry into force implications of the Jong Kong Convention, ed. Springer, Berlin, New York, 2013, pp. 180ss. W. SCEMEISSER, D. KRIMPHOVE, R. POPP, International human resource

288 TFEU. It will therefore be the responsibility of the EC to decide the most appropriate instrument to implement an agreement. At the moment, only the Directive has been used; however, according to this interpretation, even a decision or regulation could be chosen.
As regards an agreement aimed at creating a European social security scheme, the Directive would seem to be the most appropriate instrument. Normally used for the realization of the internal market and more respectful of national peculiarities according to the principle of subsidiarity, it should in fact give objectives to the Member States. In particular, even if some harmonization of social law and national labor would be necessary, this agreement would require first of all the mutual recognition of different national legal realities, in order to make them compatible with each other[69]. And then, a Directive in the social sector could be feasible, at their joint request, by the same national social partners, as foreseen by art. 153.3 TFEU[70]. Which actors would be better suited to implement an agreement establishing a complementary social security scheme, given that they are already in many countries directly involved in the creation and management of such schemes? Among other things, the same Directive 2014/50/EU (former portability), even if not having its legal basis in article 153 TFEU explicitly allows the social partners to implement it in their respective countries, with the agreement of the authorities of their Member State[71].
Article 155 TFEU states that only agreements concerning the areas referred to in article 153 TFEU can be implemented through a Council Decision. This limitation on negotiable matters which in practice form part of the aforementioned EC control over the legality of the act concerns the broader discussion of the competences of the Union in social policy. In fact, from a certain point of view, the second paragraph of article 155 TFEU seems to be unassailable: only in these matters the Council has legislative power, although article 155 refers generally to the "areas covered by article 153"[72], whose list includes other subjects than those listed in letter b) of the same article 153.2 TFEU, for which "the Parliament and the Council" may adopt directives. In essence, point (b) represents a sub-group (9: from letter a) to i) of the totality of the sectors listed in the first paragraph of article 153 TFEU, which are 11 (a) to k)). With regard to the voting procedure in the Council, on the other hand, article 155.2 TFEU clarifies that unanimity is required for the same sectors for which this procedure is prescribed in article 153.2 TFEU[73].
The latter provision does not raise particular issues: only in some cases the choice to use a qualified majority or unanimity is not always clear. For example, the Parental Leave Directive[74] was voted by a qualified majority, although its clause 2 (4) deals with the legal aspects of dismissals which fall in principle in the matter of protection of workers when their employment contract is terminated (art 153.1 letter d), at the time art. 137.1 lett. d) TCE) for which unanimity would be required. However, it should be recognized that in that agreement, the clause linked to layoffs was far from the core of its content. In the case of a european agreement relating to "social security and social protection", as this matter is covered by point c) of article 153.1 TFEU, a unanimous vote would in principle be necessary. The topic will be addressed in the paragraph concerning the competences of the Union to legislate on such an initiative. In particular, aware of the possible difficulties of achieving unanimity in such a sensitive subject, the possibility of involving only a limited number of Member States through enhanced cooperation (referred to in articles 326 and following) will be assessed[75]. This option has never been used for this type of agreement.

6.The UEAPME with particular reference to the project in question.

management and international labour law. A human resource management accounting approach, Oldenbourg Verlag, München, 2013.
[69]J.S. BERGÉ, S. ROBIN-OLIVIER, S. THEOCHARIDI, Le droit européen et la creation du droit, in Les petites affiches, 2007, n. 76 avril, pp. 12. J. BARTHELEMY, Négociation collective au plan européen et intégration des accords dans les droits internes, in L'Europe et le dialogue social, sous la direction de Laurent Duclos, Commissariat général du Plan, Les cahiers du Plan 12, 2005, pp. 54ss.
[70]A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamiento, ed. Marcial Pons, Madrid, 2018.
[71]A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamiento, op. cit.
[72]A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamiento, op. cit.
[73]A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamiento, op. cit.
[74]Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, p. 4-9.
[75]For analysis see: D. LIAKOPOULOS, Artt. 326, 327, 328, 329, 330, 331, 332, 333, 334 TFUE, in P.E. HERZOG, C. CAMPBELL, G. ZAGEL, Smit & Herzog on the law of the European Union, ed. LexisNexis, New York, 2018.

The *UEAPME* case[76], in addition to referring to the relationship between the criteria of representativeness of the parties and the legitimacy of the social partners to resort to a Directive deriving from an agreement[77], also deals with a question that particularly concerns this research: it clarifies why Parliament European does not participate in the specific legislative process that should result from implementing the agreement in the form of a Council Decision. The ruling justified the importance of the tests on the representativeness requirements of the signatory parties precisely in order to ensure the fulfillment of the democratic principle "on which the Union is founded, given the absence of the European Parliament in this legislative process"[78]. The social partners would themselves represent citizens to replace the Parliament. It will be necessary here to reiterate that today article 155.2 TFEU provides that during the legislative process "Parliament is informed"[79]. The doctrine is rather divided on the fact that the social partners can be considered as suitable for replacing the European Parliament in the legislative process. There are in fact some totally unfavorable authors: Betten considers the social partners to be inadequate[80], and urges for an urgent role for the European Parliament in order to ensure that citizens are involved in the process each of the negotiating parties, but collectively; in addition, with particular reference to the exclusion of UEAPME from the negotiations, representativeness is sufficient when the signatory parties are in a position to represent also those parties that, precisely, had not taken part in the negotiations (in this case, it was considered that UNICE adequately represented the members of UEAPME)[81]. Only if this were not the case, the annulment of the Directive would have been justified. After this judgment, UEAPME closed a cooperation agreement with UNICE in order to be involved in the "high-level" EU legislative process Business Europe[82]. Franssen and Jacobs address the question of the admissibility of the shares pursuant to art. 263 TFEU (ex article 230 TEC) and propose to amend the article by giving the social partners a specific and direct right to take legal action for a revision of a Council Decision implementing agreements concluded by them[83]. In fact, given their potential involvement as EU legislators, they should also have the same rights accorded to the other European institutions[84]. Finally, according to their opinion, only in this way the social partners could become real actors in the development of the Union's social policy[85].

There are also intermediate positions, such as those of Britz and Schimdt, according to which the employers' and trade-union sides alone would not be enough to represent the European public as a whole; however, considering the intervention of both the Council and the EC in the legislative process, the democratic principle would not in any case be violated[86]. Moreover, the European social partners could contribute to a substantial legitimacy of the european legislative process to the extent that they were adequately representative and committed themselves to representing the interests of that part

[76]See, T-135/96, Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of 17 June 1998, ECLI:EU:C:1998:37, II-00373. The ruling rejected UEAPME's claims and created a link between the representational requirements listed in the 1993 Communication and the principle of recognition of the negotiating parties. Firstly, the Court established that the principle of mutual recognition applies at the negotiation stage, but between those organizations which had at least been consulted in advance by the Commission. Secondly, the representativeness of the signatory parties must be collectively sufficient given the content of the agreement in question.

[77]A. ADINOLFI, Admissibility of action for annulment by social partners and "sufficient representativity" of european agreements, in European Law Review, 6, 2000, pp. 176ss.

[78]T-135/96, Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of 17 June 1998, op. cit.,

[79]T.H. FOLSOM, Principles of European Union law, including Brexit, op. cit.

[80]L. BETTEN, The role of social partners in the community's social policy law-making, in C. ENGELS, M. WEISS, Participatory democracy or furthering the interests of small elites, Liber Amicorum Blanpain, Kluwer Law International, The Hague, 1998, pp. 31-36.

[81]For details see: G. SGUEO, Beyond networks. Intelocutory coalitions, the european and global legal orders, op. cit.

[82]G. SGUEO, Beyond networks. Intelocutory coalitions, the european and global legal orders, op. cit.

[83]E. FRANSSEN, A. JACOBS, The question of representativity in the european social dialogue, in Common Market Law Review, 35 (6), 1998, pp. 1307ss.

[84]See in particular: Z. ELKINS, T. GINSURG, B. SIMMONS, Getting to rights: Treaty ratification, constitutional convergence and human rights practice, 54 in Harvard International Law Journal, 54, 2013, pp. 65ss.: "(...)yet evidence on the influences between international and constitutional economic and social rights indicates a far more idiosyncratic dynamic within different systems (...)". in the same spirit see also: D.M. BRINKS, V. GAURI, K. SHEN, Social rights constitutionalism: Negotiating the tension between the universal and the particular, in Annual Review of Law and Social Sciences, 11, 2015, pp. 298ss.

[85]In the same opinion see: S. SMISMANS, Law legitimacy and european governance: Functional participation in social regulation, Oxford University Press, Oxford, 2004, pp. 358ss.

[86]G. BRITZ, M. SCHMIDT, The institutionalized participation of management and labour of the management and labour in the legislative activities of the European Community: a challenge to the principle of democracy under Community law, in European law Journal, 6 (1), pp. 68ss.

of the population to which the future legislation was directed[87]. A similar opinion seems to be shared by Cella, which makes a distinction between political representation (which belongs to political institutions) and the so-called "pluralistic representativeness" that should lead to the construction of an economic and social citizenship. For Cella both channels represent the necessary basis for liberal-democratic political systems. Social dialogue would be the second channel for legitimizing European governance and would compensate for the democratic weakness of the European institutions[88].
Finally, there are theories in favor of the complete autonomy of the social partners: unlike Cella, which agrees on the need to strengthen controls on representativeness and on the internal democratic decision-making process to the social partners, but Bercusson has a completely different approach. According to him, the risks of democratic decipit should not be resolved either with controls or even with judgments, as the latter represent an "unjustified limit to the autonomy of the social partners"[89]. According to Bercusson, the European Parliament itself should normally accept the role of the governed and regulated social-auto parts-in the legislative process[90]. However, this constitutionalised european autonomy of the European social dialogue based on collective laissez faire should address the further demand for the independence of the European social partners: this autonomy has been questioned by several authors[91].
As far as it concerns the question of the foreseeable vetoes of the national social partners and of many Member States- the first ones during the negotiations of the agreement; the others in the Council-could, probably, be one of the main obstacles to its implementation. In this context, the lack of active intervention by the Parliament would certainly not represent a democratic deficit[92]. For this reason it would tend to share the opinion of Britz and Schimdt according to which, considering the intervention of both the Council and the EC, the democratic principle would not in any case be violated, much less when it would even be necessary to vote unanimously Member States[93].
Finally, it is added that an agreement such as the one in question, concluded by the social partners and concerning the improvement of working conditions, would satisfy the requirements laid down by the EU jurisprudence[94] to be considered as a collective agreement. This all the more because the initiative of the agreement would be spontaneous, and not induced by the EC. The Council Decision would then represent an extension decree on the model of those used in many Member States. In national laws, extension decrees are often of an administrative nature (ministerial) and national parliaments are not involved. At this point, particular problems would not be seen if this happened also at European level. Of course, here we would go beyond the mere extension of a normal collective agreement, as this provision would also involve legislative changes in some countries. But they would remain merely functional to the creation of the social security system and aimed at removing the obstacles deriving from its transnational scope.

7.The necessary requirements to transform an agreement into a Council Decision.
Before the EC proposes to the Council a legislative proposal to implement a European agreement, five checks are foreseen. The Commission Communication of 1993 introduced four controls, while the 1998 Communication introduced the fourth[95]. They are: the representativeness of the signatory social partners; the mandate of the social partners; the concordance of each clause of the agreement

[87]G. BRITZ, M. SCHMIDT, The institutionalized participation of management and labour of the management and labour in the legislative activities of the European Community: A challenge to the principle of democracy under Community law, op. cit.
[88]G.P. CELLA, European governance, democratic representation and industrial relations, in European Review of Labour and Research, 9, 2003, pp. 198ss.
[89]G.P. CELLA, European governance, democratic representation and industrial relations, in European Review of Labour and Research, op. cit.
[90]B. BERCUSSON, Democratic legitimacy and european labour law, in Industrial Law Journal, 28, 1999, pp. 164ss.
[91]For example, some doubts have been raised regarding the independence of some European social partners given their financial difficulties. Because of these, some social partners strongly depend on the financial support of the Union. The case would appear to be particularly related to the ETUC.
[92]P. GJORTLER, Democratic legitimacy and the Court of Justice of the European Union, in B. PÉREZ DE LAS HERAS, Democratic legitimacy in the European Union and global governance. Building a european demos, Palgrave Macmillan, London, 2017, pp. 182ss.
[93]G. BRITZ, M. SCHMID, The institutionalized participation of management and labour of the management and labour in the legislative activities of the European Community: a challenge to the principle of democracy under Community law, op. cit.
[94]M. HECQUET, Essai sur le dialogue social européen, op. cit. pp. 49ss.
[95]Communication from the Commission of 14 December 1993 on the implementation of the protocol on social policy presented by the Commission to the Council and the European Parliament (COM (93) 600 final). For analysis see: E. ELLIS, P. WATSON, European Union anti-discrimination law, Oxford University Press, Oxford, 2012, pp. 18ss.

in relation to EU law; the rules concerning SMEs as foreseen in article 153.2 lett. B) TFEU; the necessity/opportunity of the agreement. Controls on representativeness and control over the mandate are justified by the fact that a legislative act of the Union would be created without an active intervention by the European Parliament (here obviously refers to the UEAPME ruling on the role of democratic legitimacy)[96].

In particular, the control over the mandate[97] of the social partners aims to ensure that the signatory parties have effectively negotiated on behalf of their national members. According to the preliminary memorandum referring to the existing directives, the wording concerning the existence of a mandate to negotiate should be as follows: "the national members of these organizations (eg ESCs, BusinessEurope and CEEP) have given them a specific mandate to negotiate (...) the three organizations have concluded the framework agreement on behalf of their national members"[98]. The third check concerns the compatibility of each clause of the agreement in relation to european law. In the fifth, however, the EC will evaluate the agreements "in the light of the Social Charter of 1989[99] and of the European employment policy with reference to the necessity/opportunity of the agreement": in practice, it will assess whether the agreement is coherent with the existing policies and needs of the Union, and will check whether the aims of the agreement confirm them[100].

If analyzed jointly, the third and fifth tests appear to be controversial. While the third seems to be in fact consistent with the function of the EC as "guardian of the Treaties", as regards the other-as noted by Weltz[101]-, the EC has introduced a sort of political benchmark such as "employment policy in course"[102]. According to our opinion, a test on the opportunity is, by definition, open to discretion. Although it is not shared, in principle it is believed that the control over the opportunity could eventually reinforce the theory: that the European agreements are not a source of european law, but rather mere tools of interlocution used for the purposes of the EC that it could use a more effective decision-making process to achieve the objectives of the Union. Moreover, the fact that the control of the opportunity takes place only in cases where an agreement is launched on the autonomous initiative of the social partners (even if it is logical in principle[103]) would risk raising even more doubts about the hidden intentions of the EC to link the social dialogue to their needs. In short, the combination of legal (normal, in the opinion of writes) with the (questionable) political control would give the EC too much power to "filter" future legislative actions promoted by the social partners.

The EC would not logically evaluate the opportunity of the initiative if it had itself launched the initiative through a consultation of the social partners for an EU initiative on the same subject. The European Parliament and the Economic and Social Committee also dealt with this issue and, according to their opinions, the EC would have neither discretion nor the right to reject the agreements to be proposed to the Council. Kapten and Van Themaat[104], on the other hand, together with Betten, believe it is normal that the EC has discretionary power and that there is no obligation on its part to transform an agreement into European Union law[105]. Finally, Jacobs supports EC's right to make these checks, but only in the form of advice: it would then be up to the Council to give the final word and decide on the proposed act. It would be inconsistent with the nature of collective autonomy a political control of the EC on possible spontaneous initiatives taken by the social partners. On the other hand, the other

[96]E. ELLIS, P. WATSON, European Union anti-discrimination law, op. cit.

[97]Proposal for a directive and explanatory memorandum of the proposal for a directive to implement the framework agreement on parental leave concluded by UNICE, CEEP, and CES, COM (96) 26 final, point 13, CEC 1997, Proposal for a directive to implement the agreement framework on part-time work concluded by UNICE, CEEP and CES, COM (97) 392 final, points 16 and 17; Proposal for a directive to implement the framework agreement on fixed-term work concluded between UNICE, CEEP and the ETUC, COM (99) 203 final, points 18 and 19.

[98]E. ELLIS, P. WATSON, European Union anti-discrimination law, op. cit.

[99]See in particular: V. KHALLIQ, The European Union and the European Social Charter. Never the twain shall meet?, in Cambridge Yearbook of European Legal Studies, 15, 2013, pp. 170ss. G. CONWAY, European Union law, ed. Routledge, New York, 2015.

[100]S. SMINSMANS, The European social dialogue between constitutional and labour law, op cit., pp. 352ss.

[101]C. WELTZ, The european social dialogue under articles 138 and 139 of the EC Treaty, Kluwer Law International, The Hague, 2008, pp. 324ss.

[102]E. ELLIS, P. WATSON, European Union anti-discrimination law, op. cit.

[103]European Parliament, Doc A3-0091/94 in OJ C77/30.

[104]P.J.G. KAPTEYN, V. VAN THEMAAT, Introduction to the Law of the European Communities, Kluwer Law International, The Hague, 1998, pp. 1062ss.

[105]L. BETTEN, The role of social partners in the community's social policy law-making: Participatory democracy or furthering the interests of small elites, op. cit., pp. 258ss.

controls of legality and representativeness would be very normal[106]. Having said this, in the light of various initiatives taken by the ECs over the last few years on the promotion of supplementary pensions and the removal of obstacles to workers' mobility with regard to the protection of their complementary pension rights, there would be no reason to fear that EC found (politically) inappropriate a social security scheme created at European level. The real question, however, would be its "legality" referring to the competences of the EU and the Member States. As for the powers of the Council to reject the agreement for political reasons, however, no author analyzed until now has raised criticism. The reason for this consensus lies in the fact that this institution-and its voting procedure-naturally presupposes a political judgment on the acts in question. The same consensus was expressed by the doctrine on the impossibility, both for the EC and for the Council, to make amendments to the agreement[107]: whether such a faculty was granted to them, the autonomy of the social partners-and the inherent nature of the dialogue social-it would result in compromises[108].

8.Issues of subjects excluded from the scope of article 153 TFEU.

Paragraph 5 of article 153 TFEU excludes certain matters from the object of every possible provision. Among these exclusions there is also the subject of remuneration. This limit represents a major problem for this research, since the CJEU case law has repeatedly considered the complementary social security benefits as "deferred remuneration"[109]. Both communications from the EC of 1993 and 1998 confirm that these exclusions also apply to the possible content of agreements. Franssen believes that this provision was introduced to protect the autonomy of the national social partners from the Union's interference in these matters[110]: the link between article 155 TFEU and article 153 TFEU should not therefore refer to the limitations listed in the latter and the European social partners could also deal with these matters. Instead, Piazolo believes that if this were possible, then the Council could easily (and dangerously) go beyond these limits, introducing its legislation through the ploy used to implement collective agreements[111]. Jacobs also appears to be reluctant: in the case of legislation in these matters, the lack of rules on the voting procedure in the Council should prove that the opinions in favor of including such matters are not in keeping with the structure of article 153 TFEU[112]. In reality, this unresolved problem-especially with regard to the strong wage differences between EU Member States- does not seem to have gone unnoticed by the EC. In fact, in its Social Agenda 2005-2010[113], it revealed its intention to promulgate a proposal for a new voluntary but legally binding framework for collective bargaining at the enterprise and sector level, precisely to overcome today's obstacles. Naturally, this instrument would remain outside the scope of article 155 TFEU. But it would still have covered European collective bargaining and would have been able to deal with some key issues that are now, in fact, excluded from article 153.5 TFEU. In reality, in the wake of the said Social Agenda, a study was made in 2006 for the EC[114]; however, the initiative was strongly

[106]A. JACOBS, European social concertation, in Collective bargaining in Europe, Comisión Consultiva Nacional de Convenios Colectivos. Ministerio de Trabajo y Asuntos Sociales (Spain) 2004, pp. 372ss.

[107]A different question is that of the possibility for the Commission to include in the preamble of the Directives, some amendments of a procedural, technical, grammatical or orthographic type. The problem would arise if these amendments had an interpretive nature. There were particular problems with regard to the fixed-term agreement, where the Commission introduced a provision in Article 3 which provided for penalties for those States that had committed infringements. Member States rejected this rule by raising the violation of Article (ex) art. 249 TEC (today 288 TFEU). The Commission therefore had to transform this rule into a declaration declaring the importance of good mechanisms to provide effective sanctions.

[108]J. HELLESTEN, Reviewing social competence of European Communities, EC legislative process involving social partners and legal basis of European Collective agreements, Helsinki, Ministry of Labour, pp. 108ss.

[109]As we can see the use of termine from CJEU in the next cases: C-69/80, Worringham e Humphreys/Lloyds Bank of 11 March 1981, ECLI:EU:C:1981:63, I-00767; C-170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz of 13 May 1986, ECLI:EU:C:1986:204, I-01607, par. 16; C-262/88, Barber v. Guardian Royal Exchange Assurance Group of 17 May 1990, ECLI:EU:C:1990:209, I-01889; C-23/83, Liefting and others v. Directievan het Academisch Ziekenbuis bij de Universiteit van Amsterdam of 18 September 1984, ECLI:EU:C:1984:282, I-03225.

[110]E. FRANSSEN, A. JACOBS, The question of representativity in the european social dialogue, op. cit. 185-186

[111]K. PIAZOLO, Der Soziale Dialog nach dem Abkommen ueber die Sozialpolitiek und den Vertrang von Amsterdam, ed. Springer, Frankurt am Main, 1999, pp. 128ss.

[112]A. JACOBS, European social concertation, in Collective bargaining in Europe, op. cit. K. PIAZOLO, Der Soziale Dialog nach dem Abkommen ueber die Sozialpolitiek und den Vertrang von Amsterdam, op. cit. A. JACOBS, European social concertation, in Collective bargaining in Europe, Comisión Consultiva Nacional de Convenios Colectivos. Ministerio de Trabajo y Asuntos Sociales (Spain) 2004, pp. 372ss.

[113]Com(2005) 33 final.

[114]E. ALES, Transnational wages setting as a key feature of a socially oriented european integration: Role of and (questionable) limits on collective action WP C.S.D.L.E. “Massimo D’Antona”. INT-63/2008, pp. 5ss.

opposed and actually blocked by Business Europe[115].

9.The legal effects of agreements implemented according to national practices.
The implementation of the so-called voluntary or autonomous agreements is based only on the national industrial relations systems of each State involved, as required by article 155.2 TFEU[116]. These agreements can also be concluded following a previous EC consultation (scenario 2); or they can be concluded on the spontaneous initiative of the parties (scenario 4). The 1993 EC Communication states that if the social partners decide to choose the voluntary way, the terms of the agreement "will bind its members and will only affect them[117]". Therefore, in the light of these rules, some consequent characteristics of such agreements can already be listed: the erga omnes effect is excluded; these agreements do not presuppose either a direct application on individual contracts and national labor legislation[118]; and neither-unlike those implemented by a Council Decision-are part of european law. Finally, the results of their implementation will vary in the different Member States, given the large differences between national legal systems. An important point to note is that these agreements are not limited to the matters referred to in article 153 TFEU only. In fact, since the Council does not take any decision, there is no direct link with the requirements, limits and procedures imposed for the legislative process. In short, these agreements could go well beyond the european legal competences[119]: this opportunity could open wider scenarios for the creation of social policy at european level, even if the present study will undoubtedly give precedence to an agreement implemented by a Decision of the Council in order to make it compulsory and extended erga omnes.
The greater flexibility envisaged for autonomous agreements should not be underestimated, because both the matters of negotiation (social security and social protection) and the required voting requirements (unanimity), represent major obstacles to the implementation of the agreement through the european legislation. Some issues were raised with regard to the role of Member States on the implementation of article 155 TFEU agreements, since the Declaration No. 27 on the Treaty of Maastricht provides that Member States have no obligation to apply such agreements, nor in direct way (through the law), or by modifying their legislation in order to facilitate its application[120]. In reality, this statement seems to contradict the wording of that article which would instead suggest that the Member States are obliged to contribute to the implementation of these agreements. Article 155 TFEU in fact uses the present indicative: "agreements are implemented" (and in english, the future imperative "shall") and then the conjunction "and" according to practice, etc[121].
Thus, if national governments did nothing to transpose the agreement into their national legal system, it would be a burden of the European social partners to put pressure on their national members in order to respect the rules of the agreement. In this regard, one wonders whether the national social partners are obliged to implement the agreement and, if this is the case, on which law such an obligation would be based. Although the 1993 Communication clearly stipulates that members are bound, the doctrine seems divided. Unsurprisingly, those who do not recognize any normative effect to such agreements, such as Sciarra [122] or Kenner[123], exclude that it produces legal effects for their members. The solutions proposed by Jacobs and Franssen appear interesting. Franssen believes

[115]A. ALES, Transnational collective bargaining: Past, Present and Future. European Commission, DG Employment and Social Affairs and Equal Opportunities. Unit D2 February 2006.
[116]See for details: R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, München, 2016. M. DECHEVA, Recht der europäischen Union, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 586ss. N. FOSTER, European Union law directions, Oxford University Press, Oxford, 2016. A. THIES, International trade disputes and Europan Union liability, Cambridge University press, Cambridge, 2013. D.A.O. EDWARD, R. LANE, Edward and Lane on European Union law, Edward Elgar Publishers, Cheltenham, 2013.
[117]B. BERCUSSON, Cross border collective actions in Europe: A legal challenge, op. cit., pp. 14ss.
[118]O. DEINERT, Modes of implementing European collective agreements and their impact on collective autonomy, in Industrial Law Journal, 32, 2003, pp. 324ss.
[119]S. SMISTMANS, Law legitimacy and european governance: Functional participation in social regulation, op. cit., pp. 326ss.
[120]See, A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. K. LENAERTS, I. MASELIS, K. GUTMAN, European Union procedural law, Oxford University Press, Oxford, 2014, pp. 133ss.
[121]K. LENAERTS, I. MASELIS, K. GUTMAN, European Union procedural law, op. cit.
[122] S. SCIARRA, Collective agreements in the hierarchy of european community sources, op. cit.
[123]J. KENNER, EU employment law. From Rome to Amsterdam and beyond, op. cit.

that the phrase "are implemented" is directly addressed to the affiliated national social partners of the signing parties[124]. The reason should be based on the fact that only the national social partners have the capacity to implement these agreements and certainly not the European social partners. On the basis of this argument, Franssen even criticizes the wording of the article because this obligation to conclude national collective agreements would imply a limitation on the freedom of collective negotiation protected by the ILO Convention n. 154[125]. According to Jacobs[126], however, the ILO Convention would not be violated because the national members, from the moment they affiliated themselves with the European organizations, would automatically accept to commit themselves to implementing the agreements signed by them and the mandate would therefore already be included in their contract membership; in addition, affiliates should be considered bound even if they do not approve the agreement, provided they are in the minority with respect to all other national members; Franssen also takes into consideration the internal rules of the European Organizations. In fact, Franssen similarly proposes a solution based on private law: an obligation originating from the internal operating rules of the European organizations and applicable to national members[127].

This obligation would derive automatically from the mandate or agency contract underlying membership of a European Trade Union or employers' organization. However, the main problem concerns the members of the national organizations (the final recipients, ie, of the agreement: companies or workers) who would be obliged to implement the agreement on pressure, in turn, of their national affiliated organizations, in fact, to the European ones. Here the solution of making the agreement legally binding seems to be more complicated, considering the different functioning of the national legal systems. This is the reason why Jacobs speaks of "chains of responsibility"[128].

Both theories of the mandate and the agency contract are taken into consideration to frame the possible relationship between the signatory party to the agreement and its national affiliated organizations. The uncertainties about the legal effects of voluntary agreements and their non-erga omnes nature remain an open question; moreover, their implementation and their actual execution, even if properly carried out by the national actors, will then turn out to be very different according to the national laws. Some of the questions outlined above clearly emerge from the Report of the European social partners of 28 June 2008[129] on the implementation of the agreement on teleworking: considerable differences were found between the states, both on the content-sometimes enriched by the national social partners-and in the different modalities laws used to transpose the agreement and, consequently, on the scope and measures to ensure its execution. Finally, it will be up to the social partners to monitor the implementation of these agreements, and this through national reports and working groups. However, the role of the EC should not be underestimated in all those cases where the European social partners had concluded an agreement following a previous consultation on the basis of article 154 TFEU[130]. In fact, given the previous interest expressed by the EC in regulating a given subject, which then resulted in a consultation of the social partners, further control of the EC could take place not only on the representativeness of the parties. In the event that the agreement was not implemented satisfactorily, the EC could react even by issuing its legislative proposal on this matter[131]. It is the so-called "or you act, or we legislate", as expressed by Smismans[132]. Of course, if there was not even a previous consultation by the EC (scenario 4), the social partners, although much freer (and not even subject to controls of representation, in addition to everything) would have even less chance of receiving support to make apply their agreements.

[124]Or vis-à-vis the Council in the case of the other implementation option provided for in the second part of the paragraph of this article.

[125]And entry in force from 11 August 1983. For details see, F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN, The European Convention on Human Rights and the employment relation, ed. A & C Black, London, 2014. D. LIAKOPOULOS, Domaine social: rôle de l'Union européenne et de l'Organisation Internationale du Travail, in International and European Union Legal Matters-working paper series, 2010.

[126] A. JACOBS, European social concertation, in Collective bargaining in Europe, op. cit., pp. 380ss.

[127]E. FRANSSEN, Legal aspects of the european social dialogue, op. cit.

[128]A. JACOBS, European social concertation, in Collective bargaining in Europe, op. cit.

[129]R. BLANPAIN, European labour law, op. cit.

[130]A.C. NEAL, (Report on) The United Kingdom, in R. BLANPAN, Implementation of the european agreement of telework, Kluwer Law International, The Hague, 2007, pp. 242ss.

[131]Comunication (2004) 557 12/08/2004

[132]S. SMINSMANS, The European social dialogue between constitutional and labour law, op. cit., pp. 356ss.

10.Some final thoughts/considerations on the agreements of article 155 TFEU.

A framework agreement implemented by a Council Decision (scenario 3) would be the ideal instrument for creating a mandatory european social security scheme: it could be concluded at sectoral level; would have an erga omnes application and could be exempted from the rules of competition[133]; moreover, once it has been adopted by the Council in the form of a Directive, it would have the power to impose on Member States the necessary adaptations of their national legislation- or at least impose an exemption from them with regard to the part only of the agreement in question- in order to allow the scheme to operate on a transnational level.

But there are many obstacles: the subject "social security and social protection" listed in article 153 TFEU has never been the subject of European agreements; the political resistance of the national social partners affiliated to the European organizations will probably be very strong; no less, if even an agreement could be reached, there would be various oppositions of the Member States in the Council where unanimity would be needed; finally, if the supplementary pension is considered as "remuneration", it could in principle be excluded from the object of a regulation pursuant to article 153.5 TFEU[134]. As for autonomous agreements, they would ideally represent a second choice with respect to the former. In particular, the difficulties in ensuring its implementation would greatly limit the possibility of creating a mandatory transnational professional social security scheme. If it were not compulsory, it could not therefore offer a high level of solidarity and would undoubtedly be subject to EU competition rules[135]. It is also believed that if it were not mandatory, it could not even be truly transnational, since many States would not be able to fully implement it in their national laws.

The instrument of the Directive would however allow the national social partners to implement the agreement in their respective laws under article 153.3 TFEU but in this case, the State would be guarantor, guardian and responsible for the agreement to be effectively implemented.

Of course, the chances of achieving such a European agreement will also depend on the type of social benefits that the scheme intended to offer: health, retirement, paid leave, insurance against lack of self-sufficiency, etc. But if we wanted to create a transnational social security regime, in many cases it would be necessary to exempt labor and social legislation in Member States. For this reason it is reiterated that the Directive would remain the best system. That said, the autonomous agreements have the advantage of leaving much more autonomy to the social partners; and the signatory parties would have the freedom to choose the scope and contents of the matters to be negotiated.

This greater flexibility could open the door to a first, even timid "experiment", and new perspectives of European collective bargaining in so far unexplored lands[136].

11.Feasibility of a European framework agreement establishing a supplementary pension scheme at EU level: The question of its legal basis and EU competence on this subject and the issue of the legal basis with reference to the subject of the agreement.

It will therefore attempt to hypothesise a social security scheme created by a European collective

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[133]CJEU, C-437/09, AG2R Prévoyance of 3 March 2011, ECLI:EU:C:2011:112, I-00973; C-185/91, Reiff of 17 November 1993, ECLI:EU:C:1993:886, I-05801, par. 14; C-245/91, Ohra Schadeverzekeringen of 17 November 1993, ECLI:EU:C:1994:887, I-05851, par.10; C-266/96, Corsica Ferries France of 18 June 1998, ECLI:EU:C:1998:306, I-03949, parr. 35, 36 and 49; joined cases C-570/07 and 571/07, Blanco Pırez et Chao Gomez of 1st June 2010, ECLI:EU:C:2010:300, I-04629, parr. 65-66.; C-92/09 and C-93/09, Schecke e Eifert v. Land Hessen of 9 November 2010, ECLI:EU:C:2010:662, I-11063; C-400/10 PPU, McB v. L.E. of 5 October 2010, ECLI:EU:C:2010:582, I-08965; joined cases C-264/01, C-306/01 and C-355/01, AOK Bundersverband and others of 16 March 2004, ECLI:EU:C:2004:150, I-02493; C-218/00, Cisal di Battistello Venanzio of 22 January 2002, ECLI:EU:C.2002:36, I-00691; C-70/95, Sodemare of 17 June 1997, ECLI:EU:C:1997:301, I-03395; C-280/00, Altmark Trans of 24 July 2003, ECLI:EU:C:2003:415, I-07747; C-99/17 P, Infineon Technologies v. Commission of 26 September 2018, ECLI:EU:C:2018:773, published in the electronic Reports of the cases; C-673/16, Coman and others of 11 January 2018, ECLI:EU:C:2018:2, published in the electronic Reports of the cases. See for the analysis of the above cases. D. SCHIEK, Economic and social inegration. The challenge for European Union constitutional law, Edward Elgar publishers, Cheltenham, 2012. A. SÁNCHEZ GRAELLS, Public procurement and the European Union competition rules, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 139ss. A. EZRACHI, European Union competition law. An analytical guide to the leading cases, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 669ss.

[134]A. SÁNCHEZ GRAELLS, Public procurement and the European Union competition rules, op. cit.

[135]See for details: A. WZRACHI (ed.), Research handbook on international competition law, Edward Elgar Publsihers, Cheltenham, 2012. R.WHISH, D. BAILY, Competition law, Oxford University Press, Oxford, 2012.W. VERLOREN VAN THEMAAT, B. REUDE, European competition law. A case commentary, Edward Elgar Publishers, 2018. M. LORENZ, An introduction to European Union competition law, Cambridge University Press, Cambridge, 2013. A. ALBORS-LLORENS, European competition competition law and policy, ed. Routledge, London & New York, 2012, pp. 123ss.

[136]S. SMINSMANS, The European social dialogue between constitutional and labour law, op. cit.

agreement pursuant to article 155.2 TFEU and implemented through a Council Decision which would make the regime compulsory. In this regard, the issue of the matters of the agreements that can be implemented through this Decision should be dealt with more extensively.
The second paragraph of article 155 TFEU[137] states: "Agreements concluded at Union level shall be implemented in accordance with the procedures and practices of the social partners and of the Member States or, in the areas covered by article 153, and at the joint request of the signatory parties, on the basis of a decision by the Council on the proposal of the EC. The European Parliament is informed"[138]. The Council shall act unanimously when 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) from the moment whereas only an agreement falling within the matters listed in article 153 can therefore be implemented through a Council Decision, and since it is also necessary to follow the same voting requirement for these matters, it must be ascertained that the subject matter of the agreement falls within the article 153 TFEU, provided that it is repeated, it is necessary to make it compulsory through EU legislation[139]. Well, point (c) of sub-paragraph 1 of that article refers to social security and social protection for workers. moreover, for this sector, the Council deliberates according to a special legislative procedure, unanimously, after consulting the European Parliament o and of the Economic and Social Committee and of the EU Committee of the Regions; it has also been seen that, pursuant to article 155.2 TFEU[140] on the other hand, subject to the same conditions of voting in the Council as set out in art.153.2 TFEU, Parliament is "informed"[141].

12.Can such a (legislative) initiative fall within the competence of the European Union?
Social security systems tend to remain a national competence. The term "tendency" is used here because the jurisprudence of the CJUE has often circumscribed the powers of States also in such matters, whenever the fundamental freedoms of the Treaty could be limited by them[142]; moreover, the new right of European citizenship has also been invoked to compress national autonomy on these systems[143]. With regard to public social security systems, which are certainly subject to much more stringent rules and state powers than private ones, it is recalled that even health care systems have been included in the notion of "services"[144]. The (public) social security schemes are coordinated in accordance with article 48 TFEU[145], aimed at ensuring the free movement of workers, of which Regulation 883/04[146] is today its main implementation. The limitations on the sovereignty of Member States on their public pension schemes for example from 1959 to 2009 the CJEU has enacted more than 600 judgments in this matter, mostly in an attempt to define and broaden the scope of security systems of social coordination[147].

13.Social security and social protection in letter c) article 153.1 TFEU.
Returning to letter c) of sub-paragraph 1 of the said article, it mentions both social security and social

[137]Otherwise, as noted in paragraph 2 of this chapter, an autonomous agreement should not necessarily satisfy the matters listed in Article 153.1 TFEU. Naturally, if the social partners opted for this option, all the limits and difficulties of implementing these types of agreements would remain.
[138]R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, op. cit.
[139]In the areas referred to in paragraph 1 (c), (d), (f) and (g), the Council shall act by special legislative procedure unanimously after consulting the European Parliament and those committees.
[140]R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, op. cit., M. DECHEVA, Recht der europäischen Union, op. cit., C. BARNARD, S. PEERS, European Union law, op. cit., N. FOSTER, European Union law directions, op. cit., A. THIES, International trade disputes and Europan Union liability, op. cit., D.A.O. EDWARD, R. LANE, Edward and Lane on European Union law, op. cit.,.
[141]R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, op. cit.
[142]See the analysis of L. BOUCON, EU law and retained powers of Member States, in L. AZOULAI, The question of the competence in the European Union, Oxford University Press, Oxford, 2014, pp. 170ss.
[143]L. BOUCON, EU law and retained powers of Member States, in L. AZOULAI, The question of the competence in the European Union, Oxford University Press, Oxford, 2014, pp. 170ss.
[144]C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss.
[145]C. BARNARD, S. PEERS, European Union law, op. cit.
[146]Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coodination of social security systems, OJ L 166, 30.04.2004. A.H. TÜRK, Judicial review in European Union law, Edward Elgar Publishers, Cheltenham, 2010.
[147]Even Directive 2011/24 / EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare has its legal basis in Article 114 TFEU (Internal Market), beyond than on Article 168 TFEU (Public Health).
S.A. ROBERTS, A short history of social security coordination, in Y. JORENS, 50 years of social security coordination: Past-present-future, European Commission, Directorate General, Social Affairs and Equal Opportunities (printed in Spain).

protection for workers. The latter term is clearly broader: according to Blanpain[148] this term, in itself, could refer to all the subjects that can improve the situation of a worker, such as working conditions, salaries, other social benefits, etc. In this context, however, the notion should probably be linked to social security. In the sense here, in the opinion of the writer, that it should refer to the same services typically provided by the public social security (health, disability, unemployment, pensions, family allocations, etc.), thus excluding both the other subjects that are listed in the same article 153 TFEU; and, obviously, those that are explicitly removed from the scope of article 153 TFEU (such as strike, lockout, wages, etc.)[149].

It is believed that the broader concept of social protection should not be read in the sense that it refers to social risks other than those offered by social security. Mere assistance to the unemployed, for example, is part of the fight against social exclusion, listed in the subjects of article 153.2 TFEU lett. j); The notion of "social protection" in article 21.3 TFEU on European citizenship could already be more ambiguous: in that case, this term was interpreted extensively to include social assistance, since that article refers to all citizens[150].

But in art. 153 TFEU, social security and social protection refer to workers. We therefore remain on the interpretative line of Blanpain. And it is assumed here that in the broader tenor of the term "social protection" referring to the same benefits provided by the public pension and having the same ratione personae (the workers), one could include, for example, complementary social security.

To be sure, the term "social security" has been used several times also in reference to complementary social security. The EC Communication of 22 July 1991, for example, is entitled: "Supplementary social security schemes": the role of occupational pension (social security supplement): role of occupational pension schemes in the protection of workers and their implications for freedom of movement)[151].

Directive 98/49/EC, in his recital num. 2, seems to define complementary pension schemes as a sub-group of the broader concept of "social protection"[152]. In fact, it states: "(2) Whereas the social protection of workers is guaranteed by legal social security schemes supplemented by complementary social security schemes"[153]. Of course, according to this recital, both the legal and the complementary schemes are "social security"; however, it should also be remembered that this Directive has its own legal basis in article 48 TFEU which coordinates, in fact, social security schemes for the movement of workers. This legal base, on the other hand, has not been taken over from the already examined Directive 2014/50/EU[154] which, although directly referring to supplementary pensions, is instead based on article 46 TFEU[155].

Among other things, while article 20 of the "IORP" Directive (2016/2341 of 14 December 2016)[156], when it dictates the rules of the cross-border activities of the latter, saves "the national legislation on social security and work with regard to the organization of pension systems, including mandatory membership and the results of collective bargaining"[157], the corresponding English version of that article does not use the term social security:" Without prejudice to national social and labor legislation

[148]R. BLANPAIN, The EU competences regarding social policies, op. cit., pp. 62ss.

[149]C. NOWAK, Europarecht nach Lissabon, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, European Union law, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, Text, cases and materials on European Union law, Gavendish Publishing, New York, 2013.

[150]C. BARNARD, S. PEERS, European Union law, op. cit.

[151]European Commission, Communication of 22 July 1991: Supplementary social security schemes: the role of occupational pension in the social protection of workers and their implications for freedom of movement SEC (91) 1332.

[152]Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ L 209, 25.7.1998, p. 46-49. for details see: G. MOENS, J. TRONE, Commercial law of the European Union, ed. Springer, 2010.

[153]G. MOENS, J. TRONE, Commercial law of the European Union, op. cit.

[154]Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights Text with EEA relevance, OJ L 128, 30.4.2014, p. 1-7. See for details, C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss

[155]For details see, A. KACZOROWSKA-IRELAND, European Union Law, Routledge, London & New York, 2016.

[156]Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs), OJ L 354, 23.12.2016, p. 37-85. See also: P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, Oxford University Press, Oxford, 2017.

[157]European Commission, Communication of 22 July 1991: Supplementary social security schemes: the role of occupational pension in the social protection of workers and their implications for freedom of movement SEC (91) 1332.

on the organization of pension systems, including compulsory membership and the outcomes of collective bargaining agreements"[158].

It is not believed that in the 1991 social policy agreement the contracting parties had thought about supplementary pensions[159]. Moreover, at that time public social security in most European countries was largely dominant, if not the exclusive source of social security. But times have changed a lot in recent years and today complementary social security has conquered, and will increasingly conquer, a decisive role for European welfare. In this regard, the subsequent strong Union initiatives on supplementary pensions should also be considered. The EU initiatives on supplementary pensions have focused on two specific directions: removing obstacles to the mobility of workers enrolled in supplementary funds; and to create a single market for pension funds[160], and in particular to create "pan-european" pension funds. It is reiterated, however, that already financial supervision of pension and insurance funds has already been "Europeanised" and exercised by a European Authority (the European Insurance and Occupational Pensions Auhtority (EIOPA)) based in Frankfurt[161]. The EIOPA can not only make binding decisions directly addressed to pension funds and insurance without the need for authorizations from national supervisors; but it now fully participates in the drafting of European legislation on pensions for pensions and insurance in close cooperation with the EC. The fact that supplementary pensions may form part of the legal basis of article 153 TFEU lett. c) it is peaceful: the two EC consultations are proof of this. The EC wanted to base this initiative on supplementary pensions. More specifically, with the two consultations of the European social partners (intersectoral) of 2002[162] and 2003[163], the EC intended to undertake an initiative on the mobility of workers registered in pension funds (an initiative that would then lead to the proposal of the so-called "portability" Directive "of supplementary pension rights[164]).

In this regard, the EC decided to consult the social partners under article 154.2 TFEU (ex article 138.2 TEC) on the possible orientation of the action to be taken[165].

The main point to be noted for this research is that already the first EC consultation clearly recognized the Union's competence to take such actions under article 153.1, lit. c) (ex article 139.1, letter c, TCE), referred to the "social security and social protection of workers"[166]. Furthermore, in its consultation, the EC referred to what the social partners had already expressed in the preamble to their agreement on fixed-term work then implemented by the Directive, which requires innovations to complementary social protection systems for workers, to adapt them to current situation and in particular to ensure the transferability of rights[167].

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[158]The same in french version: “Sans préjudice des dispositions de leur droit social et de leur droit du travail relatives à l'organisation de leurs régimes de retraite, y compris l'affiliation obligatoire, et des dispositions résultant des négociations de conventions collectives". For the English and French versions of this article, it would be necessary to "simply" safeguard the national social and labor law applied to the organization of national pension systems, but not specifically the social security legislation. See also: P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.

[159]E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, Complete European Union law. Texts, cases and materislas, Oxford University Press, Oxford, 2013

[160]Commission Communication of 11 May 1999: Towards a Single Market for Pension Schemes, COM (99) 134. It should be added that this document was preceded by another 1994 Communication: "An Internal Market for Pension Funds" (94 / C 360/08) which, moreover, replaced a legislative proposal by the Commission, which it subsequently withdrew.

[161]For more details see: A. GEORGOSOULI, Regulatory incentive realignment and the EU legal framework of bank resolution, in Brooklyn Journal of Corporate, Financial & Commercial Law, 10 (2), 2016. E.WYMEERSCH, The european financial supervisory authorities or ESAs, in E. WYMEERSCH, J.K. HOPT, G. FERRARINI, Financial regulation and suprvision. A post-crisis analysis, Oxford University Press, Oxford, 2012. P. IGLESIAS-RODRÍGUEZ, Supervisory cooperation in the single market for financial services: United in diversity?, in Fordham International Law Journal, 41, 2018, pp. 590ss.

[162]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, Cambridge University Press, Cambridge, 2014. M. HAVERLAND, When the welfare state meets the regulatory state : EU occupational pension policy, in Journal of European Public Policy, 14 (6), 2007, pp. 888ss. A. HENNESSY, The role of agenda control in the creation of a single market for pension funds, paper presented in decimal EUSA Biennial International Conference, Montreal, Canada, May 17-19, 2007.

[163]First consultation on portability of pensions SEC (2002) 597 - adopted by the Commission on 3/06/2002. Second consultation on portability: possible content of the action: SEC (2003) 916 of 12 September 2003.

[164]Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights, SEC(2005) 1293, COM/2005/0507 final-COD 2005/0214

[165]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, op. cit.

[166]For analysis see, G. CONWAY, European Union law, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, European Union law stories, Cambridge University Press, Cambridge, 2017.

[167]Council Directive 1999/70 / EC of 28 June 1999 on the framework agreement for ETUC, UNICE and CEEP on fixed-term work.

It should also be noted that the inter-sectoral european social partners, in their 2003-2005 work program presented in Brussels on 28 November 2002, also included a chapter on worker mobility. In particular, a seminar was envisaged to identify the fields or joint action of social partners at Union level that could help remove obstacles to mobility (especially for managers), including those linked to occupational pensions[168]. After the affirmative reply to the first consultation in 2002, the intersectoral social partners were again consulted by the EC on the possible content of the initiative. Finally, the EC Communication, which reports the results of the consultation, leaves no doubt about the possible competence of the social partners to negotiate on the matter: "in light of the provisions of article 153 (1) of the EU Treaty, according to which the supports and complements the activities of the Member States on social security and social protection for workers, the EC considers that there are requirements for legislative action aimed at establishing minimum requirements to improve the portability of supplementary pension rights in the context of Union. The EC believes that the most necessary instrument would be a collective agreement at European level"[169]. Finally: "the EC hopes strongly (as reported by English: strongly hopes) that, (...) the social partners make use of the possibilities provided for in article 155 TFEU with a view to a European framework agreement"[170].
The European social partners did not agree on the content of the initiative, and the EC launched the aforementioned legislative proposal in 2005. However, it is also recalled that Directive 2014/50/EU, heir of that consultation many years before and the first proposal of 2005, has maintained a "stain" of article 153 TFEU in its content: Article 8 of the Directive explicitly provides that Member States can implement the Directive through agreements. This option is rather curious, given that this Directive does not have its legal basis in article 153 TFEU. Only paragraph 3 of the article in question provides Member States with the option to have directives implemented by their social partners; but it should be inferred that this option applies "only" to directives adopted under the same article 153 (or 155 if deriving from a European agreement implemented by the Council Decision) and not to directives having a different legal basis. Continuing with EU initiatives on supplementary pensions. In short, the Union's approach to supplementary retirement pensions has moved away considerably from that reserved for public pensions. "Deducting" at this point in lett. c) of article 153 TFEU, public social security from the complementary one, could perhaps be less obstacles to an initiative of the European social partners to create a complementary European social security system, thus overcoming the many, already seen, limits of EU competence still imposed by the Treaties on the subject of social security which, however, could be understood here as public social security[171].
Moreover, in many other European Union rules, social security and social protection have not always been treated together, and this could help to prove that the (historic) prudence of the European legislator was rather-if not exclusively-concentrated on public schemes. Of course, back to the 80s, the term social security refers to both public and private schemes, such as the two directives on anti-discrimination between men and women in relation to social security[172]. However, the said directives referring respectively to public and supplementary pensions, add in the definition of the latter the term "occupational (social security)"[173]"; schemes; while to define public welfare they use only the term "social security". Also in those years, in the directives concerning the insolvency of employers, whose first version is in 1980, the section containing the provisions concerning the protection of public and

[168]G.P. CELLA, B. BERCUSSON, F. TRAXLER, Towards a wuropean system of industrial relations, in Transfer, 9 (2), 2003, pp. 253ss.
[169]Comunication 916 of 12 September 2003.
[170]Comunication 916 of 12 September 2003.
[171]Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements to increase the mobility of workers between member states by improving the acquisition and safeguarding of supplementary pension rights.
[172]See in this sector the leading case: CJEU, C-409/95, Marschall of 11 November 1997, ECLI:EU:C:1997:533, I-06363 : “A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Art. 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment (...)". For details see also: M. POIARES MADURO, M. WIND, The transformation of Europe: Twenty-five years on, Cambridge University Press, Cambridge, 2017, pp. 321ss.
[173]Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in the field of occupational social security schemes, later replaced by Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

private social security rights of workers is entitled "social security"[174], even if rules to protect public and private insurance are contained in different articles. Analyzing TFUE[175], there are some significant norms that seem to confirm a separation, if not a distinction, between social security and social protection: In art. 153, for example, sub-paragraph 4 protects the right of the Member States to organize their social security systems and their financial balance; but social protection is not mentioned; In the Treaty on European Union, social protection, and more generally various aspects of social relevance, are indicated as an objective in article 3. Finally, art. 34 of the Charter of the Fundamentals Rights of the European Union (CFREU), refers to the right of access to social security and social assistance[176], according to the procedures established by European Union law and national laws and practices[177]. In fact, there are no particular "prudential" clauses relevant to this reasoning. The second part of sub-paragraph 4, on the other hand, the one that allows states to maintain or adopt more favorable measures providing for greater protection, refers to all the provisions adopted pursuant to the same article. In article 156 TFEU concerning the open method of coordination (MAC)[178] which is notoriously a soft law system for achieving coordination of national policies, the reference to the various subjects includes only social security. More generally, it refers to matters on which public intervention remains prevalent[179].

Article 48 TFEU, conceived in the 1957 Treaty of Rome, focuses only on the removal of workers' social security barriers and does not mention "social protection"[180]. Not surprisingly, the safeguard clause dictated for this article refers to the possible risks to states with particular regard to the financial balance of their systems. "Only" sub-paragraph 3 of article 21 TFEU on European citizenship[181], when it requires special procedures and unanimity to promote the right to stay and circulate within the Union, still refers to social security and social protection. Apart from the fact that the requirement of unanimity is an established fact, already foreseen by the letter of article 153 TFEU, it is pointed out that the article refers to "citizens" and not to workers. It therefore takes care to protect public schemes rather than complementary ones, bearing in mind that the scope of the Directive refers, in fact, to those "non-active" citizens who could therefore claim welfare assistance services stay where they were staying[182]. The same preamble to the framework agreement on fixed-term work already mentioned above seems to make a clear distinction between public and complementary social protection. Regarding the first, he says: "This agreement refers to the working conditions of fixed-term workers and recognizes that matters relating to statutory social security schemes fall within the competence of Member States"[183]. On the other hand, the sentence concerning supplementary social security is separated, inserted in the subsequent paragraph, and is preceded by an "in addition". Note, however, that there is also a different terminology for the two: "legal social security schemes" for the public; and

[174]Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

[175]Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employed persons in the event of the employer's insolvency; then, as will be seen later, it was replaced by two other directives: Directive 2002/74 of 23 September and finally Directive 2008/94 of 22 October. The title of the "social security provisions" section originating from the 1980 directive has always remained unchanged in the subsequent directives

[176]See for details: X. GROUSSOT, G.T. PETURSSON, The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?, in S. DE VRIES, U. BERNITS, S. WEATHERILL, The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing, Oxford University Press, Oxford, 2015. S.I. SÁNCHEZ, The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental Right, in Common Market Law Review, 49 (5), 2012, pp. 1566ss. T. TRIDIMAS, Fundamental rights, general principles of EU law and the Charter, in Cambridge Yearbook of European Legal Studies, 16 (3), 2014, pp. 364ss. H. VON DER GROEBEN, J. SCHWARZE, A. HATJE, Europäisches Unionsrecht, ed. Nomos, Baden-Baden, 2015, pp. 820ss. K. STERN, M. SACHS, Europäische Grundrecht Charta, ed. C.H. Beck, München, 2016, pp. 756ss.S. PEERS et al. (eds.), The EU Charter of Fundamental Rights, A Commentary, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 1523-1538.

[177]See for details, F. PENNINGS, European social security law, Cambridge University Press, Cambridge, 2015.

[178]According to the new Title VIII (artt. 125-130 TCE, now artt. 145-150 TFUE). For analysis see: P. VEILLE, How the horizontal social clause can be made to work: Lessons of gender mainstreaming, in N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit. 108ss. T.H. FOLSOM, Principles of European Union law, including Brexit, op. cit.

[179]Despite the first directive n. 49 of 1998 on the subject of mobility for the protection of supplementary pension rights has its legal basis in that article. The European Citizenship Directive has already been mentioned in Chapter 1 (Directive 2004/38/EC of the Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely in the territory of the Member States).

[180]W. STREECK, Neo-voluntarism: A new european social policy regime?, in European Law Journal, 1 (1), 1995, pp. 32ss.

[181]F. MARTUCCI, Droit de l'Union europèenne, LGDG, Paris, 2017.

[182]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, op. cit.

[183]G. SGUEO, Beyond networks. Intelocutory coalitions, the european and global legal orders, op. cit.

"complementary social protection systems" for the latter, then: social protection.
If we accept the interpretation of the "spin-off" between public welfare systems and complementary regimes it is thought that many of the findings made refer in particular to public regimes and to the power, even political, that such sovereignty implies towards its citizens. On this point, however, we focus hardly on this tension (national-vs-transnational) and in fact we also propose scenarios to overcome this dilemma. The "political" question of the resistance of States and national social partners to an eventual European social security regime remains an open problem[184].
A further argument in favor of the hypothesis of the division between the notion of social security and that of social protection (which would include complementary pension schemes) concerns the system of financing social protection schemes: public schemes are often financed by the general taxation and work (pensions) according to the system of distribution (generational solidarity or over time)[185]. For these reasons, considering that they are also often deficient, the protections and precautions granted to the states would be more explainable to safeguard their balance. The complementary systems are instead financed by the capitalization system and therefore this problem would not be posed in the same terms. In this regard, complementary social security is identified as a hybrid entity, which is inherently located on the border between labor law and social security on the one hand, and competition and market law on the other[186], especially insurance law and financial products. For this reason, we are talking about a double soul or "double face" of complementary social security, also in the light of attempts to make the single market of financial services take off within the European Union.
It is very clear that the communications and directives pension funds have always had in mind this specificity of complementary pension, especially pension, precisely: it has never been made mystery, moreover, that the purpose of some EU initiatives had the intention to develop the financial industry through the creation of a single market for pension funds[187]. On the Europeanisation of European supervision of capitalized pension funds, both pension and insurance through EIOPA[188].
The same CJEU has used the difference between distribution and capitalization as a fundamental criterion, together with that of solidarity, in assessing the extent of the powers of the States on their social security systems: here we limit ourselves to remembering the two different outcomes of the Pistre et Poucet judgments and Fédération Française des Sociétés d'Assurance (also known as "Coreva")[189]. In the first case, the body in charge of managing a pay-as-you-go scheme was not regarded as an undertaking and therefore excluded from EU competition law[190]; while in the second one, the cash was considered an enterprise and therefore subject to the antitrust rules of the EU as it was in charge of managing an equally public, but voluntary and capitalized regime.
In conclusion, he noted that the political and regulatory limits to Union intervention in terms of public welfare differ a great deal[191] from those (although existing, of course) in terms of complementary social security, although both subjects are included in lett. c) of art. 153 TFEU, there is a greater legal margin for the social partners in terms of complementary social security. They could then take action to safeguard its social purpose, before that part of the provision is completely left to the "mercantilistic"

[184]H. THOMAS, Qu'est-ce que l'intégration sociale? Sortir des conceptions nationales impériales, in Revue des Affaires Européennes, 4, 2013, pp. 640ss.
[185]S. SCHIARRA, Solidarity and conflict: European social law in crisis, op. cit.
[186]W. VERLOREN VAN THEMAAT, B. REUDE, European competition law. A case commentary, op. cit.
[187]A. HENNESSY, The role of agenda control in the creation of a single market for pension funds, op cit., pp. 12ss.
[188]F. NICOLA, B. DAVIES, European Union law stories, op. cit.
[189]CJEU, joined cases 17 Febbraio 1993, C-159/91 and C-160/91, Christian Poucet and Assurances Générales de France (AGF) and Caisse Mutuelle Régionale du Languedoc-Roussillon (Camulrcac) and Daniel Pistre and Casse Autonome de Compensation de l'Assurance Vieillesse des Artisans (Cancava) of 17 February 1993, ECLI:EU:C:1993:63, I-00637; joined cases C-264/01, C-306/01 e C-355/01, AOK Bundersverband and others of 16 March 2004, ECLI:EU:C:2004:150, I-02493; C-218/00, Cisal di Battistella Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) of 22 January 2002, ECLI:EU:C:2002:36, I-00691; C-350/07, Kattner Stahlbau HmbH contro Maschinenbau-und Metall- Berufsgenossenschaft of 5 March 2009, ECLI:EU:C:2009:127, I-01513. See also: C. BARNARD, The substantive law of the European Union: The four freedoms, Oxford University Press, Oxford, 2013.
[190]A. EZRACHI, European Union competition law. An analytical guide to the leading cases, op. cit. A. JONES, B. SUFRIN, European Union competition law. Text, cases and materials, Oxford University Press, Oxford, 2016. W. FRENZ, Handbook of European Union competition law, ed. Springer, Berlin, 2015, pp. 398ss.
[191]This situation is likely to remain at least until further reduction and "deterioration" of the state social regimes take place: jurisprudential, financial sustainability and, not least, coming from the Commission's increasingly urgent recommendations to the States on the coordination of economic and monetary policies of which the "European Semester" is the most significant instrument.

norms of the EU internal market[192]. While not denying any interpretation of the original spirit of the 1991 Social Policy Agreement, which results from article 153 TFEU, it is reiterated that this interpretative approach is in any case in line with that already followed by the EC; which would not require any modification of the FEU Treaty; and above all that it would be consistent with the social, economic and regulatory changes that took place in Europe in the years already passed since the date of that Agreement[193].

14.Complementary pension as deferred wages: Observations on the prohibition of article 153 TFEU to deal with wages.

If the instrument created by the social partners was limited to co-ordinating, for example, existing national regimes in order to promote the mobility of workers (or even, perhaps, capital or services) under article 153, it would remain "still" in the scenario of the already seen initiative launched in 2002 by the EC in terms of portability of supplementary pensions.

From the jurisprudence of the 80s (*Worringham*[194], *Bilka*[195], *Liefting*[196] and *Barber*[197]) onwards, complementary pensions have been considered as forms of deferred retribution. Paragraph 5 of article 153 TFEU[198] explicitly excludes pay from its scope, as well as the right to strike, lockout and right of association. Regarding these exclusions, on May 30, 2012, EC received the first "yellow card" from national parliaments on the proposed regulation known as "Monti II"[199] which aimed precisely at clarifying the relationship between collective actions and freedom of establishment and provision of services. Among the arguments used against this initiative was the exclusion provided for in paragraph 5 on the subject of freedom to strike. Against the resistance of the national parliaments, the EC three months later withdrew the proposal, but not because it considered it to be incompatible with the Treaty; simply because it realized that there would be no numbers to approve it in the Council and Parliament[200].

Returning to the concept of pay, and remaining on the subject of non-discrimination between men and women referred to in the *Barber* case[201], article 157.2 TFEU (former article 119 TCEE) defines this concept widely, as it includes not only the minimum wage or normal, but also any other compensation paid directly or indirectly, in cash or in kind, by the employer depending on the employment relationship. This concept is also taken from art. 2.1 lett. e) of Directive 2006/54 on equal treatment opportunities between men and women in the field of work[202].

In fact, EC was challenged to interfere with national labor systems. The reasoned opinions of the parliaments doubted the added value of this initiative and above all emphasized the fact that the Treaty explicitly excluded the right to strike from the competences conferred to the Union[203]. For its part, the CJEU has also included other social security benefits attributed to the employee even after

[192]See, S. GARBEN, The constititional (im)balance between "the market" and "the social" in the European Union, in European Constitutional Law Review, 13 (1), 2017, pp. 26ss.

[193]In both Commission documents cited above, (SEC (2002) 592 of 27 May 2002 and SEC (2003) 916 of 12 September 2003, not only is the purpose well clarified and delimited from the beginning. the fact that the problem has already been regulated by reference to the public regimes governed by (then) EC Regulation 1408/71 based on Article 42 TEC (now Article 48 TFEU).

[194]CJEU, C-69/80, Worringham e Humphreys/Lloyds Bank of 11 March 1981, op. cit.

[195]CJEU, C-170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz of 13 May 1986, op. cit.

[196]CJEU, C-23/83, Liefting and others v. Directievan het Academisch Ziekenbuis bij de Universiteit van Amsterdam of 18 September 1984, op. cit.

[197]CJEU, C-262/88, Barber v. Guardian Royal Exchange Assurance Group of 17 May 1990, op. cit.

[198]C. NOWAK, Europarecht nach Lissabon, op. cit., D. CHALMERS, G. DAVIES, G. MONTI, European Union law, op. cit., J. TILLOTSON, N. FOSTER, Text, cases and materials on European Union law, op. cit.

[199]Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337, 12.12.1998, p. 8-9. for details and analyis see: S. ANDERSEN, The enforcement of European Union law. The role of the European Commission, Oxford University Press, Oxford, 2012. N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, Hart Publishing, Oxford & Oregon, Portland, 2012.

[200]In both Commission documents cited above, (SEC (2002) 592 of 27 May 2002 and SEC (2003) 916 of 12 September 2003, not only is the purpose well clarified and delimited from the beginning. by reference to the public regimes governed by (then) EC Regulation 1408/71 based on Article 42 TEC (now Article 48 TFEU).

[201]CJEU, C-262/88, Barber v. Guardian Royal Exchange Assurance Group of 17 May 1990, op. cit.

[202]F. FABBRINI, Yellow card but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike, in Common Market Law Review, 50 (1), 2013, pp. 116ss. X. GROUSSOT, Subsidiarity as a procedural safeguard, in L. AZOULAI, The question of the competence in the European Union, op. cit. pp. 242ss

[203]Directive 2006/54 / EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

the termination of the employment relationship.
In addition to supplementary pensions, which included substitutive pensions, there are many other occupational social security benefits in the notion of remuneration. At this point it would seem impossible for the european social partners to negotiate an agreement to create a social security scheme.
However, it is common ground that article 153 TFEU in its origins did not at all aspire to the creation of social security systems at European level[204], the fact remains that letter (c) of the same article explicitly mentions "social security and social protection for workers", in accordance with its sub-paragraph 2 lett. B, it is included among those "sectors" that could be the subject of directives from the Parliament and the Council[205]. If we limit ourselves only to initiatives concerning the mobility of workers, why not rely directly on the rules prescribed for this subject, to which the Union had always used previously, just as, moreover, the Union has also done for that Directive in which the social partners were previously involved without finding an agreement to act on their own initiative?[206]
This refers once again to Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements to increase the mobility of workers between Member States by improving the acquisition and safeguarding of supplementary pension rights[207].
Article 153 TFEU, which is a specification of article 151 TFUE[208], is inserted in the chapter "Social Policy". It is not by chance that the last article, after listing the various Social Charters to which the Union and the Member States take into account, has as its objectives "the promotion of employment, the improvement of living and working conditions, which their equality in progress, adequate social protection, social dialogue, the development of human resources to enable a high and lasting level of employment and the fight against marginalization"[209]. The same directives issued under article 153 TFEU had first of all nature and social objectives. In essence: even if these objectives have the further function of increasing the economic competitiveness of the Union (sub-paragraph 2 article 151 TFEU), they remain first of all "social"[210]. The legal basis for the measures referred to in article 153 and/or 155 TFEU should therefore serve to achieve the social objectives of article 151 TFEU, before other functional objectives of the internal market or of an economic nature[211].
In this regard, the preamble to the Directive framework 89/391/EEC of 12 June 1989 on the safety and health of workers in the workplace states that its objective "can not depend on purely economic considerations"[212], adding that the harmonization of the various legislative systems can be functional in preventing the creation of "competition to the detriment of safety and health"[213].
The Directive on the insolvency of the employer (former Directive 80/987) is primarily social and from whatever side you look at it, it is not explainable in terms of good functioning of the market[214]. It is

[204]CJEU, C-12/81, Garland v. British Rail Engineering of 9 February 1982, ECLI:EU:C:1982:44, ECR 00359, a supplementary redundancy bonus related to unemployment provided for by the Belgian collective bargaining agreement only for workers (males) over sixty years old; C-173/91, Commission v. Kingdom of Belgium of 17 February 1993, ECLI:EU:C:1993:64, ECR 00673; C-132/92, Birds Eye Walls v. Roberts of 9 November 1993, ECLI:EU:C:1993:868, ECR 05579; a survivor's pension paid by a regime of negotiating origin: C-109/91, Ten Oever of 7 October 1993, ECLI:EU:C:1993:833, I-04879 and finally, family allowances and sickness benefits paid by the employer and the additional early retirement allowance provided for by a Belgian collective agreement: C-171/88, Rinner Kühn of 13 July 1989, ECLI:EU:C:1989:328, I-02743; C-166/99, Defreyn v. Sabena of 13 July 2000, ECLI:EU:C:2000:411, I-06155. For analysis see: N. FOSTER, EU law directions, Oxford University Press, Oxford, 2014. A. MCCOLGAN, Discrimination, equality and the law, Hart Publishing, Oxford & Oregon, 2014, pp. 124ss.
[205]N. FOSTER, EU law directions, op. cit.
[206]Letter B, paragraph 2 of Article 153 TFEU: For this purpose, Parliament and Council (...) (b) may adopt the minimum requirements in the areas referred to in points (a) to (i) by means of directives. progressively applicable, taking into account the existing technical conditions and regulations in each Member State. These directives avoid imposing administrative, financial and legal constraints of a nature such as to hinder the creation and development of small and medium-sized enterprises.
[207]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[208]N. FOSTER, EU law directions, op. cit.
[209]Art. 151 TFUE. See also: N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit
[210]As confirmed from the CJEU in the next case: C-362/13, Fiamingo of 3 July 2014, ECLI:EU:C:2014:2044, not published.
[211]N. FOSTER, EU law directions, op. cit.
[212]Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8. For details see: C. BARNARD, European Union employment law, Oxford University Press, Oxford, 2012, pp. 512ss.
[213]M. LORENZ, An introduction to European Union competition law, op. cit.
[214]Before Directive 80/987 was replaced, there was another Directive of 2002 (Directive 2002/74 of 23 September) which, already based on Article 153 TFEU had amended Directive 80/987 also changing its original title. The first title concerned "the approximation of the laws of the Member States with regard to the guarantee of workers' claims in the event of insolvency of the employer (...)". The subsequent Directive of 2002, in its

important in this regard to point out that the original legal basis of that Directive was art. 115 TFEU (as renumbered today after Lisbon) on the internal market; and that the Directive 2008/94 of 22 October that the substitution is instead based precisely on today's art. 153 TFEU paragraph 2 (on minimum conditions for "working conditions"[215], therefore letter b); the original title has also changed due to the change in the legal base. Without being able to list all the social directives here, it is added that the TEU clearly states that the Union (...) promotes social protection (together with those of solidarity between generations, equality between men and women, protection of the child) in its article 3.2 TEU[216].

Returning now to paragraph 5 of article 153 TFEU, the following considerations will be made: The first is that if, in the list of matters listed in article 153 TFEU, there is also security and social protection, on the basis of the specialty principle, it it could not be understood as a specific matter and independent of the salaries excluded from paragraph 5 of that article. The same (second) cited consultation of the EC on supplementary pensions approaches the issue of the relationship between pensions and salaries in the same way; it concludes that the main responsibility in terms of occupational pensions rests on the social partners, which is why the EC, - after having said that they are part of the remuneration package agreed between employers and employees - expects the social partners to be in fact, to address the issue of portability of supplementary pension rights.

In the Van der Woude sentence[217] the appellant had attempted to assert his reasons by claiming that his situation was not comparable to that of the *Albany*[218] and *Drijvende Bokken*[219] cases, precisely because, unlike the pensions to which those disputes referred, a health insurance did not represent a part of direct remuneration and therefore did not fall within the category of the essential provisions subject to collective bargaining. The CJEU completely ignored this exception, treating the two social-pension and health benefits-in the same way, claiming that the latter also represented an improvement in working conditions, not only guaranteeing (to workers) the means necessary to meet expenses by illness, but also by reducing the expenses which, in the absence of a collective agreement, should have been borne by workers[220]. Moreover, at least here in Europe, most of the private and public social security (even if the CJEU did not consider the latter as remuneration) is financed by wages or general taxation: another subject, the fiscal one, on which the has very limited skills.

The second observation concerns the impact-at least indirect-that many of the initiatives in the subjects of art. 153 TFEU would have on pay. In particular, in the *Del Cerro Alonso* sentence[221], a question was asked on clause 4 of the framework agreement on a fixed-term contract. It states that "employment conditions" must not be less favorable for fixed-term workers than permanent employees. It is a question of whether the remuneration should also be included for employment conditions. The CJEU's answer was affirmative. The CJUE made a distinction between what is the level of remuneration-which remains the responsibility of the Member States-and measures that have indirect effects on this could not be extended. The scope of the exclusion of paragraph 5, art. 153 TFEU, has ruled the CJEU, to any question that has any connection with the remuneration, otherwise it would risk to empty most of the matters provided for by article 153.1 TFEU[222] of their substance, including the same equality between workers (paragraph 25 of the sentence).

In this regard, according to Blanpain, all matters explicitly excluded from the scope of article 153 TFEU

Article 1, thus replaced the title of Directive 80/987 "Council Directive 80/987/EC of 20 October 1980 on the protection of employees in the event of insolvency of the employer".

[215]Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283, 28.10.2008, p. 36-42.

[216]S. SCHIARRA, Solidarity and conflict: European social law in crisis, op. cit.

[217]CJEU, C-222/98 Van der Woude of 21 September 2000, ECLI:EU:C:2000:475, I-07111, par. 20.

[218]CJEU, C-67/96, Albany of 21 September 1999, op. cit.

[219]CJEU, C-219/97, Drijvende Bokken of 21 September 1999, ECLI:EU:C:1999:437, I-06121.

[220]"The employer's offer of a professional pension is part of the remuneration package agreed between the employer and the employee through collective or individual negotiation. Although this takes place within the legal framework established by the national legislature, the main responsibility (of it) rests on the two parts of industry (employers and workers). The Commission therefore expects the social partners to play an active role in tackling the problem of the portability of supplementary pension rights (...) according to the case: C-222/98 Van der Woude of 21 September 2000, op. cit.

[221]CJEU, C-307/05, Del Cerro Alonso of 13 September 2007, ECLI:EU:C:2007:509, I-07109, par. 41.

[222]C. NOWAK, Europarecht nach Lissabon, op. cit. D. CHALMERS, G. DAVIES, G. MONTI, European Union law, op. cit. J. TILLOTSON, N. FOSTER, Text, cases and materials on European Union law, op. cit.

should be restrictively interpreted[223]. This is due to the simple fact that all the subjects-especially the right of association, collective negotiation, strike and lockout-are closely linked to each other and therefore not with reference to the contributions paid for it, nor with reference to the services provided as they respond to social policy considerations. Contrary to what the Advocate General Maduro had expressed in its Conclusions of 10 January 2007[224].

The works come together in order to collectively defend their interests through collective bargaining on the strength of the market and possibly resorting to their last weapon, it would be easy to define them separately without distorting the objectives of this part of the Treaty which are those to create a (more) social Europe[225]. If we accept the theory that the exclusions of paragraph 5 of art. 153 TFEU should be interpreted restrictively, it could also be assumed that the all-inclusive concept of pay provided for in article 157.2 TFEU should not apply to the exclusions of article 153.5 TFEU[226];and the same applies to those judgments based essentially on article 157 TFEU, which has become a fundamental principle of the legal system which is directly applicable also to private and public employers, especially in the light of the Defrenne II sentence[227].

Of the sentences that included supplementary pensions in the notion of remuneration are then added to the legislation[228] and the jurisprudence[229] concerning more generally equal pay. But the *ratio* of art. 157 TFEU, as well as the intention of the courts of Luxembourg, is to ensure equal pay for men and women in all its forms and to avoid any direct or indirect discrimination. An extensive interpretation of the notion of remuneration is therefore functional to the objective of defending the fundamental right that one wants to protect. More generally, there are many rules and judgments of the Union concerning wages, even if they are enacted to protect or defend other objectives of the Union. Even if you go back to the Directive on the insolvency of the employer (80/987/EEC), it is clear that the protection of the worker concerns the salary of the workers, as well as their public and private social security. Rules and judgments aimed at protecting other legal objectives such as freedom of movement for workers, freedom to provide services (including public health services), european citizenship, non-discrimination based on nationality and competition law[230].

But again, it could be reiterated that the common denominator remains the same: in order to protect precise legal values, the CJEU and the legislation did not hesitate to "touch" even subjects that would in principle be excluded from European Union competences, such as the right to strike, association or remuneration. In the specific case of this research, a European social security scheme would have as its object the protection of workers' social protection, also envisaged as an objective to be protected and as a matter of Union intervention pursuant to letter (c) of article 153 TFEU; a subject that would also have effects on remuneration, of course, but which should instead be interpreted restrictively instead of being defined in accordance with article 157.2 TFEU on wage discrimination between men and women. If it were not so, -recropping the sentence *Del Cerro Alonso*-, if it extended the scope of the exclusion of paragraph 5 art. 153 TFEU to any question that has any link with the remuneration, (...) there would be a risk of emptying most of the matters provided for by article 153.1 TFEU of their substance. Finally, he concludes with an important clarification regarding the possible impact that a mandatory european social security system would have on wages[231].

In this regard, it is possible to comment on the rationale of the prohibitions provided for in paragraph

[223]R. BLANPAIN, European labour law, op. cit.

[224]CJEU, C-307/05, Del Cerro Alonso of 13 September 2007, op. cit. N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[225]R. BLANPAIN, The EU competences regarding social policies, op. cit., pp. 72ss.

[226]J. TILLOTSON, N. FOSTER, Text, cases and materials on European Union law, op. cit.

[227]C-43/75, Defrenne v. SA Sabena of 8 April 1976, ECLI:EU:C:1976:56, I-00455. For analysis and details see. G. BEHR, Development in judicial control in the European Communities, Martinus Nijhoff Publishers, 2013, pp. 599ss. S. VELLUTI, New governance and the european employment strategy, ed. Routledge, London,. 2010, pp. 92ss.

[228]In particular, today the Directive 2006/54 / EC in which Directive 75/117 is transfused. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[229]CJEU, C-109/88, Danfoss of 17 October 1989, ECLI:EU:C:1989:383, I-03199; C-127/92, Enderby of 27 October 1993, ECLI:EU:C:1993:859, I-05535. For details see: A. SOMEK, Engineering equality: An essay on european anti-discrimination law, Oxford University Press, Oxford, 2011.

[230]A. EZRACHI, European Union competition law. An analytical guide to the leading cases, op. cit.

[231]CJEU, C-307/05, Del Cerro Alonso of 13 September 2007, op. cit. See also:

5 of article 153 TFEU. It is clear that the Member States and the social partners themselves in their agreement of October 1991 wanted to exclude these matters in order to avoid interference or harmonization on the part of the EU institutions in matters they considered "their own", including the regulation of wage levels[232], the right to strike[233] or the right of association.

Of course, the argument in these matters could be the subject of negotiation of the social partners if they were to deal with them, since those exclusions had been wanted by them for the sole purpose of avoiding public interference, undoubtedly has its solidity. To these observations we add that article 152 TFEU which, when read together with the provisions introduced by CFREU[234], would confer to collective autonomy a "constitutional" consecration[235] which would allow it to be composed of an autonomous and original legal order and which would then confer to the parties the right to take care of all matters within their competence, including those excluded from paragraph 5 of article 153 TFEU[236].

However, as recalled by Schlatchter, not only can we not take into account the role and the will of Member States who would have the last word in the Council[237]; but moreover, it is added here, the creation of a social security system would require an indispensable participation and cooperation of the states themselves, since such a regime, in order to be able to operate, would inevitably imply some normative changes in the national laws.

Well, even if the exclusions provided for by paragraph 5 of art. 153 TFEU were interpreted restrictively, a European social security system would not have the purpose or even the effect of harmonizing wages between Member States: it would merely allocate part of the salary to a social security scheme leaving national wage differences unchanged. In many countries there are already complementary social security schemes, and in this case the impact of a European scheme would be even zero on wages, if it were decided that the percentage of contributions to be paid to this scheme would be directly devolved from the national ones[238].

An initiative in the matter of complementary social protection, even if indirectly concerning wages, would be considered as not falling within the exclusions of paragraph 5 of art. 153 TFEU, at least that the letter c) of its paragraph 1[239] should not be considered to be empty. A more adequate social protection is an objective of the Union provided for by art. 151 TFEU and initiatives-including legislative ones-on the subject of social security and social protection[240] could not be understood differently, if not to pursue this objective. Therefore, such initiatives should be evaluated on the basis of the specialty principle with respect to paragraph 5 of the same article, which should however be interpreted restrictively both by the jurisprudence and by the doctrine. Finally, it should be added that in the specific case, the project of a professional pension scheme would have no harmonizing effect on wages, given that the contributions would represent an identical percentage of the salaries

[232]P. LANGE, Maastricht and the social Protocol: Why did they do it? In Politics & Society, 21, 1993, pp. 12ss.

[233]C. BARNARD, S. DEAKIN, "Negative" and "positive" harmonisation of labor law, in E. FRANSSEN, Legal aspects of the european social dialogue, op. cit., 185-186

[234]In the same spirit also the next cases from the CJEU: C-312/17, Bedi of 19 September 2018, ECLI:EU:C:2018:734; C-57/17, Checa Honrado of 28 June 2018, ECLI:EU:C:2018:512; C-677/16, Montero Mateos of 5 June 2018, ECLI:EU:C.2018:393; C-574/16, Grupo Norte Facility of 20 December 2017, ECLI:EU:C:2017:390; C-158/16, Vega Gonzàlez of 20 December 2017, ECLI:EU:C:2017:1014; C-177/14, Repojo Dans of 20 May 2015, ECLI:EU:C:2015:326, all the above cases published in the electronic Reports of the cases. See also the case: C-465/15, Hühenwerke Krupp Mannesmann of 7 September 2017, ECLI:EU:C:2017, not published.

[235]In particular see: J. MEYER (ed.), Charta der Grundrechte der Europäischen Union, ed. Nomos, Baden-Baden, 2014, pp. 813-826. J.P. JACQUÉ, La Cour de Justice de !'Union et !'application de la Charte dans les Etats membres: "Mehr Licht", in European Yearbook on Human Rights, 14, 2014 pp. 125-147. T. KERIKMÄE, Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights, ed. Springer, Berlin/Heidelberg, 2014, pp. 80ss. K. LENAERTS, Exploring the limits of the EU Charter of Fundamental Rights, in European Constitutional Law Review, 2012, pp. 375ss. N. LAZZERINI, (Some of) the fundamental rights granted by the Charter may be a souce of obligations for private parties: AMS, in Common Market Law Review, 51 (4), 2014, pp. 908ss. J. KROMMENDIJK, Principled silence or mere silence on principles? The role of the EU Charter's principles in the case law of the court of Justice, in European Constitutional Law Review, 11 (2), 2015, pp. 322ss.

[236]A. KACZOROWSKA-IRELAND, European Union Law, op. cit.

[237]M. SCHLACHTER, Transnational collective bargaining and the institutionalized “social dialogue, at EU level”, Research Group of Comparative and European Employment Policy and Labour Law 24. bis 26.10.2012.

[238]A. EZRACHI, European Union competition law. An analytical guide to the leading cases, op. cit.

[239]A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamient, op.cit.

[240]See in this spirit the next cases from the CJEU: C-416/16, Piscaretta Ricardo of 20 July 2017, ECLI:EU:C:2017:574; C-200/16, Securitas of 19 October 2017, ECLI:EU:C:2017:780; C-266/14, Federaciòn de Servisios Privados del Sindicato Comisiones Obreras of 10 September 2015, ECLI:EU:C:2015:578; C-160/14, Ferreira da Silva e Brito and others of 9 September 2015, ECLI:EU:C:2015:565; C-117/14, Nisttahuz Poclava of 5 February 2015, ECLI:EU:C:2015:60, all the above cases published in the electronic Reports of the cases.

previously negotiated; the wage differences between Member States would therefore remain intact and, moreover, if the resources to be paid to the scheme were to be directly derived from the existing complementary national regimes, the new regime would have a zero impact on the wages themselves.

15.European social security system and the principles of subsidiarity and proportionality.
Bearing in mind that article 4.2 letter T of the TFEU places social policy between competing matters, the Union and Member States, under article 5 TEU. Such an initiative, not belonging to the exclusive competence of the Union, should comply with the principles of subsidiarity and proportionality.
With regard to the principle of subsidiarity, and in particular paragraph 3 of art. 5 TEU1[241], it is considered that there is no doubt that the objectives of such an action could not be achieved autonomously and sufficiently by the Member States. A pan-European social security scheme would, by definition, require intervention at Union level. No State could, at its level, create a regime capable of radically removing obstacles to the cross-border mobility of workers in the same sector, provided that it does not make use of EU law and/or that uses simple international social protection treaties. As said, the scheme would then guarantee solidarity at European level, creating at the same time considerable economies of scale and therefore more resources available for future social security benefits for workers; it would avoid regulatory arbitrage between states and between financial services sectors. As regards the justifications for the competence of the Union, it has already been mentioned above.
For the question concerning the principle of proportionality, given that the content and form of the action must be limited to what is necessary to achieve the objectives of the Treaties[242], it could be argued that a Directive implementing such a European agreement would introduce minor changes to the national social and labor legislation, in the sense that Member States, without having to change anything in their legal systems, should rather accept the rules of the social security system which derogate from their national legislation; for the rest, the new Directive would make the most of the existing social security schemes in Member States; and certainly would aspire to find a good balance between the protection of members and beneficiaries, the costs for the bodies, the costs for the companies and the needs of the supervisory authorities.
First of all, it has been clarified that agreements concluded under article 155 TFEU have the power to require Member States to change their national legislation in order to apply such agreements in their legal systems. On the doubts about the Declaration No. 27 on the Treaty of Maastricht[243] which provided, it is recalled here, that the Member States had no obligation to apply such agreements, either directly (through the law), or by modifying their legislation in order to promote its application: it was denied by the wording of article 155 TFEU which requires the Member States to implement them. Another observation that appears important here is the difference between the nature of the acts and

[241]According to our opinion: The question arises as to how this standard test for justification of limitations of fundamental rights sits with CFREU which is indeed increasingly applied in cases governed by the Charter provisions. That article comprises a number of elements: the limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected. As to the grounds of general interest that may serve to limit CFREU such as overriding considerations pertaining to the security of the EU or of its Member States when the disclosure of information is at issue or the existence of swift, effective and less costly dispute settlement or certain judicial proceedings, it would not seem that Article 52(1) brings about important changes compared to the pre-Charter regime. The same is true in relation to the proportionality test. For the analysis of the above article see: K. LENAERTS, Exploring the limits of the EU Charter of Fundamental Rights, in European Constitutional Law Review, 2012, pp. 375ss. N. LAZZERINI, (Some of) the fundamental rights granted by the Charter may be a souce of obligations for private parties: AMS, in Common Market Law Review, 51 (4), 2014, pp. 908ss. J. KROMMENDIJK, Principled silence or mere silence on principles? The role of the EU Charter's principles in the case law of the court of Justice, in European Constitutional Law Review, 11 (2), 2015, pp. 322ss. F. HOFFMEISTER, Enforcing the EU Charter of Fundamental Rights in Member States: How far are Rome, Budapest and Bucharest from Brussels, in A. VON BOGDANDY, P. SONNEVAND, Constitutional crisis in the european constitutional area, theory, law and politics in Hungary and Romania, Hart Publishing/Nomos, Oxford, Baden-Baden, 2015, pp. 126ss. K.G. YOUNG, Proportionality, reasonableness and economic and social rights, in V.C. JACKSON, M. TUSHNET (eds.), Proportionality: New frontiers, new challenges, Cambridge University Press, Cambridge, 2017.
[242]As already mentioned in paragraph 2 of this chapter, this declaration was added by the Member States to the Treaty of Maastricht, with reference to the previous article 4 (2) which then became Article 139 in the Treaty of Amsterdam (and now 155 TFEU). 2. To this end, the European Parliament and the Council may adopt the minimum requirements to be applied progressively in the areas referred to in points 1 (a) to (i) by directives, taking into account the existing technical conditions and regulations in each Member State.
[243]A. KACZOROWSKA-IRELAND, European Union Law, op. cit.

the same procedures for approving the regulatory measures provided for in article 153.2 letter b) with respect to those of art. 155.2 TFEU. With regard to nature, the provisions of the first rule include directives[244], aimed at introducing minimum requirements and not representing obstacles to small and medium-sized enterprises.
On the notion of such directives, however, the CJEU has had the opportunity to clarify the concept in United Kingdom v. Council of 1996[245]. In that dispute, the United Kingdom advocated a reductive position of this notion with regard to the Directive on the protection of the health of workers, claiming in practice that they represented a sort of minimum common denominator "acceptable to all Member States". The CJEU stated instead that the notion of "minimum requirements"[246] does not affect the intensity of the action (...)"[247] that the Council "may deem necessary" and implies only the recognition of the possibility for Member States to "adopt stricter rules than those which are the subject of Community intervention". CJEU made it clear that this provision only implies that smaller companies "may be the subject of specific economic measures. On the other hand, this provision (today article 153 TFEU) does not prevent (...) that they are subject to binding measures"[248].
Having said that the "Council Decision" of article 155.2 TFEU, could also refer to acts other than directives (to all binding acts provided for in article 288 TFEU), and therefore also to regulations, far more restrictive, by their nature, respect to directives: the EC has confirmed this in its Communications[249] and proposals, the same jurisprudence of the Union in the aforementioned *UEAPME* case.
We are not here arguing that such an agreement should be implemented by a Council Regulation: we are only saying that the Council Decision implementing the non-member agreement. These directives avoid imposing administrative, financial and legal constraints of a nature such as to hinder the creation and development of small and medium-sized enterprises. Moreover, also the procedure foreseen for the approval of the Council Decision differs from that foreseen by article 153.2 TFEU: while for the first the Parliament is informed, for the second "the European Parliament and the Council deliberate according to the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions"[250]. If article 155 TFEU intended to equate the acts of the Council with those laid down in article 153.2 TFEU by nature and procedure, it explicitly provided for it, as it did for the voting requirements (by majority or unanimity) which must instead, they are the same as those provided for in article 153. Ultimately, it is considered that a European agreement establishing a European social security scheme implemented by a Council Decision would not be incompatible with the principles of subsidiarity and proportionality since the same objective it would not be feasible by the individual Member States, it being understood that the latter could continue to maintain their national social security schemes on condition that they do not impede or hinder the functioning of the new European regime. With regard to the Council Decision to implement the Europe Agreement, it is considered that the latter should not correspond toutiliously to the characteristics prescribed for the directives referred to in letter b) of article 153.2 as it has been repeatedly confirmed that this Decision could have the most appropriate form to achieve the prefix result, including the form of a regulation.
If these hypotheses were to be confirmed, the famous "tests" of the EC preliminary to the proposition of the agreement for a Council Decision should not find obstacles. This refers in particular to the legality test and the opportunity test, bearing in mind that the second one should also be in line with the objectives of improving the social security of workers with particular reference to the benefits that such regime could bring, without forgetting that it would remedy significantly to the obstacles-or

[244]C. TIMMERMANS, ECJ doctrines on competenses, in L. AZOULAI, The wuestion of the competence in the European Union, op. cit., pp. 162-163.
[245]CJEU, C-84/94, United Kingdom v. Council of 12 November 1996, ECLI:EU:C:1996:431, I-05755, par. 44.
[246]A. PONCE DEL CASTILLO, Occupational safety and health in the EU: Back to basics, in B. VANHERECKE, D. NATALI, D. BOUGET (eds.) Social policy in the European Union: State of the play 2016. Brussels: ETUI and OSE, 2016, pp. 131-155, 142ss.
[247]CJEU, C-84/94, United Kingdom v. Council of 12 November 1996, op. cit.
[248]COM (1996) 26; But also confirmed in: Reply from the Commission of 7 August 2006, in Gazz. Uff .UE: C 305 of 15 October 1996 p. 46.
[249]Proposal for a Council Directive concerning the framework agreement on fixed-term work concluded between UNICE, CEEP and the ETUC/COM/99/0203 final/Point 46 of the introduction.
[250]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

unequal treatment-regarding workers' mobility. It is also known that the Union has no competence for the problems concerning the internal mobility of workers. However, this Directive, precisely because it is based on the rules of the Treaty in the social field, would have a different objective: social in fact; the benefits of which, however, would also have a positive effect on the mobility of workers inside and outside their national borders. Another secondary advantage would be to eliminate the differences in treatment between intra-company and inter-company cross-border mobility.

16.Assumptions to assign a double legal basis to the Council Decision (here: Directive) implementing the agreement.

However, a brief disgrace can not be omitted regarding the possibility of assigning a double legal basis to the possible Council Directive implementing the agreement. It is true that the original priority of the latter is the improvement of the social protection of workers. However, as mentioned above, this scheme would also have a direct impact on the establishment or functioning of the internal market. The original proposal of the "portability" Directive (Directive 2014/50/EC) of supplementary pension rights in 2005 provided for two legal bases: that of the current article 48 TFEU (measures on social security for the free movement of workers) and article 115 TFEU (on directives for the approximation of national provisions which have a direct impact on the establishment or functioning of the internal market)[251]. The double legal basis was also maintained in the next proposal of 2007, after the portability (ie the transferability of pension rights, corresponding to the capital accumulated by the workers) was removed due to the opposition of Member States. Both proposals[252] justified the use of the then article 94 TEC (today 115 TFEU)[253] because it was impossible to effectively improve professional mobility without ensuring the approximation of national laws precisely in order to guarantee such mobility even within Member States. This second legal basis, in addition to ensuring the application of the provisions of the agreement also to cases of internal mobility (provided that, naturally, conditions already favorable in this sense exist in some Member States, or in the case where sectoral regimes already exist which guarantee workers to remain registered under the same sectoral professional regime if they change employer within the same sector), would also have a further, important advantage: it could allow a solution to possible tax obstacles in the case of cross-border mobility of workers registered for the European scheme. It is in fact known that this article is used to regulate direct taxation, since article 114 TFEU does not allow provisions in this area. An agreement implemented by a Directive based on art. 155 TFEU, moreover, would not have the possibility to regulate the fiscal matter. After all, a European social security system could have the ability to "reconcile" the social objectives of the Union with its economic freedoms. A double legal, social and internal market basis would represent, even symbolically, proof that this conciliation is possible and useful for the aforementioned new "social market economy" called for by the Lisbon Treaty[254].

Given that a double legal basis has never been attributed to the (few) directives implementing European agreements, it is not at all clear that this solution is available, even if from a procedural point of view, the two Treaty provisions would seem compatible. In particular: for both the unanimity of votes in the Council that adopts the act is required; as regards the involvement of the European Parliament, article 155 TFEU requires that it be "informed"; article 115 TFEU instead requires that it (together with the Economic and Social Committee) be consulted beforehand, but its opinion is not binding[255]. Art. 115 TFEU establishes that only directives are emanable within the meaning of that article; it has already been said that the agreement discussed here should be a Directive[256]. Ultimately,

[251]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[252]Page 4 of the Preamble of the 2005 proposal and Resolution of the European Parliament of 20 June 2007 with reference to the second proposal.

[253]In particular see S. WEAHERILL, Maximum versus minimum harmonization: Choosing between Unity and diversity in the search for the Soul of the internal market, in N.N. SCHUIBHNE, L.W. GORMELY, From single market to economic Union. Essays in memory of John A. Usher, Oxford University Press, Oxford, 2012, pp. 176ss.

[254]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[255]CJEU, C-370/07, Commission v. Council of 1st October 2009, ECLI:EU:C:2009:590, I-08917, parr. 46-49; C-403/05, European Parliament v. Commission of 23 September 2007, ECLI:EU:C:2007:624, I-09045, par. 49: "the choice of the legal basis for a Community measure must be based on objective factors which are amenable to judicial review, including in particular the purpose and content of the measure; C-411/06, Commission v. European Parliament and Council of 8 September 2009, ECLI:EU:C:2009:518, I-07585. For details see: H. MERKET, The EU and the security-development nexus: Bridging the legal divide, Brill/Martinus Nijhoff Publishers, Leiden, Boston, 2016.

[256]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

such a solution would not appear to be contrary or incompatible with the principles set out in the EU jurisprudence on the double legal basis. One could argue against this choice that a purpose (the social one) would remain preponderant with respect to the other (internal market), and that therefore the latter is secondary and indirect. But this decision would be for the EC, which should eventually establish the legal basis of the proposal for a Directive in which to include the European agreement in question. Of course, as already clarified in paragraph 2, the Council would have no power to amend the agreement annexed to the proposal for a Directive: it would, in essence, be a "take or leave".

17.(Follows) The hypothesis on the feasibility of an intermediate solution for a field of application of the agreement limited to some States. Evaluations on a possible and realizable reinforced cooperation.

It has been said that a Union measure with binding force concerning the matters of article 153 let.c) would require the unanimity of the Member States in the Council (article 153.2 TFEU[257]). This requirement would also apply to agreements concluded by the social partners pursuant to article 155 TFEU, bearing in mind that the second part of paragraph 2 of that article states that "the Council shall act unanimously when 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)"[258]. Given the "delicacy" of the subject and the predictable difficulties to meet this requirement, it will be appropriate here to consider the hypothesis in which unanimity would not be reached by States. Therefore, the hypothesis of implementing the agreement through a normative act limited to some States will be evaluated. In particular, the hypothesis of enhanced cooperation under articles 326-334 TFEU[259] and article 20 TEU will be examined.

As regards the matters that could be the subject of this procedure, article 20.1 TEU[260] states that it can be established within the framework of non-exclusive Union competences. Social policy is a matter of shared competence (article 4 (2) (b)). The same paragraph 20.1 TEU also provides that "enhanced cooperation is aimed at promoting the achievement of the Union's objectives, protecting its interests and strengthening its integration process"[261].

It has already been seen that social policy is undoubtedly one of the objectives of the Union[262]. Nothing could lead one to think that such an initiative could in any way harm its interests; no doubt, finally, it was intended to strengthen its integration process.

A possible social policy initiative should fall within the scope of the matters of enhanced

[257]However, the use of a double legal basis is excluded when the procedures laid down in relation to the one and the other legal basis are incompatible and / or when the accumulation of legal bases is such as to affect Parliament's rights. See form the CJEU, C-178/03, Commission v. European Parliament of 10 January 2006, ECLI:EU:C:2006:4, I-00207, par. 57. See also from the European Parliament: Opinion of 30 January 2012 on the legal basis for the proposal for a Council Directive on a common consolidated corporate tax base (CCCTB) (COM (2011) 0121 - C7 0092/2011 - 2011/0058 (CNS))**.**

[258]The provision of art. 153.2 to which we refer as follows: "In the areas referred to in paragraph 1, letters c), d), f) and g), the Council shall act in accordance with a special legislative procedure, by unanimity, after consulting the European Parliament and "Committees.

[259] F. MARTUCCI, Les coopérations renforcées, quelques années plus tard: Une idée pas si mauvaise que cela ?, in A.A.V.V. Europe(s), Droit(s) européen(s)-Une passion d'universitaire. Liber amicorum en l'honneur du Professor Vlad Constantinesco, ed. Bruylant, Bruxelles, 2015, pp. 396ss. C. MARTÍNEZ CAPDEVILA, ¿Son los acuerdos 'inter se' una alternativa a la cooperación reforzada en la UE?, in Revista Espaňola de Derecho Europeo, 40, 2011, pp. 427 ss. EDITORIAL COMMENTS, Enhanced cooperation: A Union à taille rèduite or à porte tournante? In Common Market Law Review, 48 (3), 2011, pp. 318ss. J. KUIPERS, The law applicable to divorce as a test ground for enhanced cooperation, in European Law Journal, 19 (1), 2012, pp. 22ss. S. PEERS, Divorce european style: The first auhotrization of enhanced cooperation, in European Constitutional Law Review, 6 (2), 2010, pp. 340ss.

[260]For analysis and details see: F. WOLLENSCHLÄGER, The judiciary, the legislation and the evolution of Union citizenship, in P. SYPRIS (a cura di), The judiciary, the legislature and the EU internal market, Cambridge University Press, Cambridge, 2012.

[261]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[262]In this regard, Ahrens, Ohr and Zeddies simulate the possible options for enhanced cooperation between Member States by taking an initiative on social security as a reference hypothesis. The authors use as their approach the "cluster analysis" or "club theory" (ie the theory of groups of states united by similar characteristics) simulating which states would be willing or potentially available to start a strengthened cooperation in this matter. This simulation was considered necessary because, according to the authors, after the enlargement of the Union, there will be greater differences among groups of countries, especially between the hard core of the founding countries of the Union and the peripheral ones. Perhaps somewhat surprisingly, in the subdivision of the three groups of countries united by similar characteristics in social matters, the countries of Southern Europe and those of Central and Eastern Europe were included in the same group 3 (the three Scandinavian countries in group 1; and the continental western European countries in group 2). J. AHRENS, R. OHR, G. ZEDDIES, Enhanced cooperation in an enlarged Union, in Review of Economics, 58 (2), 2007, pp. 132ss.

cooperation[263]. Although not formalized in the acquis communautaire of the aforementioned rules, a form of strengthened cooperation between states could also be represented by the same Protocol on Social Policy of 1992, considering that the United Kingdom decided to remain foreign to it[264].

18.(Follows) Enhanced cooperation and prohibitions referred to in article 326 TFEU.
With regard to the prohibition of damaging the internal market, the economic, social and territorial cohesion of the Union, if a compulsory social security scheme was introduced in some Member States through enhanced cooperation, it would have the effect of strengthening the internal market (free movement of workers, services, capital and freedom of establishment) as well as the economic, social and territorial cohesion of the Union. Therefore, it should not be considered that it could prejudice these matters. In this regard, reference could also be made to the first case in which the CJEU had to comment on enhanced cooperation. It referred to Decision 2011/167/EU of Council of 10 March 2011[265] which authorized such cooperation in the area of the establishment of intellectual property rights to facilitate the development of uniform patent protection in the internal market. Spain and Italy appealed against this decision[266]. To the protocol on social policy are added the Schengen Treaty and the same "Fiscal Compact" of 2012[267] which is an intergovernmental treaty although it could have been object, by scope of a strengthened cooperation. It has been argued that the choice to opt for an intergovernmental agreement would have been dictated by reasons of political visibility, rather than by possible legal obstacles with EU law. The dispute arose because during the negotiations, the Member States did not find a unanimous agreement on the use of the usable linguistic regime. In particular, Spain and Italy proposed that for the issuing of European intellectual property rights a penta-linguistic regime (english, french, german, spanish and italian) or, alternatively, monolingual (english) should be provided, so as not to jeopardize the activity of their domestic companies in the internal market compared to french, english and german companies, bearing in mind that the proposal discussed envisaged the use of three languages and the consequent exclusion of spanish and italian. The CJEU, however, considered the (various) objections raised by the two countries to be unfounded and confirmed the legality of the contested provision. Already the Advocate General Bot, in its conclusions of 11 December 2002[268], argued that, contrary to what was claimed by the two countries, enhanced cooperation for the creation of a unitary patent would necessarily help to improve the functioning of the internal market and reduce obstacles trade and distortions of competition between Member States[269]. On the contrary, it was the regulatory differences in this matter which would have created obstacles to the circulation of patented products and competition within the common

[263]J. AHRENS, R. OHR, G. ZEDDIES, Enhanced cooperation in an enlarged Union, op. cit.
[264]F. FABBRINI, Enhanced cooperation under scrutiny: Revisiting the law and practice of multi-speed integration in light of the first involvement of the EU judiciary, in Legal Issues of Economic Integration, 40 (3), 2013, pp. 209ss.
[265]Directive 2011/167/EU: Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, OJ L 76, 22.3.2011, p. 53-55. For details see: M. CREMONA, C. KILPATRICK, European Union legal acts: Challenges transformations, Oxford University Press, Oxford, 2018. A. JAKAB, D. KOCHENOV, The enforcement of European Union law and values. Ensuring member States compliance, Oxford University Press, 2017. M. BERGER, Le parquet européen-Un nouvel acteur au sein du système juridictionnel de l'Union européenne, in Liber Amicorum Vassilios Skouris, ed. Bruylant, Bruxelles, 2015, pp. 89-98. J.V. LOUIS, La pratique de la coopération renforcée, in Cahiers Droit Europèen, 49 (2), 2013, pp. 277-291. V.F. FABBRINI, The enhanced cooperation procedure: A study in mutispeed integration, in CSF-research paper, 2012. M. ÖZLEM ULTAN, Enhanced cooperation in European Union law and its effect on the european integration, in International Journal of Social Sciences and Education Research, 3 (5), 2017, pp. 1814ss. J.C. PIRIS, The acceleration of differentiated integration and enhanced cooperation, in EI-working paper series n. 328, 2017. F. MARTUCCI, Les coopérations renforcées, quelques années plus tard: Une idée pas si mauvaise que cela ?, in A.A.V.V. Europe(s), Droit(s) européen(s)-Une passion d'universitaire. Liber amicorum en l'honneur du Professor Vlad Constantinesco, op. cit., C. MARTÍNEZ CAPDEVILA, ¿Son los acuerdos 'inter se' una alternativa a la cooperación reforzada en la UE?, op. cit., EDITORIAL COMMENTS, Enhanced cooperation: A Union à taille rèduite or à porte tournante?, op. cit., J. KUIPERS, The law applicable to divorce as a test ground for enhanced cooperation, op. cit., S. PEERS, Divorce european style: The first auhotrization of enhanced cooperation, op. cit.
[266]A. KOCHAROV, Another legal monster? An EUI debate on the fiscal compact treaty, EUI Working Paper No. 09/2012
[267]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit. J.USHERWOOD, S. PINDER, The European Union. A very short introduction, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, European Union law and integration. Twenty years of judicial application of European Union law, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, Principles of European Union law, including Brexit, op. cit. pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, München, 2016. M. DECHEVA, Recht der europäischen Union, ed. Nomos, Baden-Baden, 2018.
[268]Conclusions of the General Advocate Bot in the joined cases: C-274/11 and C-295/11 of 11 December 2002, ECLI:EU:C:2013:782
[269]For details see, I. LIAKOPOULOU, Scritti sulle politiche sociali, fiscali e della concorrenza comunitaria, ed. Ed.It, Firenze, Scientific Series: Interdisciplinary issues, 2012.

market[270].

The Advocate General added that this cooperation would also strengthen economic and social and territorial cohesion in the Union, given that this initiative was indeed in line with the objective of article 174 TFEU[271]. In fact, the ruling found that the cooperation would be limited to the participating countries only and would not have had any impact on the others.

The discourse concerning the second group of prohibitions, namely the prohibition of causing distortions of competition between Member States, other than that of representing an obstacle or discrimination for trade between the latter, would be different.

Indeed, a mandatory social security scheme would most likely have the effect of distorting competition between States, since the labor cost of the sector to which the agreement refers would increase. However, paragraph 4 of article 20 TEU provides that acts adopted through enhanced cooperation only bind the participating Member States, and the first part of article 327 TFEU[272], states that "enhanced cooperation respects the competences, rights and obligations of the Member States that do not participate in it"[273].

Ultimately, strengthened cooperation that would limit the scope of this social security system could perhaps have the effect of distorting competition between participating and non-participating States, but would not cause any injury to the latter; on the contrary, the latter better clarified the meaning of article 326 TFEU, specifying that the law is designed to protect countries that do not participate in such cooperation[274]. Moreover, as already amply argued above, wage differences between countries already exist; moreover, many EU countries have already adopted occupational pension schemes, sometimes mandatory. More generally, there are large differences between EU countries with regard to social security costs (public and complementary) incurred by employers and employees.

Moreover, in the Conclusions of Adovcate General Jacobs[275] on the *Albany* and in the *Pavlov* cases[276] it was argued that collective agreements on wages and working conditions, while limiting competition between workers, do not have significant effects on competition between employers, as they affect only one of the production costs[277]. Three topics were used in this connection: firstly, in terms of demand on the labor market, such harmonization would not prevent entrepreneurs from offering more advantageous conditions to their employees; secondly, with reference to competition in the market for products or services in which employers operate, agreements on wages or working conditions are limited to harmonizing one of the numerous production costs. The productivity of workers determined, for example, by professional capacity, motivation, technological environment, work organization, and more generally the management of human resources can continue to represent a strong competition on labor understood as a cost factor (here considered as a real cost compared to the nominal wage cost)[278]. Competitive ability, as the Advocate General said could indeed be determined by many other factors related to their organizational efficiency in the use of human resources and therefore, to put it to Jacobs, such an agreement would not necessarily have a significant effect on competition between employers[279]. Moreover, this is already proven by empirical experience: many EU countries with a very high nominal labor cost are more competitive than many others with lower wages. Going even further, but not being able to leave the path of this research and the legal reasoning on the difference between the nominal wage cost and the real wage cost, we will limit ourselves here only to add,

[270]CJEU, joined cases C-274/11 and C-295/11, Spain and Italy v. Council of 16 April 2013, ECLI:EU:C:2013:240, published in rhe electronic Reports of the cases, par. 149

[271]Par. 150 of the conclusions of the General Advocate Bot, ECLI:EU:C:2013:782 in the joined cases: C-274/11 and C-295/11.

[272]S. PEERS, Divorce european style: The first auhotrization of enhanced cooperation, op. cit.

[273]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[274]A. ALBORS-LLORENS, European competition competition law and policy, ed. Routledge, London & New York, 2012, pp. 123ss.

[275]CJEU, Conclusions of the General Advocate in joined cases C-274/11 and C-295/11, Spain and Italy v. Council, op. cit.

[276]CJEU, C-180/98 and 184/98, Pavel Pavlov and others of 27 January 2000, ECLI:EU:C:2000:49, I-00493. For details see: K. FLØISTAD, The EEA agreement in a revisised European Union framework for welfare services, ed. Springer, Berlin, 2018, pp. 168ss.

[277]F. FABBRINI, Enhanced cooperation under scrutiny: Revisiting the law and practice of multi-speed integration in light of the first involvement of the EU judiciary. op. cit., pp. 198ss. H. ULLRICH, Enhanced cooperation in the area of unitary patent protection and European integration, in ERA Forum, 13, 2013, pp. 592ss.

[278]A. ALBORS-LLORENS, European competition competition law and policy, op. cit.

[279]I. LIAKOPOULOU, D. LIAKOPOULOS, Politica delle concentrazioni e restrizioni della concorrenza, in Scritti sulle politiche sociali, fiscali e della concorrenza comunitaria, ed. Ed. It, Firenze, Series: Interdisciplinary issues, 2012, pp. 154ss.

confirming the above, that it is also known that many other factors unrelated to labor costs are crucial for the competitive capacity of the countries. Ultimately, it is not considered that a European agreement implemented through cooperation strengthened by a group of States could be in conflict with article 326 TFEU[280].

19.(Follows) Procedural issues in the case of enhanced cooperation with reference to a proposal for a Directive based on article 155 TFEU.

One big question that is difficult to answer is the procedure by which such enhanced cooperation could be initiated with reference to a proposal for a Directive based on article 155 TFEU. In fact, if we envisage a proposal for a Directive of EC containing an attached European agreement signed by the social partners, we would be faced with a particularly unusual situation. The agreement concluded by the social partners, if aimed at being implemented through a Council Decision, could not be amended by either the EC or the Council. It has also been said that if this faculty were granted to the institutions of the Union, the autonomy of the social partners-and the inherent nature of the social dialogue-would in fact be compromised. Finally, it was said that both the EC communications of 1993 and 1998 confirm this orientation. The EC could only include some amendments in the preamble to the Guidelines, but procedural, technical, grammatical or spelling. It is true that the major criticism of the aforementioned *Spain and Italy v. Council* has indeed been based on the argument that the use of enhanced cooperation is only feasible by the Member States when there is a disagreement on the an and not on the quomodo (Spain and Italy agreed on the initiative[281]; they simply disagreed how to apply the linguistic discipline to the single patent so, according to the critique, a strengthened cooperation should not have been allowed, given the institution's ratio). However, even assuming that a group of States accepted the idea of adopting the Europe agreement (hence the an), the practice of article 155 TFEU would not allow any discussion of the substance of the agreement. In short, Member States in favor of the initiative (at least 9, as foreseen by article 20.2 TEU) would be faced with a mere "take or leave" without any margin of negotiation on the content of the rules of the agreement annexed to the Directive. Furthermore, pursuant to the second paragraph of article 329 TFEU[282], any authorization to proceed with this procedure is granted by the Council on the basis of a proposal by the EC after approval by the European Parliament. Thus, the open questions would be two: Parliament should approve the authorization, although it is not directly involved in the adoption of Council Decisions under article 155 TFEU[283]; and furthermore, if this procedure were accepted, the Member States could not, in fact, defer the proposal to the EC for a possible new Directive proposal. Thus, or they would be found to (not) discuss the same unchanged Directive proposal, only for the purpose of approving it; or the EC should ask the signatory social partners to change certain provisions of the agreement on the basis of the indications given by the States concerned, and then present a new proposal for a Directive including the amended agreement. Despite such a procedure of enhanced cooperation "adapted" to the adoption of a European sectoral agreement, it is bizarre, if Parliament gives its authorization and the States participating in such cooperation accept the text of the agreement concluded by the social partners, they should not be other technical obstacles that could lead to the conclusion that this solution is impossible. Hypothesis of a pension scheme in the light of Directive 2003/41/EC with particular reference to the obligation for social security funds to comply with national social and labor legislation in the case of cross-border activities[284].

20.The Pension Fund Directive (2003/41/EC): A difficult compromise.

We have already seen that Directive 2003/41/EC does not use the term pension fund, but "corporate or professional pension institution" (IORP)[285]. In the case of cross-border activity, the home Member

[280]H. ULLRICH, Enhanced cooperation in the area of unitary patent protection and European integration, op. cit.
[281]CJEU, joined cases C-274/11 and C-295/11, Spain and Italy v. Council of 16 April 2013, op. cit.
[282]C. MARTÍNEZ CAPDEVILA, ¿Son los acuerdos 'inter se' una alternativa a la cooperación reforzada en la UE?, op. cit.
[283]C. MARTÍNEZ CAPDEVILA, ¿Son los acuerdos 'inter se' una alternativa a la cooperación reforzada en la UE?, op. cit.
[284]In the same spirit see also: Commission Implementing Regulation (EU) No 643/2014 of 16 June 2014 laying down implementing technical standards with regard to the reporting of national provisions of prudential nature relevant to the field of occupational pension schemes according to Directive 2003/41/EC of the European Parliament and of the Council (OJ L 177, 17.6.2014, pp. 34-41).
[285]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.

State is the one where the pension fund or IORP is based[286]. So "origin" refers to the fund, (home State in english). The general rule of the Directive is that of mutual recognition, therefore in the case of cross-border activities, the fund follows the prudential rules of your country on the other hand, it is the state in which workers and businesses are located, as well as the "pension scheme" or regime[287]. According to the provisions of the Directive in question, the host state is also the one whose labor and social law will be applied (host state)[288].

On the prudential rules, the solution of the "prudent person" was finally adopted as regards the investments of the funds, without imposing particular restrictions on IORPs, despite the opposition of the member states of the Continental block (in particular France, Spain and Portugal); Italy[289] and Germany were decisive in this choice, since they, although part of that group, had meanwhile introduced into their pension reforms the principle of the prudent person for their national pension funds. However, and this represents a potential obstacle to a European regime, in the case of cross-border activities it was decided that the host Member State could impose closer prudential rules on the "foreign" fund that would manage its own national regime. However, these last restrictions guarantee a minimum level of investment freedom and these restrictions must also be imposed on national funds: essentially, a Member State could not impose tighter restrictions on foreign funds than its domestic funds[290]. This compromise was reached by the Spanish Presidency of the Union. The fear was the one that created a regulatory competition between countries with lighter investment rules.

With regard to the coverage of biometric risks (which in fact are the basis of the solidarity of a capitalized regime)[291], the Member States did not agree to include an obligation to cover these risks. In reality, no State wanted to give this Directive a "social" connotation. The compromise of the Parliament, which had included this obligation along with mime guarantees on the returns on investment, was therefore rejected by the Council. The argument used was that such an imposition would violate the principle of subsidiarity. The option to offer biometric risk coverage, however, remains. First of all, these risks can be "covered" by the companies that contribute to the fund; or they can be covered by the fund itself. If one opts for this second hypothesis, the Directive imposes particular reserves and own funds in order to guarantee that the fund is able to face such additional financial risks[292]. The coverage of biometric risks could be foreseen in the rules of the regime created by a collective agreement, or more generally in the social and labor law of a given State. Therefore, in the case of cross-border activities, the host State "A" could impose on the pension fund of Country "B" to cover the biometric risks envisaged in the scheme created in "A" and managed, precisely by "B".

With regard to collective agreements and social and labor law, during the negotiations the Netherlands required two sentences to be included: the initial sentence of the article on cross-border activities in which the national legislation on social security and work with regard to the organization of pension systems, the Netherlands added "including mandatory membership and the results of collective bargaining" (article 20.1); and in the same article 20, paragraph 9, again at the request of the Netherlands, it was added that the authorities of the host country constantly monitor the respect of their social and labor rights by the foreign IORP; and that, in the case of irregularities, they immediately inform the authorities of the home Member State of the fund in order for these irregularities to be

[286]Article 6 letter i) of Directive 2003/41/EC: "Member State of origin": the Member State in which the institution has its registered office and its main administrative offices or, if it has no registered office, has its main administrative offices ".

[287]Article 6 letter b) of Directive 2003/41/EC: “pension scheme”: a contract, an agreement, a fiduciary shop or a set of provisions that establishes the payable pension benefits and the conditions for their disbursement.

[288]Article 6 letter j) of Directive 2003/41/EC:"host Member State "means the Member State whose labor and social security law Social security relevant to occupational pension schemes applies to the relationship between the sponsoring company and the members".

[289]M. FERRERA, E. GUALMINI, Reforms guided by consensus: The welfare state in the Italian transition, in West European Political Studies, 2000, pp. 187ss.

[290]Article 18.7 of the Directive: "In the case of cross-border activity as referred to in Article 20, the competent authorities of each host Member State may request that the rules referred to in the second subparagraph be applied in the home Member State to the pension institution. These rules apply in this case only for the part of the assets of the institution which corresponds to the activities carried out in that particular host Member State. Furthermore, these rules only apply if the same stricter rules or rules also apply to institutions which have their registered office in the host Member State".

[291]S. SCHIARRA, Solidarity and conflict: European social law in crisis, op. cit.

[292]Recital 30; Article 15 (2) and Article 17 (1) of the Directive.

removed[293]. It should be added that the information requirements for members and beneficiaries are also dictated by the host state[294]. The new Directive did not impose any rules concerning the tax treatment of cross-border activities. Significant in this regard is the sentence of the original article 20 of the proposal of this Directive which was then deleted in the final version: "(...) greater coordination of tax treatment is also essential. However, this issue is not addressed in this proposal (...)[295]".
Finally, it will be worthwhile to point out two other aspects of this compromise in order to better address the problems that a European social security system, if retired, should tackle. The first concerns the scope of the Directive: in addition to excluding the bodies responsible for managing pension schemes subject to the social security system coordination rules (originally public)[296], it excludes, among others, those companies that use based on the establishment of accounting reserves for the provision of pension benefits to their employees[297] (the so-called "book reserves")[298]. This exemption was imposed as a conditio sine qua non by Germany[299]. In fact, in that country (and in Austria) many companies offer their employees a supplementary pension, but "holding" the capital within the company. The Beveridgian countries[300] considered this exemption to be inequitable with respect to competition between companies, as companies in some countries could count on additional capital to finance their activities. This condition was posed as non-negotiable[301]. Again with reference to the scope of the Directive, it does not refer, in principle, to the bodies already subject to the insurance directives[302]. However, there are two rules in this regard of particular interest. In the event that the pension fund also covers biometric risks, Directive 2003/41/EC refers to the same requirements as for the technical provisions for insurance, in particular articles 27 and 28 of Directive 2002/83/EC (called also Solvency I)[303]. This postponement has created enormous controversy and pressure on the European Union after the Directive was replaced by the Directive 2009/138/EC (the so-called "Solvency II" Directive)[304]. The latter Directive is in fact much more restrictive than the previous one of 2002 (Solvency I), but only applies to insurance institutions, while pension funds continue to refer to Solvency I. The rivalry between insurance and pension funds has become that point, which is very harsh, and the comments that will be made later on a European pension scheme will take account of it.
The second rule of Directive 2003/41/EC in which pension funds and insurance companies "meet" is article 4: in fact, Member States may allow their insurance institutions to apply certain articles of this Directive for the activities concerning the occupational pensions sector. In this case, however, reads in art. 4, "all the assets and liabilities items corresponding to these assets are identified, managed and organized separately from the other activities of the insurance companies, without the possibility

[293]Paragraph 9 art. 20:. The institution shall be subject to constant supervision by the competent authorities of the host Member State as regards the compliance of its activities with the provisions of labor law and social security law of the host Member State relevant to occupational retirement schemes (...) where such supervision reveals irregularities, the competent authorities of the host Member State shall immediately inform the competent authorities of the home Member State thereof. The latter, in coordination with the competent authorities of the host Member State, shall take the necessary measures to ensure that the institution in question terminates the alleged violation of social and labor law provisions.
[294]Par. 7 of art. 20.
[295]Article 20 of the proposal for a Directive of the European Parliament and of the Council on the activities of institutions for occupational retirement provision/COM/2000/0507 final-COD 2000/0260
[296]In particular the EC Regulation 883/04 which replaced the Regulation CE 1408/71 Article 2.2 lett.e)
[297]In this regard, it has already been mentioned in chapter 1 to the difficult classification of the notion of complementary social security not only from the point of view of the classification of pension pillars in the European Union, but also to the possible scope of the EU social security directives. supplementary pension.
[298]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, op. cit.
[299]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, op. cit.
[300]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe,
[301]A. HENNESSY, The europeanization of workplace pensions. Economic interests, social protection and credible signaling, op. cit.
[302]Article 2.2 lett.b)
[303]Article 17.2
[304]Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009, p. 1-155, which is based on the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, pp. 13-18). For details see: O.J. ERDÉLYI, Twin peaks for europe: State of the art financial supervisory consolidation. Rethinking the Group support Regime under Solvency II, ed. Springer, Berlin, 2016. N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

of transfer"[305]. A new proposal for the IORP Directive presented by the EC on 27 March 2014[306] should be added here. Once approved, it should replace this Directive 2003/41/EC[307]. "The crossover" between pension funds and life insurance also remains in article 4 of the new proposal, but there is also a provision for insurance companies to make use of this option: the issue will be addressed later. Above, there are no major doubts about the fact that the welfare state theory prevailed in many respects in the final compromise reached by Member States on 5 November 2002, when the Council approved its common position[308] from which the Directive derived 2003/41/CE. The only important victory of the Beveridgian countries was the adoption of the prudent person principle regarding the rules on investments and, in fact, the absence of relevant rules regarding the reserves of the funds (rules of solvency)[309]. As is the case, contrary to the approach of the theory of international political economy, Member States have managed to keep their national social, fiscal and labor law. And this safeguard has always represented, in fact, the greatest obstacle to the creation of cross-border activities of pension funds. In 2012 there were only 84 cross-border pension fund assets in Europe[310]. One of the major difficulties encountered by those funds (or companies) that would like to make use of the possibility of establishing cross-border activities was the difficulty of identifying even the notion of social and labor legislation in the various Member States. Despite the fact that Directive 2003/41/EC establishes clearly that Member States must always communicate their social and labor law provisions, this activity has often not taken place in a clear and transparent manner; moreover, some provisions that are considered part of its social and labor law for a Member State could be considered part of its own prudential legislation in another state. Such a difference represents a further difficulty, since the pension institution is subject to the prudential law of your country, while it is obliged to apply the social and labor law of the host country: it is clear that if some mainly prudential provisions were declared by given the state as part of its social and labor law, the IORP would be forced to apply the law of that state rather than its national law. This obstacle is also compounded by the requirement for IORPs engaged in cross-border activities to always have fully integrated technical reserves in relation to the set of managed pension schemes[311] (fully funded): this requirement is especially burdensome for funds that manage schemes a defined benefit. Moreover, of these 84 funds, about 40% carry on cross-border activities between Great Britain and Ireland, countries that are very similar also for their tax system[312]. Of pan-European pension funds (covering all EU Member States), among other things, they have never been created. However, it will be worth mentioning here that in 2009 the EC financed a feasibility study for the creation of a pan-European pension fund for researchers: this initiative was included in the list of actions listed in the White Paper for adequate, safe and sustainable pensions of 16 February 2012[313]. This project has two specific aims: the first is to promote the mobility of workers in this sector, also taking into account its highly transnational specificity and based on frequent changes of employer (research institutes, universities) ; the second is to provide these workers with an adequate pension that even, according to the project, has been set at 70% of the replacement rate (combining the first pillar pension provision with the planned pension fund) compared to the average salary received during working life. The final feasibility project was presented on 20 December 2013[314]. It has moreover been specified that this research has not focused on "pan-European funds", but on a "European scheme or scheme". The IORP Directive prohibits the possibility of creating a European regime, as it keeps intact ("save" as stated in article 20) the laws and collective agreements of the member states. It is not by chance, as already mentioned, the "pan-European fund" for

[305]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[306]Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision of 27 March 2014 com (2014) 167 final
[307]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[308]JO C E/2002/299/16
[309]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[310]P. DARY, Hitting a brick wall, in European Pensions, April 2013
[311]Art. 16.3 of Directive 2003/41/CE. P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[312]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[313]Commission White Paper of 16 February 2012: "An Agenda dedicated to adequate, safe and sustainable pensions" ((COM 2012) 55).
[314]Paragraph 1.1 "objectives of the proposal" of 27 March 2014 com (2014) 167, op. cit.

researchers, it would be the managing fund of a multiplicity of national pension schemes[315]. The project would leave the national social and labor laws intact. Despite this, some reform recommendations to better adapt the operation of the fund are contained in the project.

21.Problems and possible solutions for the creation of a European pension scheme in the light of Directive 2003/41/EC and for the near future.

If the European social partners decided, in their agreement, to create a pension scheme they could not clearly exclude the provisions of Directive 2003/41/EC. Taking up the four main points outlined above with regard to the compromise and especially the provisions of the Directive in the European pension scheme scenario, the issues (and possible solutions) are as follows: On the prudential rules it was said that in principle the rules of Country in which the fund is based (rules of the state of origin). However, if a fund were to perform cross-border business, the host Member State may impose more stringent prudential rules on the "foreign" fund which would manage its own national regime provided that, of course, the same rules also apply to its national funds. It would be undeniable that such rules could create dysfunctions in the global management of the european regime, since the investments permitted in Country A would not perhaps be permitted in Country B or C. But in particular, the main argument that would go against these restrictions is the fact that there would no longer be a host country: the regime would be European and therefore should be exempted from the respective national laws of the countries in which it operates. This would be the case if you opt for centralized management of the regime (a single fund that manages the regime); both in the case of decentralized management, since even if several national pension funds managed the same European regime, the latter would not "belong" to any country, since decisions regarding investments would be made, or at least agreed, at the central level, that is from a european control room in charge of the progress and smooth functioning of the regime.

In this regard, it should also be added that the proposal for the Directive pension funds, now being discussed by the Council and the Parliament, will seek to further remove the "prudential barriers that still hinder the cross-border activity of IORPs by providing that the rules on investments and information for members and beneficiaries are the same as in force in the Member State of origin, specifying the procedures for cross-border activities and clearly defining the field of action of the home Member State and the host Member State (...)"[316].

A possible harmonization of the provisions could genuinely prove useful: if it were the European agreement establishing the regime to impose its rules, here we will simply say that any impact of such exemptions from national rules would be limited, because these rules would remain fundamentally intact for national pension funds, except for that part of the European scheme which could be "spun off" from the rest of the funds managed by national funds in a specific sector (or rather, well-defined scheme fund) (the fund "european regime")[317].

If the organization and characteristics of the pension schemes of Member States continue to remain governed only by legislation and/or their national collective bargaining, as established by the initial sentence of paragraph 1 of article 20, a European pension scheme would be, as stated above, simply prohibited[318]. The agreement eventually implemented by the Council decision should therefore provide for an exemption from the application of article 20 of the IORP Directive[319].

The European social partners should here realize one of the main objectives of the international political economy theory: to harmonize, within the scope of the regime, those parts of national social, fiscal and labor law that could hamper its functioning.

With regard to the coverage of biometric risks, it has been seen that Directive 2003/41/EC does not provide for any prohibition (or even obligation) to cover them. The decision would be for national

[315]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.

[316]Article 20, first part of paragraph 1: "Without prejudice to national legislation on social security and employment with regard to the organization of pension systems, including mandatory membership and the results of collective bargaining (...)".

[317]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[318]Unlike the regimes based on individual accounts, collective schemes allow to "mix" or "mutualize" the risks of members: there would be a common fund in which all contributions would flow. Only through the mutualisation of risks could some mechanisim of solidarity among members be created.

[319]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.

collective bargaining or collective bargaining. One could hypothesize here that the European regime covers biometric risks with regard to solidarity[320]. In this regard, it has also been said that the regime should work on a collective basis. It is also imagined that the principle of subsidiarity could be invoked by some Member States that it did not accept to accept this Directive. It is true, moreover, that the coverage of biometric risks is often expensive. However, from the moment the regime was collective, huge economies of scale and "spread" risks could be generated, unlike individual pension plans[321].
One could also imagine that the regime has a guaranteed minimum return on investments. This was the question of the European socialists during the discussions of the proposal for a Directive in Parliament. As you recall, the final version of Directive 2003/41/EC did not include anything in this regard, but of course this option is not even prohibited.
However, these hedges and guarantees could only be offered by the scheme if the latter, as well as being collective, was also compulsory. The mutualisation of risks between members (and/or funds), which in fact would be the basis of a solidarity offered to members, could only take place if all the companies and workers in the sector contributed compulsorily to the scheme. From this point of view, and contrary to Directive 2003/41/EC, the regime created by the European social partners would undoubtedly be more "social".
In the light of the elements mentioned here for a hypothetical model of a European pension scheme, examples of some national social and labor laws that would prevent the creation of such a regime will be listed here: in many countries, membership of supplementary pension schemes does not it is mandatory as in Italy, Germany, Ireland or Great Britain[322]; the coverage of biometric risks is by no means a foregone conclusion in many countries such as Great Britain or Central and Eastern European countries; in other countries such as Belgium, the annual financial return guaranteed for pension funds is 3.25%[323]. If the funds fail to achieve this result, employers must add the remaining part. This guarantee is provided for by the Belgian social law and consequently, in principle, it should be applied under the IORP Directive[324]. In Germany, waiting periods to accrue pension rights are normally five years[325]. In the Netherlands, supplementary pension schemes have a hybrid form with regard to future performance: they are "defined ambition" in the sense that the fund aims, in fact, to pay a pension benefit calculated on the basis of the average salary of the working career and the duration of the same. However, this goal is no longer a promise (as would a defined performance system, or DB in English: defined benefit): but for sure, "ambition", although not strictly binding, would probably be higher than the minimum guaranteed annual return proposed by the present hypothesis. The Dutch system is also a reference model for this regime, since it is collective and supportive[326].
We could go on with many other examples, but they should be sufficient to show that an exemption from the application of article 20 of the IORP Directive[327] would be indispensable for making the pension system here hypothesised work. Moreover, in light of the Casteels sentence[328], the CJEU did not hesitate to declare the German collective bargaining rules unlawful, which imposed a penalizing waiting period for those workers who had been transferred from the parent company to another branch of another country[329]. Essentially: social and labor law, including collective agreements establishing

[320]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[321]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[322]J. MORT, B. BEATTY, International pension & employee benefits lawyers Association (IPEBLA), 2013/2014, pp. 273-275.
[323]A. VAN DAMMEm J. BEERNAERT, Belgium, A comparative survey of pension law issues, in J. MORT, B. BEATTY, International Pension & Employee Benefits Lawyers Association (IPEBLA). Ed. 2013/2014, pp. 98ss.
[324]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[325]H.J. LIEBERS, Germany, A comparative survey of pension law issues, in J. MORT, B. BEATTY, International Pension & Employee Benefits Lawyers Association (IPEBLA). Ed. 2013/2014, pp. 158ss.
[326]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[327]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[328]CJEU, C-379/09, Casteels-British Airways of 10 March 2011, ECLI:EU:C:2011:131, I-1379. For details see, F. PENNINGS, Case C-379/09, Maurits Casteels v. British Airways plc, Judgment of the Court (Third Chamber) of 10 March 2011, nyr", in Common Market Law Review, 49, 2012, pp. 1788ss.T. STOREY, C. TURNER, Unlocking European Union law, ed. Routledge, London & New York, 2014, pp. 251ss. F. PENNINGS, G. VONK, Research handbook on european social security law, Edward Elgar Publishers, 2015, pp. 342ss.
[329]The first hybrid model was first called collective defined contribution, or CDC: every 5 years, the social partners re-negotiated the share of contributions to be paid to the fund. With the transition from CDC to DA (defined ambition), employers have virtually "frozen" the possibility of renegotiating contributions every 5 years. See, E. SCHOUTEN, T. ROBINSON, Defined ambition pensions-Have you found the golden mean for retirement saving?, in Pensions, 17, 2012, pp. 335ss.

pension schemes, already represent obstacles to workers' mobility within the meaning of article 45 TFEU[330].

It is for this reason, moreover, that it is considered that a European agreement establishing a pension scheme should be implemented through an EU act having normative force in order to prevail over national legislation. It should also be added that national social and labor law imposes specific requirements on the information to be given to members of the regime: this means, in principle, that an entity engaged in cross-border activities should give different information depending on the country in which it operates[331].

The new proposal of Directive pension funds of March 2014 seeks, among the various objectives, to harmonize the information requirements for all countries in order to facilitate cross-border activities. But even the new Directive could not prevent, a priori, that a country could continue to have more "heavy" information requirements; and the foreign body would be obliged, once again, to meet these requirements if the latter were classified as social and labor legislation by a given country. Here it could be assumed that an agreement concluded by the european social partners, with the aim of creating a genuinely social and certainly not business-like social security system, should be able to ensure, in its provisions, an adequate and transparent level of information to its members. But again, an exemption from the application of article 20 (paragraph 7) of the Directive would be necessary.

The scope of the IORP Directive has limitations. The fact that it does not apply to Institutions that manage social security schemes should not, in principle, create problems, except in many countries of Central and Eastern Europe. In many states in that area, in fact, "pension funds" are considered as an integral part of public social security, and are rather considered as a first "bis" pillar[332]. It could certainly be said that in these countries there is a "void"[333] substantial because professional schemes are lacking in most cases, except in some large companies; and an EU regulatory gap, because the internal market directives for supplementary pensions do not apply. If the agreement in question were implemented by a Directive, and the European regime was compulsory, the impact on the systems of these countries would therefore be heavier for employers.

In other Member States such as Germany, it has been seen that many corporate pensions (still the majority: about 59% of all corporate funds) remain within the company (book reserve) and do not apply the IORP Directive[334] from which they are excluded. Not that in Germany there are no pension funds subject to the IORP Directive or the insurance directives[335]: certainly, however, many companies that have opted for book reserves would not willingly contribute to a mandatory regime, outside their balance sheet, if such companies belonged to the productive sector to which the agreement refers. Keeping in mind what happened during the negotiations for the 2003 pension funds Directive, it would probably be preferable for the European social partners, interposing with their German (and Austrian) member organizations, to carefully evaluate the impact that a compulsory regime could have on those countries. It is clear that much would also depend on the sector involved. In any case, if there was the risk that such an obligation would generate the threat of a veto as happened in the past for the IORP Directive, an act of "realism" should also consider the possibility of excluding from the scope of the agreement the "Book reserve". A similar discourse concerning possible exemptions from the obligation to join the scheme could also apply to the countries of Central

[330]M. POIARES MADURO, M. WIND, The transformation of Europe: Twenty-five years on, Cambridge University Press, Cambridge, 2017, pp. 321ss. A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, op. cit., K. LENAERTS, I. MASELIS, K. GUTMAN, European Union procedural law, op. cit., A.H. TÜRK, Judicial review in European Union law, op. cit., L. WOODS, P. WATSON, Steiner & Woods European Union law, op. cit.

[331]Article 7 of Directive 2003/41/CE

[332]Communication from the Commission to the European Parliament, the Council, the European Economic and social committee of the regions. Launching a consultation on a european pillar of social rights, COM/2016/0127 final.

[333]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[334]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.

[335]There are the classic life insurances (Direktversicherung) with which the employer concludes a contract for its employees; traditional insurance pension funds (Pensionskasse), which is a small insurance association of which workers also become members; and then there are the pension investment funds (Pensionfonds) which have softer rules regarding investments. However, in the event of insolvency, another guarantee fund financed by employers (PSV) intervenes; then there are "support funds" (Unterstutzungkasse) which are entities independent of the company and for which the employers are fully responsible; and finally there are funds created more than anything else to guarantee the solvency of large companies, called CTAs.

and Eastern Europe in the light of the above arguments. Already different would be the case of Italy, because there is already a public effort in place to remove the TFR from companies: or to donate it to pension funds through the tacit transfer, or, ultimately, to devolverlo directly into the paycheck[336]. The Italian problem would rather be the refusal to make membership of the compulsory scheme in a country where complementary social security remains voluntary. Finally, as far as the relationship between pension funds and insurance companies is concerned, it will firstly be necessary to clarify that some countries, although having complementary professional pensions, do not apply the IORP Directive, but only the insurance directives. In the case of the coverage of biometric risks, it has been seen that pension funds should apply the prudential rules set out in the "Solvency I" Insurance Directive 2002/83/EC. However, it has also been seen that in the meantime, the prudential rules for insurance have been reinforced (or weighted) by the Directive 2009/138/EC "Solvency II"[337].
In the first intentions of the EC, the new directive on pension funds should have also dictated prudential (quantitative) rules for pension funds, taking its inspiration from the Directive Solvency II for insurance. The pension fund lobbies, together with the European social partners and some Member States, strongly opposed this initiative, and in particular any approximation of pension fund regulations to that for insurers. The fear has always been that the same rules applied to both entities would definitively trigger the competition between insurance and pension funds for the control of supplementary pensions in Europe. The strong opposition made the EC desist from introducing into the new proposal of the Directive of 27 March 2014 a prudential framework for pension funds: the statement was made by the same Commissioner for the internal market at the time, Michel Barnier, on 23 May 2013[338]. The question concerning pension funds and insurance must in any case be taken into consideration by the european social partners. For the time being, it could only be suggested that insurers, in the event that they wish to participate in the management of the scheme and if they apply the IORP Directive[339], where possible, use article 4 of the said Directive. In this section we have made what Schmidt would call "discourse analysis"[340]: on the one hand the positions of the key actors (employers, trade unions, political parties, lobbies) and their interactions and compromises (coordinative dimension) were taken into consideration; on the other hand it was also seen how the parties managed to include new ideas in their political programs and to communicate them (communicative dimension). Moreover, a project of this type could not completely exclude this type of analysis.

22.Concluding remarks and outlook.
The divergences in the doctrine on the same nature and effects of the European agreements-for some not considered as collective agreements and therefore lacking, at least potentially, of that immunity from the prohibitions set by the EU antitrust law that was instead granted by the EU judge to the contracts traditional collectives-these divergences, it was said, make a discussion of the compatibility of a European agreement establishing a social security system with the legal order of the Union particularly uncertain. Another great uncertainty concerns the EU's competence to "sponsor" with a Council Decision an agreement that would actually (or rather: impose, due to its nature as an EU legislative act) within national social systems, a new social security system created outside of the same. However, it has been argued, the law has already many times limited the competence of Member States in social matters, and complementary pension, although it is an important subject for the States of the Union, should not be considered as "untouchable" as the public pension. In particular, we tried to argue that many of the precautions provided for by the treaties on "social security" seem to refer more to public security than to private security.

[336]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[337]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[338]The 4 European social partners, together with lobby organizations such as PensionsEurope, AEIP, EAPSPI, EFAMA (capital managers' lobby, asset managers: www.efama.org) and EVCA (risk capital managers or venture capital lobbies) have created a coalition called "group of 9" that is following the evolution of the new proposal for pension funds directive and has already created various common positions and press releases sent to the European Institutions.
[339]P. BROWNSWORD, E. SCOTFORD, J. YOUNG, The oxford handbook of law, regulation and technology, op. cit.
[340]V. SCHMIDT, C.M. RADAELLI, Policy change and discourse in Europe: Conceptual and methodological issues, in West European Politics, 27 2004, pp. 184ss.

With regard to the exclusion provided for in article 153.5 TFEU to adopt provisions on remuneration, the doctrine appears once again divided: not so much on pay, but on other matters equally excluded from that article, in particular the strike and the right to Association. It is clear that if this doctrine were to be accepted, the problem of the exclusion of remuneration would be solved in the same way as other excluded matters. In this regard, however, it was also argued that social security and social protection of workers are explicitly included in matters of possible regulation by EU measures. If they were meant as "deferred retribution" what sense would it have to include them among the subjects covered by EU measures? Moreover, if we want to deal with freedom of movement for workers, the legislator would not need to resort to this article, since there are already articles 48 and 46 TFEU[341].
Thus, it was argued that for the specialty principle (with respect to the exclusion of regular remuneration), EU social security initiatives should be allowed. However, it has also been argued that this initiative would undoubtedly also have positive repercussions on the functioning of the internal market, in particular on the free movement of workers and capital. It was also suggested that it was compatible with EU law that the Council Decision implementing the agreement had a double legal basis: article 155 TFEU and article 115 TFEU. This last legal basis could prove useful to remove some obstacles that could hinder the functioning of the regime, such as the fiscal differences between countries. The tax issue was not dealt with in this study, also taking into account the fact that it did not identify the social risk that such a social security scheme could cover: it limited itself to identifying the reasons why it would be worthwhile to exercise this option for future of social security in Europe, and to hypothesize some solutions to the legal issues that it would pose in relation to European law in particular. Returning to letter (c) of article 153 on social security and social protection for workers, another issue is that of unanimity required to settle such matters. In anticipation that this requirement would be difficult to achieve between Member States, the option of using enhanced cooperation was considered, analyzing first of all whether social protection could represent a possible subject for enhanced cooperation. In this regard it has been concluded that it falls within those matters. In particular, it was asked whether a social security scheme could represent a distortion of banned competition in the case of enhanced cooperation, and it was argued that the EU legislator wished to protect States not participating in the cooperation strengthened by damage resulting from a possible eventuality distortion of competition. In the case of the project in question, it was alleged that the damage should not fall on non-participating States but, given the additional costs that a social security scheme would entail for employers, it could fall on the countries promoting enhanced cooperation. We then tried to hypothesize how the enhanced procedure could work if applied to an act having its legal basis in article 155 TFEU dedicated to European agreements: an involvement of the European Parliament would, for example, be necessary (as it would be, at least for be consulted in the case of the use of a double legal basis by adding article 115 TFEU)[342].
A possible pension scheme would be reconciled with the directives on pension funds, and in particular with Directive 2003/41/EC (a so-called "case study" was set up). It concluded that although most of the articles of the Directive could also be applied in the case of a European regime, other articles, in particular article 20 of the said Directive, would constitute a major obstacle to the social security scheme envisaged here and therefore to the European agreement that constituted it (if any were a pension), should provide for an exemption from that article.
It is quite clear, in fact, that a supranational legal system, per se prevailing over that of its Member States, tends to frustrate the latter. But this, not so badly due to an economic design aimed at trampling social protection as such; as, perhaps more simply, because the national social systems represent barriers and obstacles to achieving the objectives of the Union. Objectives, however, that today are no longer just economic, but also social and now equivalent to the former, in the hierarchy of EU sources.
National social systems have not only been "punctured" by economic freedoms: they have also suffered censure from the jurisprudence of the Union aimed at ensuring non-discrimination, greater social rights for workers, citizens and patients moving within the territory of the Union. Of course, the

[341]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.
[342]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

idea of creating a European social security system is a bold and probably premature proposal in today's Union. However, this research has proven to what extent national sovereignties, including social sovereignties, are now embedded (embedded) in the legal, economic and monetary order of the Union. The crisis has further aggravated the situation of national social security systems and the answers could only be European: the creation of a system of European supervision of banks, financial products, insurance and funds was added to the Economic and Monetary Union in fund pensions[343]; the Europeanisation of supervision was then added to the creation of the ESM (European Stability Mechanism)[344] to face the sovereign debt crisis; economic governance was strengthened (the fiscal compact was added to the European semester and the obligation for Member States to receive the preventive clearance of their annual economic and financial maneuvers); then a banking union was proceeded; to the so-called "bazooka anti spread" of the European Central Bank[345], and is now openly debated about fiscal union and "eurobonds"[346]. Finally, in the social field, there is a debate about a European unemployment scheme and a minimum wage.

The reasons for these initiatives are all the source in an awareness, which became particularly evident during the crisis started in 2007/2008, which now Member States are "all in the same boat" and that the crisis of one or the imbalances between states ("imbalances", in the terminology of the EC, be they of an economic or social nature)[347] condition the stability of the Union as a whole. A european social security scheme could actually represent another step to complete the ongoing process.

According to our opinion the Europeanisation of social Europe - at least a "hard core" of social protection-would also be beneficial for the social security systems of Member States. However, it is well known that this change will be slow and politically tortuous. To this is added the inexorable decline of the first public pillar. By contrast, the European social partners, as already "European", would be the most suitable actors to demonstrate that social dialogue and the European social model are not outdated[348]. Complementary social security will become increasingly important in the future; the social partners already manage complementary social security schemes in many Member States. For this reason, the social partners could, in essence, become the guarantors of the survival of the European social model.

The advantages in terms of management costs deriving from the economies of scale created would be very considerable; these would bring better social benefits for workers and lower costs for

[343]See in particular the measures that have been adopted in the period of crisis: Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (2011): Council of the European Union (OJ No L 306/2011); Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (2011) Council of the European Union (OJ No L 306/2011); Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (2011) Council of the European Union (OJ No L 306/2011); Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic polic (2011) Council of the European Union (OJ No L 306/2011); Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (2011) Council of the European Union (OJ No L 306/2011); Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (2011) Council of the European Union (OJ No L 306/2011). Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (2013) Council of the European Union (OJ No L 140/2013); Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (2013) Council of the European Union (OJ No L 140/2013). For details see, C. BARNARD, The financial crisis and the Euro Plus Pact: A labour lawyer's perspective, in Industrial Law Journal, 41 (1), 2012, pp. 99ss. L. OBERNDORFER, A new economic governance through secondary legislation? Analysis and constitutional assessment: From new constitutionalism, via authoritarian constitutionalism to progressive constitutionalism, N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 384ss.

[344]S. SCHMIDT, A sense of Déjà Vu? The FCC's preliminary european stability mechanism verdict, in German Law Journal, 14 (1), 2013, pp. 10ss. K. SUM, Post-crisis banking regulation in the Eurpean Union opportunities and threats, Palgrave Macmillan, Basingstone, 2016.V.BABIS, The power to ban short-selling and financial stability: The beginning of a new era for EU agencies?, in Cambridge Law Journal, 73 (2), 2014, pp. 268ss.A. LUI, Financial stability and prudential regulation, ed. Routledge, London & New York, 2016. A.KERN, European Banking Union: a legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism, in European Law Review, 40 (2), 2015, pp. 155ss

[345]C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 586ss.

[346]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[347]C. BARNARD, S. PEERS, European Union law, op. cit.

[348]See the analyis of: T. PROSSER (2016) Economic Union without social union: The strange case of the european social dialogue, in Journal of European Social Policy, 26 (5), 2016, pp. 462ss. C. DEGRYSE, S. CLAUWAERT, Taking stock of european social dialogue: will it fade away or be ransformed?, in D. NATALI, B. VANHERCKE, (eds.) Social developments in the European Union 2011. Brussels: ETUI and OSE, 2012, pp. 132ss.

employers. Moreover, a regime of this type could accumulate enormous capital that could be partly reinvested in the "real economy", perhaps in favor of the sector to which it refers. Moreover, a European social security scheme could above all remove many of the still existing barriers to the movement of workers within the Union who, wherever they move, would always be "covered" by the same social security scheme, (at least scope of the same productive sector). In short, it would be a "European corridor" in which workers could circulate without having to leave the regime of one country each time to register with another. Even companies, especially multinationals, would derive enormous advantages from the system, since by joining the scheme, they could finally have a single pension plan for all their branches on the continent, without having to create a plan for each country where the their staff.

The CJEU has justified compulsory membership to such regimes created through collective bargaining and even their monopolistic management, against the bans imposed by competition law[349]. The reasons that the CJEU has put forward have been clear and repeated on several occasions: collective bargaining is aimed at improving the working conditions and social wellbeing of workers; the monopolistic management of a social security system by the social partners is necessary in order to guarantee solidarity, which is a European value and is therefore, under the Treaty, a mission of general economic or "social" interest worthy of protection under article 106.2 TFEU[350]. The question that has been asked is whether these objectives can also be pursued by the European social partners: a collective agreement concluded under the Social Dialogue rules of the FUE Treaty aimed at creating a social security scheme for all workers in a given sector, and subsequently extended through an EU regulatory act in order to make it mandatory and therefore supportive.

The need was then established to create a control room (made up of an equal number of European employers' representatives and trade unions), in order to guarantee the proper functioning of the regime. The control room would therefore be a European parity entity; if the signing parties so wished, it could also be entrusted with the direct management thereof. In the first case there would be a mere "paritarism of negotiation and supervision"; in the second one, instead, we would opt for a "management paritarism"[351]. Naturally, it is also important to hypothesize how the European regime could interact with national ones, if they already exist for the same sector and for the same social risk (pension, health, unemployment, paid leave, etc.)[352].

Other legal issues that remain open are the compatibility of EU law with a Council Decision (a Directive) implementing the agreement establishing the regime throughout the Union. In particular, the combined provisions of articles 153 and 155 TFEU with reference to the potential and the limits of collective european negotiation. The open questions remain in particular on the effective competence of Union law with regard to social security in relation to the competences of the Member States[353]; the question arises whether the matters explicitly excluded from article 153 TFEU including, for example, remuneration, represent an insurmountable obstacle to a Council Decision which intends to implement a social security agreement, bearing in mind that the CJEU jurisprudence has more sometimes considered the supplementary pension as "deferred salary". In this regard, however, it has been argued that the same article 153, in its letter c) provides, among the subjects of possible european Regulation, the "social security and social protection of workers"[354], and that these matters, which to date they have never been the subject of european Regulation, they should be interpreted according to the specialty principle if it were not intended to leave that rule completely empty.

Among other things, mention was made of the option of using a double legal basis for the european provision implementing the agreement, bearing in mind that a social security scheme such as the one envisaged would undoubtedly contribute to improving the development of the internal market of the Union. Even on a symbolic level, a provision based on the legal basis of social policy and the internal

[349]A. ALBORS-LLORENS, European competition competition law and policy, op. cit.

[350]N. ZEVGOLIS, Anti-competition conduct from public or privileged enterprises: Towards a per se abuse of dominant position? Applicability of the provision of TFUE article 106 (2) by national competition authorities, in European Common Law Review, 2012, pp. 84ss.

[351]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[352]S. SCHMIDT, A sense of Déjà Vu? The FCC's preliminary european stability mechanism verdict, op. cit.

[353]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit.

[354]N. BRUUN, K. LÖRCHER, I. SCHÖMANN, The Lisbon treaty and social Europe, op. cit. C. BARNARD, S. PEERS, European Union law, op. cit.

market would represent a compromise in which economic freedoms and social values could effectively be reconciled and go hand in hand, as required by art. 3 TEU[355], which explicitly imagines the new Union based on a social market economy. Moreover, some legal barriers to the creation of a cross-border regime could also derive from fiscal obstacles which, as also mentioned in the introduction, this study was not directly addressed. This also because social risk has not been identified, and it will be up to the social partners to identify it, also on the basis of the productive sector to which it refers. Bearing in mind that an EU measure referring to social security and social protection for workers requires unanimity from Member States, it has also been suggested that the Council Decision implementing this agreement will be the subject of enhanced cooperation between a group of pioneer states, available to try this new road. The path to the creation of a European social security system through Social Dialogue still remains very insidious and full of uncertainties.

However, the real, main limits seem to be more political than legal. Not that there are still open legal issues that are difficult to solve. But if the european social partners, freed from their internal conflicts, took an initiative to this effect, in the opinion of the writer, the project would probably have many more possibilities to be realized than the legal obstacles mentioned, which, however existing, would be overcome. This initiative, after all, could help to give an active role to the European social partners and above all to save the European social model which otherwise will be inexorably condemned to be overcome.

[355]F. VALDÉS DAL-RÉ, El constitucionalismo laboral europeo y la protección multinivel de los derechos laborales fundamentales: luces y sombras, Albacete, Bomarzo, 2016.