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Research Report

The European Pillar of Social Rights: An Analysis

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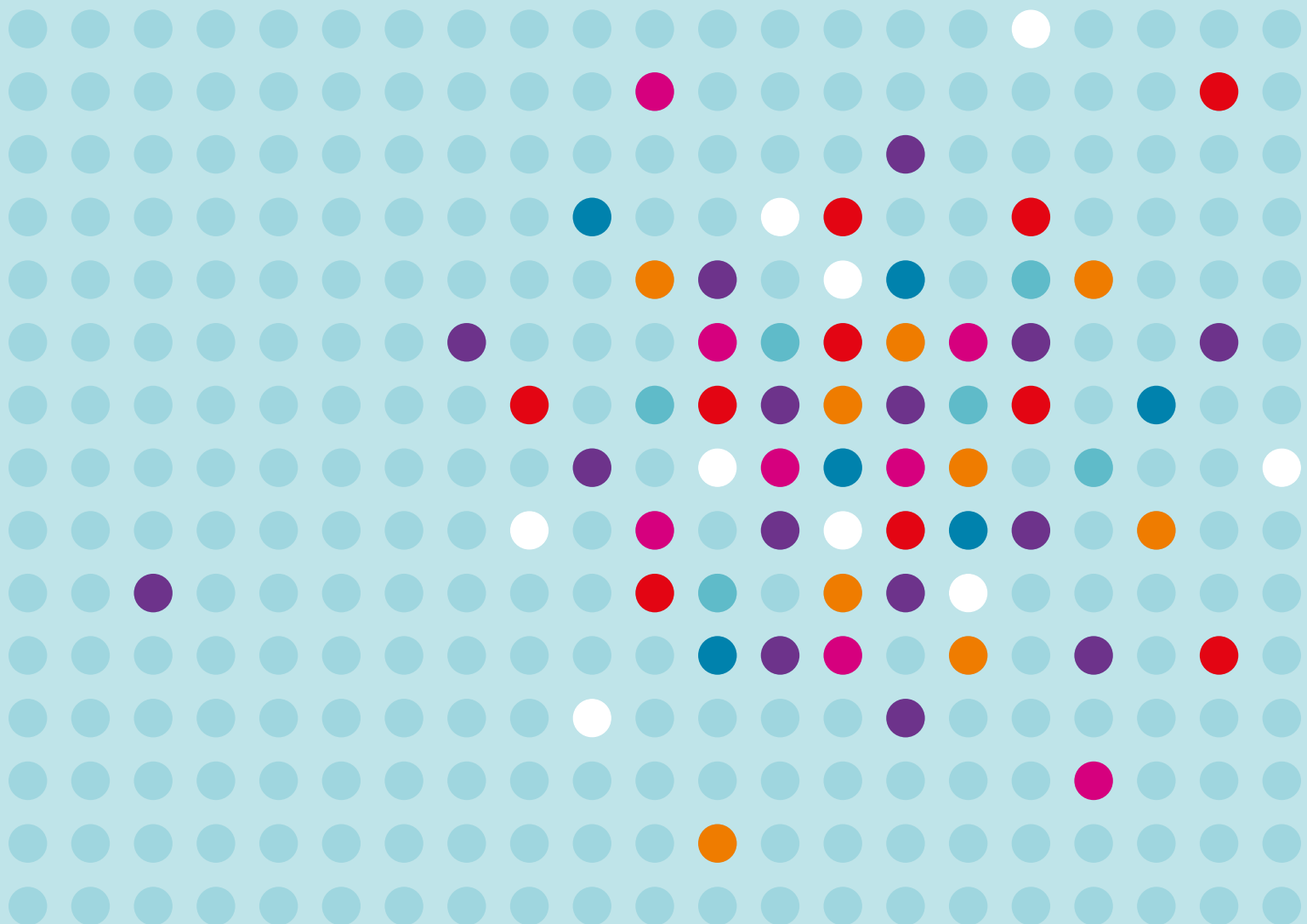
POLICY BRIEF

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THE EUROPEAN PILLAR OF SOCIAL RIGHTS: AN ANALYSIS

Daniel Seikel



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1 Introduction¹

At the Social Summit in Gothenburg, on November 17th, 2017, the European Parliament, the Council and European Commission adopted the "European Pillar of Social Rights" (EPSR).² It consists of 20 very generally formulated social policy (in the broadest sense of the word) principles which have been adopted in the form of a legally non-binding joint proclamation. The principles are formulated as social rights of individuals against the member states (Höpner 2017; Rasnača 2017, p. 17 onwards).³ The member states shall comply with these principles and implement them in national legislation. Furthermore, the principles shall be substantiated by legislative initiatives at EU level. The objectives that the Commission pursues with the EPSR are extremely ambitious. The pillar shall serve as a compass for a renewed process of convergence towards better working and living conditions in Europe (Rasnača 2017, p.13). Through the EPSR, the Commission is sending the signal that it has recognized the importance of Europe's social dimension. The Commission's initiative has to be seen before the background of the ongoing social problems in Europe, especially in some countries of the Eurozone.

This WSI Policy Brief analyses and evaluates the European Pillar of Social Rights with regard to its impact on national and European policies.

2 What is the European Pillar of Social Rights?

On March 8th, 2016, the Commission presented a first draft of the EPSR which launched a public consultation process. This draft was highly problematic (for a detailed analysis, see Lörcher/Schömann 2016). The wording subordinated social policy principles to factors not related to social policy objectives, such as fiscal sustainability and competitiveness. In addition, social rights were seen mainly from the perspective of an activation policy paradigm ("flexicurity"). For example, health systems should be cost-effective to ensure their financial sustainability; the retirement age should be linked to life expectancy; the duration of unemployment benefits should provide incentives for faster reintegration into the labour market; minimum wages should not impede the access to the labour market or discourage the job seeking of unemployed persons and wages should advance in line with productivity. This draft was to be rejected; as it stood it could even have led to a deteriora-

¹ This is a translation of a slightly modified version of Seikel, Daniel: "Was bringt die Europäische Säule Sozialer Rechte", WSI Policy Brief No. 17, 11/2017. The translation was provided by Amanda Slater.

² The full text is available here: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

³ This is an important difference to the Charter of Fundamental Rights which, while also formulating social rights, only binds the institutions of the European Union and member states only when they implement European law (Heuschmid 2011, p.157).

tion of social standards. This raised serious doubts about the Commission's intentions.

After the public consultation, some of this problematic wording was eradicated from the Commission's draft of April 26th, 2017. The remaining problematic phrasing is discussed below.

The EPSR is divided into three sections:

- Equal opportunities and labour market access
- Fair working conditions
- Social protection and social inclusion

Overall, the EPSR consists of 20 general, basic principles (for an overview, see info box 1; for more information, see the appendix).

Info box 1

Overview of the EPSR

Chapter I: Equal opportunities and labour market access

1. Education, training and lifelong learning
2. Gender equality
3. Equal opportunities
4. Active support to employment

Chapter II: Fair working conditions

5. Secure and adaptable employment
6. Wages and salaries
7. Information about employment conditions and protection in case of dismissals
8. Social dialogue and involvement of workers
9. Work-life balance
10. Healthy, safe and well-adapted work environment and data protection

Chapter III: Social protection and social inclusion

11. Childcare and support to children
12. Social protection
13. Unemployment benefits
14. Minimum income
15. Old age income and pensions
16. Health care
17. Inclusion of people with disabilities
18. Long-term care
19. Housing and assistance for the homeless
20. Access to essential services

The principles are essentially a summary of the EU's *acquis social*.⁴ According to the Commission, the pillar is intended to operationalise the *acquis social*. However, some of the elements go beyond the existing *acquis social* (see Lörcher/Schömann 2016), such as the right to an adequate minimum wage or the right to adequate minimum income benefits. The EPSR has been adopted in the form of a joint, legally non-binding proclamation of the European Parliament, the European Council and the European Commission at the EU Social Summit on November 17th, 2017 in Gothenburg. The Commission is following the example of the Charter of Fundamental Rights which was also initially only a proclamation but was later incorporated into European primary law (Rasnača 2017, p.15). The EPSR applies to the Eurozone but addresses also all other member states. After its adoption, the principles of the pillar shall be implemented by further EU legislation. However, as mentioned at the outset, the EPSR primarily aims at the member states. The implementation of the EPSR shall be monitored by a social scoreboard.⁵

As previously highlighted, the EPSR also contains some problematic phrases (see info box 2). These are passages in which high social standards are, at least implicitly, seen in a negative light. Minimum wages or social benefits that are too high, for example, are seen as negative incentives for taking up new employment.

Info box 2

Problematic Formulations

5. Safe and adaptable employment

[...] In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.
[...]

6. Wages and salaries

[...] Adequate minimum wages shall be ensured [...] whilst safeguarding access to employment and incentives to seek work. [...]

13. Unemployment benefits

[...] Such benefits shall not constitute a disincentive for a quick return to employment.

14. Minimum Income

[...] For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.

These restrictions are as much out of place in a catalogue of basic social rights as the emphasis on entrepreneurial freedom. Such wording raises doubts as to the sincerity of the Commission's commitment to strengthen social rights.

⁴ As to the extent in which the pillar goes beyond the *acquis*, from the Commission's point of view, see SWD(2017) 201 final.

⁵ SWD(2017) 200 final.

3 Assessment of the EPSR

Since the EPSR is basically a summary of the EU's current *acquis social*, no major improvements can be expected (see Rasnača 2017, p.8). Moreover, the wording is kept very general and vague (e.g. "adequate minimum wage"). Specific targets for social policy benefits (e.g. wage replacement rates for unemployment benefits) are not included. The pillar is made up of different legal sources, for instance different parts of the Treaty – e.g. equal pay for men and women (Art. 157 Para. 1 AEUV) or the provisions about the social dialogue (Art. 154-155 AEUV) – the Charter of Fundamental Rights, secondary legislation, the Youth Guarantee or ILO Conventions (Rasnača 2017, p.12). Since these documents have not brought about a social Europe, even though some of them do constitute binding European primary law, this certainly cannot be expected of the EPSR.

In the remainder, the Policy Brief briefly discusses the possible effects on the member states as well as on EU policy. At the national level, the effects will be more limited to the political discourse; at the European level, the EPSR could potentially bring about more substantial change.

3.1 Relevance for the member state level

There are no legal obligations that can be derived directly from the pillar. Even if the pillar were to acquire a more legally binding form, it is doubtful whether there would be any significant effects on the member states. The provisions are so vague that they could easily be interpreted to mean that they have already been implemented.⁶

The principles of the pillar can be potentially useful in political discourse. They provide a starting point for pushing the debate forward about an appropriate level of social benefits or (minimum) wages. Perhaps insufficient social standards could be more effectively problematized with regard to the pillar. A possible starting point could be, for example, the right to adequate minimum wages and the right to adequate minimum income benefits. The EPSR states the right to minimum wages that go beyond a minimum subsistence level and which, very much in the sense of "living wages", facilitate taking part in social and cultural life. This could be used as a starting point for a Europe-wide coordinated minimum wage policy which would aim to provide minimum wages above the poverty line (Schulten/Müller 2017). The same applies to the right to adequate minimum income benefits. Not all countries have nationwide basic income systems. Even where basic income systems exist, it would be easier to argue, on the basis of the EPSR, whether the benefits are suffi-

⁶ With some exceptions like minimum income benefits, see below.

cient to ensure "a life in dignity at all stages of life, and effective access to enabling goods and services". In addition, an initiative for providing Europe-wide standards for basic income systems could be linked to the pillar. The German Federal Ministry of Labour and Social Affairs has recently published a legal opinion on a binding EU legal framework for basic income systems in the member states (Bundesministerium für Arbeit und Soziales 2017).

Nonetheless, even in cases of undeniable failure to comply with the requirements of the EPSR, there is no political or legal enforcement mechanism in place.

3.2 Relevance for EU policy

Although the pillar actually addresses the member states, it is, paradoxically, most likely to have implications for the policies of the European Union. However, as explained below, these implications depend primarily on whether the Commission is going to base its own future actions on the pillar's principles.

3.2.1 European legislation

The EPSR is connected to the hope that the Commission will initiate a process that will realise the principles of the pillar through secondary legislation in the areas of social policy and labour law. Possible fields of action can be found in Rasnača (2017, S. 22ff.), such as occupational health and safety, atypical employment protection or working time/work-life balance. To this end, the Commission needs to propose concrete legislative measures. Implementation, however, would not be in the hands of the Commission since draft legislation requires the approval of the European Parliament and the European Council.

3.2.2 Economic Governance

Some observers also hope that the pillar's principles could be used to better balance the one-sided European economic governance which primarily focuses on competitiveness and austerity. In this regard, the planned social scoreboard⁷ is important which contains indicators on the social development of the member states and which shall be integrated into the European semester. However, the relationship with the existing economic scoreboard, which is the basis for country-specific recommendations and the macroeconomic imbalance procedure, is still largely unclear (Galgóczi et al. 2017, Rasnača 2017, p. 8, 19, 27). Considering the

⁷ See SWD(2017) 200 final.

strict conditionality (austerity, deregulation of labour markets, decentralization of collective bargaining systems) of the Euro rescue packages, there is little hope that a non-binding pillar can bring about improvements, especially since the essential procedures for the Euro-rescue (Fiscal Treaty, ESM, Troika, Memoranda of Understanding) have been formalized in international treaties outside EU law (Rasnača 2017, p.35).

3.2.3 European Court of Justice jurisprudence

Finally, the pillar could affect the case law of the European Court of Justice (ECJ). For example, the ECJ could take into account the principles of the EPSR in its rulings. The Court was already applying the Charter of Fundamental Rights before it was integrated into the Treaty of Lisbon. However, some of these rulings have limited the right to strike and national measures against wage-cutting competition. Whether the ECJ will act more cautiously with regard to the social rights outlined in the EPSR remains uncertain, especially since ECJ case law has caused problems in the area of *collective* social rights (right to strike, autonomy of collective bargaining) while the EPSR is mainly restricted to *individual* social rights (see section 4).

Should the EPSR eventually be incorporated into primary law, it could set in motion a mechanism whereby individuals can sue the member states when they fail to comply with the principles of the pillar. As already mentioned, the principles of the pillar are formulated as the rights of individuals against the member states. However, a legal codification of the EPSR would be ambivalent. On the one hand, the principles could be enforced by legal means. On the other hand, enabling such a legal mechanism poses risks, recently pointed out by Höpner (2017): social rights would be weighed against conflicting laws, such as the fundamental freedoms. This could be highly problematic because the ECJ does not weigh up European fundamental freedoms and social rights "on equal terms", but by a test that is systematically biased in favour of economic freedoms. In addition, the problematic phrasing, outlined in section 2, would become more salient if it would be codified as primary law since the ECJ could be motivated to review national social policy with regard to these elements.

3.3 Summary

Whether the EPSR will have a positive effect depends on how much the Commission bases its future actions on the pillar's principles. After all, the Commission has the sole right to initiate European legislation and is, moreover, the central actor in the European economic governance structure, with significant leeway in its decision-making (see Seikel 2016b). The Commission will, therefore, bear a large part

of the responsibility for the success or failure of the pillar. For this reason, the Commission should be taken up for its promises and, if necessary, be held accountable for its actions.

4 Deficits of the EPSR and other social policy requirements

Even after the pillar's proclamation, there is still a great need for legal and regulatory action. There is, moreover, also a need to improve the relationship between collective social rights (right to strike, autonomy of collective bargaining), on the one hand, and the four European fundamental freedoms (goods, services, capital, persons) and the rules and regulations of monetary union, on the other.

It should not be forgotten that the current economic and social problems were caused by the Euro crisis. The Euro rescue policy holds a significant share of the responsibility for the current social and economic problems. In fact, the way the Euro crisis was handled has been the greatest threat to the European social model in the 60 year history of European integration. The member states which have been hit particularly hard by the crisis have been subjected to drastic reform programmes, including austerity policies and labour market reforms: social benefits were cut, collective bargaining systems dismantled, salaries in the civil service as well as minimum wages were frozen or reduced (Busch/Hermann/Hinrichs/Schulten 2013; Rasnača 2017, p.7; Schulten/Müller 2013, 2015). These measures were catastrophic for the economic and social development in the crisis countries. The affected countries continue to face high unemployment, sharply rising poverty and major economic problems. The other elements of the reformed economic and fiscal governance architecture of the Eurozone are also socially unbalanced. All new governance procedures are biased towards fiscal consolidation and increasing competitiveness. The problem is, therefore, not just a lack of social rights' protection in the EU member states but the violation of social rights by European policies themselves.

In its current form, the EPSR fails to tackle two main problems: firstly, the reduction of social benefits and the undermining of workers' collective rights in the member states of the Eurozone, especially in countries under the supervision of the Troika (Busch/Hermann/Hinrichs/Schulten 2013; Schulten/Müller 2013, 2015); secondly, the conflict between collective social rights and the fundamental freedoms. The latter refers to the ECJ's case law on the posting of workers and other rulings which subordinated social rights under the primacy of economic freedoms and restricted the autonomy of collective bargaining (Höpner 2008; Joerges/Rödl 2009; Seikel/Absenger 2015).

As a general, non-binding document the EPSR will not help against the threats to the foundations of the European social model coming from fundamental freedoms, competition law, the European debt brake, Troika and the deficit procedure, which are all based on binding law that can be enforced either judicially or by the use of sanctions. One should not forget that collective social rights are already protected by binding European law – namely, the European Charter of Fundamental Rights. However, this protection has not prevented the EU from bypassing, or even directly violating, fundamental social rights.

In order to effectively improve the protection of social rights in the EU, further concrete and targeted measures are needed. Some possibilities are listed below:

1. The basic relationship between fundamental social rights and the fundamental freedoms of the internal market has to be corrected. This could be done in two ways. The first option would be to "de-constitutionalise" single market law (Grimm 2016; Scharpf 2015; Seikel 2016a). However, this would require far-reaching Treaty changes. For example, European primary law, in the sense of a genuine European constitution, would have to be reduced to the components that are usually to be found in constitutions: provisions on competences, institutions and procedures, as well as civil rights and fundamental social rights. All remaining provisions would then be transferred to secondary law. This would restore the supremacy of the political sphere over the whole area of single market law, including the fundamental freedoms. More feasible, but possibly equally effective, would be, secondly, limiting the scope of the fundamental freedoms through secondary legislation. For example, a directive could exclude the autonomy of collective bargaining and the right to strike from the scope of the fundamental freedoms (for more details, see Heuschmid 2011, p. 203 onwards; Höpner 2016; Kingreen 2014).
2. Social rights could be protected and improved much more effectively by concrete European minimum standards for different social benefits. For example, minimum replacement rates for social benefits, such as unemployment benefits and pensions, could be introduced. Similarly, there could also be provisions for a minimum income scheme (Bundesministerium für Arbeit und Soziales 2017). Depending on their economic performance, member states could be divided into groups with different replacement rates which would be adjusted to a higher level in the long term (Busch 2005, p. 43 onwards; Seikel 2016a, p.10).

Finally, one further fundamental problem needs to be highlighted: The Commission's long-term aim of creating binding entitlements for individuals against mem-

ber states at European level would mean that member states would be forced to implement principles without enabling the member states to bear the financial burden associated with it. At the same time, the fiscal policy provisions of the monetary union forces them to strict austerity (see Bundesministerium für Arbeit und Soziales 2017, p.31 onwards). The EPSR does not provide a solution to this fundamental problem.

5 Conclusion

At best, the EPSR is the first step on a rocky road to a more social Europe (Rasnača 2017, p.15). The expectations for the pillar should not be overstated. It would be an improvement if the Commission itself adheres to the pillar's principles in the future. The Commission should be obliged to consider the EPSR's principles when formulating new labour law and social legislation and also when applying and interpreting the rules of the economic and monetary union. Some of the formulations of the principles need to be problematized (see section 4).

Since social rights are already enshrined in EU law, much would have been achieved, if these rights were respected. This would mean ending illegitimate interference in national social policies and collective bargaining negotiations that have a disastrous impact on the social rights of millions of workers.

The European pillar undoubtedly contains important concepts for strengthening social rights in key policy areas. However, the very general principles also make it clear how difficult it is to formulate common European standards that are compatible with the different welfare and collective bargaining systems. This shows that good social standards at European level are anything but easy to reproduce. After existing social rights have been undermined by EU austerity policies in some member states, the EU, and the Eurozone in particular, needs an economic and social policy orientation that respects, and no longer undermines, the existence of social rights, including national social security and collective bargaining systems. This reorientation cannot be expected from a non-binding recommendation of individual social rights alone.

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Appendix

The EPSR

Chapter I: Equal opportunities and access to the labour market

1. Education, training and life-long learning

Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market.

2. Gender equality

Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression.

Women and men have the right to equal pay for work of equal value.

3. Equal opportunities

Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered.

4. Active support to employment

Everyone has the right to timely and tailor-made assistance to improve employment or self-employment prospects. This includes the right to receive

support for job search, training and re-qualification. Everyone has the right to transfer social protection and training entitlements during professional transitions.

Young people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within 4 months of becoming unemployed or leaving education.

People unemployed have the right to personalised, continuous and consistent support. The long-term unemployed have the right to an in-depth individual assessment at the latest at 18 months of unemployment.

Chapter II: Fair working conditions

5. Secure and adaptable employment

Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.

In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured.

Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated.

Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration.

6. Wages

Workers have the right to fair wages that provide for a decent standard of living.

Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented.

All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners.

7. Information about employment conditions and protection in case of dismissals

Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period.

Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.

8. Social dialogue and involvement of workers

The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.

Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.

Support for increased capacity of social partners to promote social dialogue shall be encouraged.

9. Work-life balance

Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.

10. Healthy, safe and well-adapted work environment and data protection

Workers have the right to a high level of protection of their health and safety at work.

Workers have the right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labour market.

Workers have the right to have their personal data protected in the employment context.

Chapter III: Social protection and inclusion

11. Childcare and support to children

Children have the right to affordable early childhood education and care of good quality.

Children have the right to protection from poverty. Children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities.

12. Social protection

Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.

13. Unemployment benefits

The unemployed have the right to adequate activation support from public employment services to (re)integrate in the labour market and adequate unemployment benefits of reasonable duration, in line with their contributions and national eligibility rules. Such benefits shall not constitute a disincentive for a quick return to employment.

14. Minimum income

Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.

15. Old age income and pensions

Workers and the self-employed in retirement have the right to a pension commensurate to their contributions and ensuring an adequate income. Women and men shall have equal opportunities to acquire pension rights.

Everyone in old age has the right to resources that ensure living in dignity.

16. Health care

Everyone has the right to timely access to affordable, preventive and curative health care of good quality.

17. Inclusion of people with disabilities

People with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs.

18. Long-term care

Everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services.

19. Housing and assistance for the homeless

- a. Access to social housing or housing assistance of good quality shall be provided for those in need.
- b. Vulnerable people have the right to appropriate assistance and protection against forced eviction.
- c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion.

20. Access to essential services

Everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications. Support for access to such services shall be available for those in need.

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