

Re-InVEST Policy Brief

The European Pillar of Social Rights: reaction on the consultation document

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The need to go beyond symbolism and to opt for enforceability

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0. Introduction

'Re-InVEST: Rebuilding an inclusive, value based Europe of solidarity and trust through Social Investments', is a H2020 funded research project operating across 19 organizations and 12 member states. It aims to strengthen the philosophical as well as the institutional and empirical underpinnings of the Social Investment Package from the perspective of human rights and (individual and collective) capabilities.

Our consortium is embedded in the network 'Alliances to Fight Poverty'. Our research methodology actively involves European citizens severely affected by the crisis in the co-construction of knowledge and the design of a more European social agenda. This contribution to the EPSR consultation reflects our theoretical understanding of how investing in human rights, as well as individual and collective capabilities can build strong institutional capacity to repair damage and restore a social Europe.

The RE-InVEST team welcomes the initiative of the European Commission of the European Pillar of Social rights (EPSR) as a timely intervention which brings fresh hope and a momentum to break a climate of socially harmful austerity policies. Moreover, the emphasis on human rights creates an opportunity to respond to increasing discontent among an important part of the European population.

However, for the EPSR Communication to become a strong social compass and not to read, as many policy papers do, as a series of ambiguous compromises, EPSR needs to include clearer and enforceable options.

In this policy brief, rather than respond in depth to the questions elaborated in the EPSR, the RE-InVEST consortium chooses to elaborate core human rights principles. Making these the touchstone of the EPSR consultation allows us share RE-InVEST's analysis as part of our co-construction of knowledge on human rights and capabilities, an analysis developed with Just Fair¹, co-author of this policy brief and a partner of the broader Alliances to Fight Poverty network, in which the RE-InVEST Consortium is embedded. We also focus on recommendations for effective implementation of the EPSR and see implementation and enforcement as a vital success factor for the EPSR as a response to the public discontent and distrust in Europe.

Given the preliminary stage of the first scientific results of the RE-InVEST project, we look forward to publishing policy recommendations related to the labour market, social protection and social services at a later stage.

¹ www.just-fair.co.uk

1 'Rights' have to be truly 'rights'.

The EU and European countries must meet the highest international standards on economic and social rights.

All EU countries have ratified the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which enshrines the right to work, the right to social security, the right to water, food and housing as part of an adequate standard of living, the right to health, education and participation in cultural life.² All EU countries have also ratified either the 1961 European Social Charter or its Revised version of 1996, which includes rights related to employment and working conditions, housing, health and social security.³

The outline of the EPSR makes several references to the EU Charter of Fundamental Rights (2000). However, it is well known that most economic and social rights proclaimed in the Charter are to be protected "under the conditions established by national laws and practices".⁴ In other words, the Charter does not directly enable judicial enforceability of these rights.

Furthermore, at the time of the adoption of the Treaty of Lisbon, the UK and Poland demanded (and the rest of Member States accepted) the attachment of Protocol No. 30, which confirms that these rights will not be justiciable unless they have been recognized as such by the laws and practices of both countries.

Article 151 of the Treaty on the Functioning of the European Union calls on EU authorities and Member States to "have in mind" the rights set out in the European Social Charter. On this note, it is written in one of the background documents of the EPSR that this Charter, as well as other documents stemming from the Council of Europe and the International Labour Organisation, "can be a source of inspiration" for EU authorities.⁵

However, International Human Rights Law (IHRL) must be more than a mere source of inspiration. The EPSR must show a clear commitment to engage with the highest economic and social rights standards of IHRL. The EU and its Member States should abide by the International covenant on Economic and Social Rights (ICESCR), as interpreted by the UN Committee on Economic, Social and Cultural Rights (CESCR), and the European Social Charter, bearing in mind the interpretation of the European Committee of Social Rights.

The EU and European countries must recognise that economic and social rights are human rights and give them full implementation in EU secondary law and in national law, enabling individuals to seek enforcement of their rights before national courts and tribunals.

1. Stressing the need to go beyond symbolism and opt for a compelling human rights agenda

The recognition of economic and social rights should avoid merely rhetoric and symbolism. Re-Invest make the credible argument that human rights as a frame has specific implications for the design of public policies on welfare. At the very least, a human rights approach to social policy should mean the following:

a. **Respect of minimum core obligations and immediate obligations to act.** Authorities must ensure the satisfaction of "at the very least, minimum essential levels" of economic and social rights. "If the [ICESCR] were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. [...] In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all

² <http://indicators.ohchr.org/>

³ <http://www.coe.int/en/web/turin-european-social-charter/signature-ratifications>

⁴ This or similar jargon is used in Articles 27 (workers' right to information and participation), 28 (collective bargaining), 30 (protection in case of unjustified dismissal), 34 (social security) and 35 (health). No such specification was deemed necessary for civil and political rights, or for the right to private property (Article 17).

⁵ Commission Staff Working Document, *The EU social acquis*, 2016, p. 17.

resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations”.⁶ The obligation “to take steps” towards the fulfilment of economic and social rights is also of immediate effect. Steps must be concrete, deliberate and targeted.⁷

b. **Equality and non-discrimination.** Another immediate obligation of state parties to the Covenant is the obligation of non-discrimination on any ground.⁸

c. **Particular attention to most vulnerable groups.** “Even in times of severe resource constraints, whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs”.⁹

d. **Obligations to respect, protect and fulfil.** The guarantee of economic and social rights has three layers of obligations: obligation to respect, which means that authorities must abstain from interfering in the normal enjoyment of these rights; obligation to protect, meaning that authorities must ensure that non-state actors do not prevent individuals from enjoying economic and social rights¹⁰; and obligation to fulfil, that is, authorities must overcome obstacles to the full satisfaction of economic and social rights.¹² Even if a public authority decides to privatise a public service, such as prisons, schools or hospitals, the State remains the ultimate responsible for the protection of all human rights.

e. **Progressive achievement of economic and social rights.** Public authorities must take measures, “to the maximum of [their] available resources, with a view to achieving progressively the full realisation” of economic and social rights.¹¹ The State bears the burden to prove that its policies are moving forward expeditiously and effectively towards the ultimate fulfilment of these rights. This has implications for fiscal policy.

f. **All appropriate policies.** Public authorities must use the most suitable tools to fulfil economic and social rights, including legislative measures and judicial enforceability, but also international cooperation and progressive taxation, among others.¹²

g. **No regressive measures.** The obligation to fulfil economic and social rights means that States cannot take measures that constitute a step back in the level of economic and social rights of the population.¹³ This obligation is of immediate effect, so it is also applicable in times of economic recession, and the State bears the burden of proof. For temporary measures to be in accordance with IHRL, public authorities must ensure that the rights of the most disadvantaged people are not disproportionately affected, the measure or policy must be non-discriminatory, mitigate inequalities and respect the minimum core content of economic and social rights.¹⁴ This imposes an impact assessment duty on public authorities.

h. **Accountability and right to remedy.** IHRL includes a collection of mechanisms that allow individuals and groups to monitor State policies and, in some instances, to lodge individual complaints and have access to effective remedies in case of violation of their rights. At the national level, judicial enforceability is both an accountability mechanism and an appropriate policy to protect economic and social rights. Accountability also includes periodic independent monitoring of the progressive fulfilment of these rights.

i. **Access to information, impact assessment and active participation.** As a corollary of all of the above, governments are obliged to provide information about the way in which they are getting the population closer

⁶ CESCR, *General Comment 3: The nature of State parties’ obligations*, 1990, UN doc. E/1991/23, para. 10.

⁷ Article 2(1) ICESCR; CESCR, *General Comment 3*, 1990, para. 2.

⁸ Article 2(2) ICESCR; CESCR, *General Comment 20: Non-discrimination in economic, social and cultural rights*, 2009, UN doc. E/C.12/GC/20.

⁹ CESCR, *General Comment 3*, 1990, para. 12.

¹⁰ CESCR, *Statement on the obligations of States Parties’ regarding the corporate sector and economic, social and cultural rights*, 2011, UN doc: E/C.12/2011/1.

¹¹ Art. 2(1) ICESCR.

¹² CESCR, *General Comment No. 9: The domestic application of the Covenant*, 1998, UN doc: E/C.12/1998/24; Special Rapporteur on extreme poverty and human rights, *Report on taxation and human rights*, 2014, UN doc: A/HRC/26/28

¹³ CESCR, *General Comment 3*, 1990, para. 9.

¹⁴ CESCR, *Public debt, austerity measures and the ICESCR*, 2016, UN doc: E/C.12/2016/1, para. 4.

to the ultimate goal of the fulfilment of all human rights. This requires institutionalising impact assessment and facilitating active participation to monitor State practices.

2. Austerity is no excuse for neglecting, nor for restricting economic and social rights

The consultation document makes clear that the EC is framing the EPSR as a policy response to the almost decade long economic crisis in Europe; “Every Member State and the EU as a whole are struggling with the political, economic and social consequences, while seeking to anticipate future developments.”¹⁵

A background document notes for example that “in particular, a number of Southern European countries and Baltic States, where the crisis hit hardest and initial conditions were more fragile than in other parts of Europe, *had to tighten* eligibility conditions for cash benefits, freeze indexation and limit in-kind benefits/social services”.¹⁶ Re-InVEST’s own analysis also shows how welfare indicators show a negative trend in recent years in most countries, but we argue this has not only been the result of economic recession, but more importantly, the product of specific policies inspired by austerity dogmas advocated, among others, by EU institutions.

Austerity measures have undermined rights, and the EC must be self-critical

As noted by the Commissioner of Human Rights of the Council of Europe, “many of these austerity measures – characterised by public expenditure cuts, regressive tax hikes, reduced labour protection and pension reforms – have exacerbated the already severe human consequences of the economic crisis marked by record levels of unemployment. [...] In some cases, the economic crisis is undermining the very capacity of central and local authorities to deliver on the basic promises of a social welfare state and ensure human rights protection for all”.¹⁷

The UN CESCR has also denounced the disproportionate adverse impact of austerity measures on the enjoyment of economic and social rights in Spain, the Czech Republic, Slovenia, Romania, Ireland, Portugal and the UK.¹⁸

We note for example one typical example of the restrictive approach to social rights in the EPSR section relating to guaranteed minimum incomes, which seems to oblige member states to make this right conditional on active participation in activation into work. Even though the overwhelming majority of minimum income applicants aspire to a regular job as a way out of poverty and dependency, the phrasing of this condition seems to ignore health problems, lack of education and skills, family responsibilities and other obstacles that prevent many minimum income recipients from taking up work in the short term. Although compulsory activation may boost the shift from welfare into work, from a human rights and capabilities point of view the effect may be very short-lived and indeed negative as people may not be able to keep their jobs, their benefits may be cut, and their freedom of choice confined.

While a more qualified conditionality of the right to a minimum income would be welcome, one would also encourage in EPSR an explicit reference to the 2008 Recommendation on Active Inclusion, which frames sustainable labour market inclusion as a right – rather than a condition – connected to the minimum income guarantee.

The EU must commit to the protection of economic and social rights. **The protection of human rights, especially those of the most vulnerable groups, must have pre-eminence over economic policy preferences or any other consideration.** In particular, the EC must seize the opportunity of the EPSR to promote a **universal social protection floor, sufficient to ensure an adequate standard of living for all throughout the European Union.**

¹⁵ European Commission, *Launching a consultation on a European Pillar of Social Rights*, 2016, p. 3.

¹⁶ Commission Staff Working Document, *Key economic, employment and social trends behind a European Pillar of Social Rights*, SWD(2016) 51 final, 8 March 2016, p. 8.

¹⁷ Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis*, 2013, p. 7.

¹⁸ CESCR, *Concluding Observations: Spain*, 2012, UN doc: E/C.12/ESP/CO/5; *Concluding Observations: Czech Republic*, 2014, UN doc: E/C.12/CZE/CO/2; *Concluding Observations: Slovenia*, 2014, UN doc: E/C.12/SVN/CO/2; *Concluding Observations: Romania*, 2014, UN doc: E/C.12/ROU/CO/3-5; *Concluding Observations: Portugal*, 2014, UN doc: E/C.12/PRT/CO/4; *Concluding Observations: UK*, 2016, UN doc: E/C.12/GBR/CO/6

3. Facing growing inequalities within Europe: Equality should be stressed as a human rights goal

OECD data echoed by an EPSR background documents suggests that “there is a broad trend toward rising inequality and declining labour income share over recent decades in Europe, as well as in most other industrialised countries [...]. In many advanced economies, there is increasing concentration of income at the very top of the distribution”.¹⁹

The EC’s consultation document states from the outset that reducing inequality must be a policy target for public authorities. “Action at EU level reflects the Union’s founding principles and builds on the conviction that economic development should result in greater social progress and cohesion and that, while ensuring appropriate safety nets in line with European values, social policy should also be conceived as a productive factor, which *reduces inequality*, maximises job creation and allows Europe’s human capital to thrive”.²⁰

IHRL does not recognise a right to material equality per se, and therefore it does not require public authorities to redistribute resources towards that goal. That said, inequality is clearly connected to human rights, particularly economic and social rights. Empirical research shows that inequality can be a cause and a consequence of human rights abuses. Socio-economic inequality can also be a threat to human rights insofar as it constraints access to political participation and to public welfare services.²¹ Furthermore, public authorities are expected to guarantee the minimum core content of all economic and social rights, devoting the “maximum available resources” without discrimination to their progressive fulfilment (Article 2(1) ICESCR). Taking this requirement seriously would probably result in public policies that lead to greater socio-economic equality.

EU authorities and European governments should recognise that inequality puts economic and social rights at risk by seriously hampering their progressive realisation and access to an adequate social protection floor for those in the lower end of the income scale. **Equality must be a priority goal** of the EPSR.

4. The need to go beyond symbolism and to opt for enforceability

In order to be more than a declaration of principles, Re-InVest contend that EPSR should be linked with **existing implementation mechanisms**. Opting for the necessary levels of enforceability involves:

- a. A clear statement that the principles in the Pillar will be put at the heart of the **European Semester process**. EU could consider adopting an additional target within the EU 2020 targets on reducing inequality in the EU in line with one of the key Sustainable Development Goals adopted in September 2015 (i.e. *to ensure that in each country the income of the bottom 40% increases faster than the income of the whole population*).
- b. A clear link could be made to the **implementation of the Social Investment Package** (in particular the EU Recommendation on Active Inclusion and the EU Recommendation on investing in Children) as a key method of ensuring the Pillar’s principles are effectively guiding policy.

Next to this, there should be clearly defined **accountability mechanisms and sanctions** for not delivering on the Pillar’s principles. These should include:

- a. A commitment to establishing **as strong a “social” as an economic scoreboard** for monitoring progress in Member States. This could draw on existing scoreboards as developed by the Social Protection Committee and the Employment Committee;
- b. A commitment to establish appropriate “social” benchmarks or minimum standards for the various principles. These could cover such areas as: a guaranteed minimum income benchmark, a minimum/ living wage benchmark and benchmarks in industrial relations.

¹⁹ Commission Staff Working Document, *Key economic, employment and social trends behind a European Pillar of Social Rights*, 2016, p. 16-19.

²⁰ European Commission, *Launching a consultation on a European Pillar of Social Rights*, 2016, p. 2.

²¹ See analysis in the debate (<https://www.opendemocracy.net/openglobalrights/economic-inequality-and-human-rights>) hosted by Open Global Rights.

c. In the longer term, consideration could be given to Treaty changes to allow for sanctions for countries failing to meet social as well as economic and employment objectives.

d. In line with the EU's *Horizontal Social Clause* included in the Lisbon Treaty, there could be a specific commitment to **effective monitoring** of countries' progress in tackling poverty and social exclusion and ensuring social rights, amongst other the adoption of specific indicators to monitor progress on reducing inequality.

Given the persistent high levels of poverty and social exclusion in the EU, the Pillar could include provision for the establishment of a highly visible **EU integrated anti-poverty strategy**. As part of this, all Member States could be required to develop and report in the context of their European Semester and/or the existing national social reports submitted as part of the Social OMC, on national plans for combating poverty and social exclusion.²²

The EPSR should guide labour and welfare policies by building on the EU regulatory body on social protection (*social acquis*). The principles of the EPSR, rather than replace existing rights, offer a way to evaluate national performance of national employment and social policies. Throughout this reflection, the European Commission must seize the opportunity to promote a universal social protection floor sufficient to ensure an adequate standard of living for all throughout the European Union. This social protection floor needs enforceability throughout existing EU instruments.

5. Eurozone vs EU27 : the need to avoid (more) social dumping

EPSR acknowledges the strong human rights foundations inform all EU member states. As stressed earlier all EU countries have ratified ICESCR and the right to work, the right to social security, the right to water, food and housing as part of an adequate standard of living, the right to health, education and participation in cultural life.²³ Likewise all EU countries have ratified either the 1961 European Social Charter or its Revised version of 1996, which includes rights related to employment and working conditions, housing, health and social security.²⁴

The EC's initial proposal is territorially limited to the Eurozone. However, the EPSR has potential to become a social convergence framework across Europe. Designing a 'social compass' for Europe, which is cited by Juncker and Thyssen as being the core aim of the EPSR, requires further measures to avoid further social dumping across all the EU member states. In this context it is crucial to avoid a two-tier social Europe (Eurozone vs non Eurozone) which could lead to an increased risk of social dumping.

6. Note on the questionnaire

The RE-InVEST Consortium have very much welcomed the EPSR consultation and offer some insights into the process. We believe the approach of ranking the proposals in the EPSR consultation could contradict the indivisible nature of human rights; prioritizing one right over another could mean saying that some rights are less important, this is not the case and runs the risk of undermining the important principle of interdependence of human rights. We also note that in the EPSR questionnaire employment questions come first. This order of the propositions is not neutral, an alphabetical order might be a preferred consultation option. We note too possible contradictions or conflicts between different proposals, e.g. the choice between flexicurity and transitional labour markets and decent employment rights. It is hard to comment on such very short policy formulas without understanding the wholesale policy approaches behind the short phrases.

²² Frazer, H. and Marlier, E. (eds.) (2016), *Towards a European Pillar of Effective Social Rights*. Submission to the European Commission, European Social Policy Network (ESPN), Brussels: ESPN.

²³ <http://indicators.ohchr.org>

²⁴ <http://www.coe.int/en/web/turin-european-social-charter/signature-ratifications>

7. Conclusion

To be convincing as a European Pillar of Social Rights, the final document will need to offer substantive, enforceable rights rather than principles. These rights should be based upon existing international legislation.

To serve as a social compass against the backdrop of widespread austerity policies within Europe, the final document will have to opt for enforceability of these social rights, on equal footing with the economic obligations now enforced through the existing EU instruments (e.g.: the European Semester, the Horizontal Clause, National Reports,...).

To prioritize addressing major divergences within Europe, the EPSR should include a specific commitment that the implementation of the EPSR will lead to a change in the overall focus of EU policy from austerity or fiscal consolidation to investment in social and environmental policies and to tackle inequality.