

# SOCIAL PROTECTION OF SELF-EMPLOYED WORKERS DURING THE COVID-19 PANDEMIC IN PORTUGAL AND THE ROLE OF EU LAW

La protección social de los trabajadores por cuenta  
propia durante la pandemia de COVID-19 en  
Portugal y el papel del derecho de la UE

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## **Abstract**

In recent years, the increasingly dominant economic structure in the EU has been ignited by digital platforms and e-tools that depend upon independent and precarious workers, in special after the financial crisis. Such background hampers the social protection rights of workers and in the context of the COVID-19 pandemic they find themselves further exposed. This deprotection is even more evident concerning the self-employed, as independent workers, due to their precarious job relations, are less covered by social assistance than contracted ones. In Portugal, the national government approved an emergency aid to face this context. The present paper seeks to ascertain if such benefit, albeit possibly lawful in light of EU law, might be insufficient for the purpose of combating social exclusion. It lastly reflects how the EU could live up to its role of complementing national action in social matters.

### **Keywords**

Social protection; self-employed workers; exclusion; emergency benefit; fundamental rights.

### **Resumen**

En los últimos años, la estructura económica que se impone día tras día en la UE se ha visto impulsada por plataformas digitales y herramientas electrónicas que dependen de trabajadores independientes y precarios, en especial después de la crisis financiera. Tales circunstancias obstaculizan los derechos de protección social de los trabajadores y, en el contexto de la pandemia COVID-19, estos se encuentran más expuestos. Esta desprotección es aún más evidente en lo que respecta a los trabajadores autónomos, ya que los trabajadores independientes, debido a sus condiciones laborales precarias, están menos cubiertos por la asistencia social que los contratados. En Portugal, el Gobierno nacional aprobó una ayuda de emergencia para hacer frente a esta situación. El presente artículo trata de determinar si esa prestación, aunque posiblemente sea legal a la luz de la legislación de la Unión Europea, podría ser insuficiente para luchar contra la exclusión social. Por último, reflexiona sobre cómo podría la UE estar a la altura de su función de complementar la acción nacional en materia social.

### **Palabras clave**

Protección social; trabajadores por cuenta propia; exclusión; beneficio de emergencia; derechos fundamentales.

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### I. INTRODUCTION

Many voices stated that the COVID-19 pandemic consisted of a symmetrical crisis in the European Union (EU)<sup>1</sup>. However, this could not be further from the truth. As demonstrated by the number of victims in Italy and Spain<sup>2</sup>, the amount of state aid Germany provided nationally<sup>3</sup> and unemployment rate projections for 2020 and 2021<sup>4</sup>, it becomes clear that its impacts are in fact highly unequal. Nevertheless, besides considerable imbalances from country to country in the EU, the pandemic also affected wages and income and provoked changes in the social protection of workers across the member states, revealing disparities and legal shortcomings. This paper will address a specific sample of them.

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<sup>1</sup> For instance, the European Parliament resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), where recital A reads that the crisis “represents an exogenous and symmetrical shock to the health systems, societies and economies of the EU”, available at: <https://bit.ly/32chDn6>, accessed on 31<sup>st</sup> May, 2020.

<sup>2</sup> The European Centre for Disease Prevention and Control presents daily up-to-date statistics, including comparative epidemiological curves, available on: <https://bit.ly/3erqHtl>, accessed on 31<sup>st</sup> May, 2020.

<sup>3</sup> As approved by the European Commission in the “State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak”, Communication C(2020) 1863 final, available on: <https://bit.ly/2GqPt02>, accessed on 31<sup>st</sup> May, 2020.

<sup>4</sup> As described in the *European Commission's Economic Forecast. Spring 2020*, pp. 52-53, available on: <https://bit.ly/3mRSMge>, accessed on 31<sup>st</sup> May, 2020.

Concretely, I will focus on the emergency aid created in Portugal for self-employed workers below the threshold of social security contributions, as established by *Decreto-Lei* 20-C/2020, of 7<sup>th</sup> May (amending the *Decreto-Lei* 10-A/2020)<sup>5</sup>. My point is to ascertain if such benefit, albeit possibly lawful in light of art. 34 of the Charter of Fundamental Rights of the European Union (CFREU) and consistent with the *rationale* of provisions deriving from the European Pillar of Social Rights (EPSR), might be insufficient for the purpose of combating exclusion as provided for in arts. 9 and 151 of the Treaty on the Functioning of the European Union (TFEU). As that purpose is binding to member states as well as to the EU, and considering their shared powers in this regard (art. 153, TFEU), I will reflect on how the EU could live up to its role of supporting and complementing national action.

In the first section, starting from a context of troublesome economic structure, entrenched on digitisation and precariousness, I will analyse the EU legal framework concerning the social protection of workers (*i.e.*, CFREU, EPSR and the Council Recommendation 2019/C 387/01, of 8 November 2019). In the second section, I will look into the Portuguese emergency policies in this matter (namely, *Decreto-Lei* 20-C/2020) concentrating on the aforementioned benefit. Finally, in the third section, I will contrast the lawfulness of the national measure with its insufficiency regarding the fight against exclusion. My aim is to highlight how the granting of this social security benefit, whilst necessary and relevant in the context of the COVID-19 pandemic, may not be enough to fulfil the EU's objective of social inclusion.

## II. OVERVIEW OF WORKERS' SOCIAL PROTECTION RIGHTS IN THE EUROPEAN UNION

Over the last few years, world economy has been ignited by apps and electronic platforms trading a wide range of services and goods<sup>6</sup>. This new model is often called sharing or collaborative economy<sup>7</sup> (Hatzopoulos and

<sup>5</sup> For an overview on the general Portuguese constitutional and legal response to the COVID-19 crisis, see Lanceiro (2020) and Santos Botelho (2020).

<sup>6</sup> Barbara de Micheli *et al.* (2018: 10) mention a change in the “nature of employment relationships”. For its turn, Eurofound (2015) has attempted to distinguish the new forms of employment and identified the following: “employee sharing”, “job sharing”, “interim management”, “casual work”, “ICT-based mobile work”, “voucher-based work”, “portfolio work”, “crowd employment” and “collaborative employment”.

<sup>7</sup> Despite conceptual divergences, EU institutions do not seem to take part in this scholar debate. See, for instance, the European Commission Study on the assessment

Roma, 2017). However, social protection of the respective precarious and self-employed workers was not met with the same thrill. In his recent artistic project, apropos of the COVID-19-inflicted quarantine, Francisco Balaguer (2020: 34) vividly explained the phenomenon in the subtitle of one of his cartoons: “Teleworking is fine, they just need to invent tele-rest and then our whole world will be completely virtual”.

Indeed, the spreading context of *uberisation* of labour relations brings about several challenges to social protection and workers’ rights in the EU, commencing with the most basic work-life balance<sup>8</sup>; but above all it perils the entire (disputable) construction of the European Social Union whose equilibrium comes from EU institutions and member states alike.

For instance, Spasova and Wilkens (2018: 97) claim new business models opt for alternative jobs positions “as a substitute for salaried employment” and pose a “challenge for national labour and social legislation”. Once a generalised necessity for adding household incomings —sometimes faced as a career alternative— precarious jobs have wide openly exhibited a void of social guarantees. Gravely felt in critical times; even more so during a period of pandemic which hinders all *uberised* works and workers.

As this economic model —usually based on digital disruption following massive youth unemployment rates— relies upon unstable and unpredictable labour relations, rights such as fair wages, annual leave and paid vacation, extra hours pay and overtime limits, full work insurance, social security, *inter alia*, are undermined. Those grounds are nonetheless at the core of social Europe. In that regard, *uberisation* venture is its antithesis<sup>9</sup>.

It is acknowledged that much beyond the project of an internal market (increasingly digital<sup>10</sup>) the EU has developed into a polity legitimised by fundamental rights and, in the words of Claire Kilpatrick (2014: 394), it also

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of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States (580/PP/GRO/IMA/15/15111J), 04 May 2018; the Joint Research Centre 2018 Report on Platform Workers in Europe; Communication an European Agenda for Collaborative Economy [COM (2016) 356 final], 06 February 2016; the European Parliament Resolution of 15 June 2017, on a European Agenda for Collaborative Economy [2017/2003 (INI)]; and the early European Economic and Social Committee’s opinion on collaborative or participatory consumption, a sustainability model for the 21st century, of 21 January 2014.

<sup>8</sup> See Directive 2019/1158, on work-life balance for parents and carers, which was adopted following the standards of the European Pillar of Social Rights.

<sup>9</sup> For a perspective on digital inequities as a new dimension of inequalities within the EU social rule of law, see Canotilho (2019).

<sup>10</sup> See Oliveira (2019).

materialises a “social constitution” that should not suffer marginalisation. In essence, the European Social Union legal foundations consist of CFREU, the treaties and the social *acquis* deriving from the multilevel/inter-constitutional integration. As well, CJEU’s case-law<sup>11</sup> and public policies linked to social matters —and in close cooperation with member states standards in favour of the higher level of protection—, including the on-going implementation of the EPSR, play a decisive role towards the achievement of the EU’s social constitution.

The principle underlying the social constitution is the protection of vulnerable individuals, mostly in times of economic meltdown (Vandenbroucke, 2017: 3). Supposedly, European economic integration (*i.e.*, Euro and Economic and Monetary Union) was to serve as a channel to prosperity and welfare which were to be mirrored in the different national social policies. In effect, as I argue, such elaborate legal structure creates in the EU a substantially binding *public reason of social democratisation* (Maia, 2019) that must be upheld in European actions.

Nevertheless, although the European Social Union multileveled constitution seems robust, the fact is that over the last years there has been an overpowering distortion in the EU functioning. While attempting to surpass EMU’s faulty design, economic rules —mostly the ones impacting solidarity expenditures in some member states’ treasures— ceased being the means of integration convergence to become its objective (Lörcher and Schömann, 2016: 14). Social democratisation was not upheld. That failure came at a cost of setting aside cohesion and marginalising the social constitution.

Altogether, in the recent aftermath of economic adjustment programmes (created under intergovernmental treaties), that previous wrested legal-political shift, alongside digitisation of work and informal self-employment growth, provoked severe inequality consequences. As stated by Mariana Canotilho (2016: 884), European regulation concerning economic, financial and labour matters restricts national public choices of social benefits. At the present time of COVID-19 pandemic such solidarity turmoil is especially visible. The implications of the crisis do not encompass only the health emergency; in fact, they expose the vulnerabilities of the globalised economic system and the flaws of a welfare-limited labour market, which are the focus of this paper.

Legal provisions on social protection of workers in the EU, thus, situate in the centre of this realm.

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<sup>11</sup> On that point, see Quesada (2017).

In this way, pursuant to art. 34, CFREU<sup>12</sup>, the protection against the loss of income (illness; accidents; old age; unemployment; maternity; etc.) through social security and social assistance instruments is a concern of the EU in line with national laws and practices<sup>13</sup>. For the purpose of this paper, the distinction between social security and social assistance is not significant; the relevant idea is that workers shall be free from the risk of social exclusion and poverty, as provided for in art. 34 (3), CFREU—that must be read in conjunction with arts. 151 and 153 (1)(c)(j), TFEU. It is clear that such standard is adjustable to each member state's actual welfare resources and conditions.

In any case, the EU keeps a concept of poverty of its own since the European Council of 1975. The definition recalls that “people are said to be living in poverty if their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live. Because of their poverty, they may experience multiple disadvantages through unemployment, low income, poor housing, inadequate health care and barriers to lifelong learning, culture, sport and recreation. They are often excluded and marginalised from participating in activities (economic, social and cultural) that are the norm for other people and their access to fundamental rights may be restricted”<sup>14</sup>.

Moreover, following a 2019 report by the European Social Policy Network on in-work poverty, data indicate that 9.4% of workers were at risk of poverty, which accounts for around 20.5 million people<sup>15</sup>. Impressively, the figures raise to 22.2% regarding self-employed workers. The study demonstrates, then, that the self-employed suffer a greater risk of social exclusion

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<sup>12</sup> It states: “art. 34. Social security and social assistance. 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”.

<sup>13</sup> Much of this protection is enforced under the framework of Regulation 883/2004, on the coordination of social security systems.

<sup>14</sup> Available on: <https://bit.ly/2GxicAw>, accessed on 11<sup>th</sup> June 2020.

<sup>15</sup> Available on: <https://bit.ly/32tdjjN>, accessed on 11<sup>th</sup> June 2020.

and are more likely to require their social protection rights. The paradox is, as commented above, that self-employment occupations are in general less covered/protected by social guarantees than contracted workers.

Whether such difference in treatment is objectively and lawfully justified exceeds my point in this paper. As I will develop in the next section, my argument is solely to emphasise the vulnerability of self-employed workers in the context of COVID-19.

Irrespective of not defining *how* social assistance ought to be provided, it seems undoubtful that art. 34 (3), CFREU aims at ensuring a decent existence while leaving for member states to implement so. As follows, CJEU's judgments *Krüger* (C-291/97)<sup>16</sup> and *Kamberaj* (C-571/10)<sup>17</sup> reiterate the wide margin of discretion member states have when taking into consideration the *conditions* of concession, the *amount* and the *objective* of social benefits.

A large decree of appreciation does not entail, though, that art. 34 should be interpreted as a principle, non-self-standing or un-justiciable. In fact, referring to different legal bases but with a similar *rationale*, judgments *Robinson-Steele* (C-131/04)<sup>18</sup>, *Egenberger* (C-414/16)<sup>19</sup>, *Bauer* (C-596/16 and C-570/16)<sup>20</sup> and *QH* (C-762/18 e C-37/19)<sup>21</sup> prove the opposite: EU social rights can be self-executive.

Consequently, in sum, art. 34, CFREU combined with art. 151, TFEU may, in effect, lead to an entitlement of the protection against social exclusion and poverty enshrined as fundamental social rights, initiated beforehand in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. This evolution culminated in their affirmation as *self-sufficient standards*; instead of being subordinated to economic rules (Leite, 2012: 672). The competence to carry out concrete actions enforcing that right belongs mainly to the member states under the encouragement of the European Commission, compliant with art. 156, TFEU.

Building on this legal structure, such *acquis* recently gained expression in the EPSR<sup>22</sup>. More precisely in its Principle 12 respecting social protection, where it reads “regardless of the type and duration of their employment

<sup>16</sup> ECLI:EU:C:1999:396.

<sup>17</sup> ECLI:EU:C:2012:233.

<sup>18</sup> ECLI:EU:C:2006:177.

<sup>19</sup> ECLI:EU:C:2018:257.

<sup>20</sup> ECLI:EU:C:2018:871.

<sup>21</sup> ECLI:EU:C:2020:504.

<sup>22</sup> Adopted as Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights and Interinstitutional Proclamation (2017/C 428/09).



relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection”. In this sense, Principle 12 envisages to suppress situations where workers do not have sufficient resources to live in decent conditions as it intends to support their endowment in circumstances where their regular earnings are impaired. I would also argue that these circumstances comprise likewise the COVID-19 pandemic effects. The provision, hence, confirms the idea of entitling a right of inclusion for workers.

Following Maurizio Ferrera’s (2018: 22) description, the EPSR might be an “operational arm” because it empowers citizens with both normative and policy-driven instruments. For her turn, while acknowledging it will not unravel all of EU’s social problems, Sacha Garben (2019) sustains that by virtue of its programmatic nature the Pillar is successful at reviving TFEU’s social title.

Conversely, some authors consider —not without some reason— the solutions proposed in the EPSR are neither adequate nor effective (Masala, 2018: 68), given its soft law nature (typical of the open method of coordination) and its lack of ampliation of EU competencies to enhance social rights. As realistic as they are, critiques of this kind, however, do not seem to take into full account that soft law can be a highly influential mechanism for member states. Also, they seem to disregard that even in domains in which the EU has limited or indirect powers, it can make a deep legal impact (*v.g.* education, youth, sport and culture).

Council Recommendation 2019/C 387/01, of 8 November 2019, demonstrates both sides’ accuracy<sup>23</sup>. Adopted to materialise Principle 12 of the EPSR as well as art. 34, CFREU, the recommendation addresses the access to social protection for workers and the self-employed. In its recitals, it recognises that *social protection schemes are still largely based on full-time contracts* and that new forms of self-employment have appeared in the EU, such as on-demand work, voucher-based work and platform work. In addition, it is stated that it applies to the protection from loss of work-related income upon the occurrence of a certain risk and that “some self-employed persons have insufficient access to the branches of social protection”. The recitals also

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<sup>23</sup> “Simplistic hard and soft dichotomies whereas the former have all binding effects and are considered ‘law’ whereas the latter, non-binding, can only have ‘practical’ effects with no legal relevance in a court of law cannot work, neither in times of crisis nor in usual times. [...] [T]he more interesting question pertains to the effectiveness of COVID-19 soft law” (Stefan, 2020: 6-7).

reveal concerns with gaps in social protection growing economic uncertainty, the risk of poverty and inequalities.

Considering those gaps may erupt damaging economic and fiscal impacts and affect key purposes of the Union, they are a matter of common interest for member states. Adequate coverage is, therefore, essential. Commensurate with Recital 17, “social protection is considered to be adequate when it allows individuals to uphold a decent standard of living, replace their income loss in a reasonable manner and live with dignity, and prevents them from falling into poverty”. The obstacle in providing adequate coverage is that the social protection schemes in some member states exclude certain categories of workers, in special the ones with precarious jobs because they do not meet the criteria (designed for classic employees) for accessing benefits. Thresholds on qualifying periods or minimum working periods, for instance, pose a real threat about creating entitlements disadvantages.

Very importantly, even if a type of social protection is granted, the benefit itself may be insufficient or untimely. In that case, the *decent standard of living* of the workers will be in jeopardy. This is why art. 9 of the Recommendation states an effective coverage so that member states ensure all workers and self-employed are not prevented from accruing or accessing benefits due to rules governing contributions and entitlements. On top of that, “differences in the rules governing the schemes between labour market statuses or types of employment relationship should be proportionate and reflect the specific situation of beneficiaries” [art. 9 (b)].

Finally, arts. 11 to 14 establish the parameters of adequacy of the protection, which should be assessed considering the national social system as a whole. The first specification recommends member states to ensure workers receive, in timely manner, appropriate income replacement and to repeal any risk of them falling into poverty, in conformity with national circumstances. Besides, member states are recommended to promote real equality amongst workers by ensuring all types of employment relationship and labour market status obtain potential exemptions or reductions in social contributions under fair and similar conditions.

Art. 14 provides the last substantially relevant qualification for our analysis. It recommends member states to base the calculation of the social protection contributions and *entitlements of the self-employed* on objective and transparent assessment of their income in order to *reflect their actual earnings*. From this, it seems conceivable to conclude that the clause means to determine that the concept of decent standard of living matches the maintenance of, at least, most of the self-employed actual earning so that she/he keeps her/his general level of well-being, rights and dignity. If so, *adequate* national social protection should yield tangible benefits for all workers to be free from the

risk of social exclusion and poverty, in line with CFREU and TFEU. Social *inclusion* is, thus, the utter measure of social protection adequacy lawfulness.

### III. COVID-19 AND PORTUGUESE EMERGENCY POLICIES FOR SELF-EMPLOYED WORKERS

In Portugal, the pandemic aggravated the reality of social deprivation. Although its comprehensive analysis needs more time to be grasped, as Rita Calçada Pires puts it (2020: 702), *vis-à-vis* the economic and social resume and their budgetary impact, it is possible to shed light in some decisive features. According to a survey conducted by Escola Nacional de Saúde Pública (National School of Public Health), workers with lower wages were more severely hit by the labour and economic breakdown in the period from March to May 2020. The enquiry shows that families with an income of up to 650 euros registered the higher rates of earnings loss. In this group, near 39% of the workers affirmed their gains were partially cut and 25% said they have lost them completely<sup>24</sup>. Also, 53,8% of self-employed affirmed to seriously fear lose their income, whereas 24,6% of employees had the same worry. Joining these data allows us to deduce the vulnerability of the self-employed due to the precariousness of their labour relationships.

Reacting to this background subsequent to COVID-19, the government created a regime of emergency and temporary support to workers in general through *Decreto-Lei* n.º 10-A/2020. Apart from norms on other subjects (public procurement; expenditure; education; restrictions on service provision; etc.) and rules on employees (family assistance; sickness benefits) —applicable too, where suitable, to self-employed—, art. 26 of the *decreto* presents the central action in favour of the self-employed: an special aid to compensate their economic activity drop.

It consists of financial support (pay) exclusive to self-employed who are not pensioners. They must have contributions records on at least three consecutive months in the past twelve months. They must prove the situation of halting of their activity or sector as a result of the pandemic [art. 26 (1)] and this circumstance must be endorsed [art. 26 (2)].

For the duration of this measure, the entitlement of the pay is limited to a maximum six-months period. The benefit is paid on a monthly basis, renewable until that time restraint. Its amount ponders the self-employed

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<sup>24</sup> Full data and results can be consulted in the Portuguese original version, available on: <https://bit.ly/36295k3>, accessed on 2<sup>nd</sup> June 2020.

remuneration registered as their contribution base in the public files. If the figure is EUR 658,22 or lower, the assistance matches the value of the *Indexante dos Apoios Sociais* (IAS), *i.e.*, the social benefit indexing [art. 26 (3)]. In 2020 that sum amounts to EUR 438,81 (*Portaria* n.º 27/2020). If the registered figure is higher than EUR 658,22, the support may raise to EUR 635 at most (matching the national minimum wage). The payment begins in the following month of the request [art. 26 (4)] and it cannot be cumulated with any other emergency support (art. 26 (6)).

Indeed, the need for having contribution records represented a threshold difficult to attend to by some self-employed, particularly young professionals and recent independent workers because, normally, they do not account enough time in their contribution history<sup>25</sup>. Moreover, in Portugal, self-employed are exempt from contributing to the social system during the first year of financial and tax registry [art. 157 (1)(d) of *Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social*], which means that *Decreto-Lei* 10-A/2020 excluded the situation of newly self-employed due to a legal stimulus instilled earlier by the state. The Portuguese ombudsman—who has powers for issuing recommendations to the public administration and *locus standi* in fundamental rights matters—alerted the government of this contradictory regime and it became clear that this legal conundrum had to be overcome.

As a result, *Decreto-Lei* n.º 20-C/2020 came into force. Not only it specified that the minimum rate of the benefit is 50% of IAS (variable to more, depending on the officially registered income) for self-employed who meet the original criteria [art. 26 (11) amended], but it also added art. 28-A to the norm.

This new art. 28-A defined that the extraordinary support includes self-employed who have initiated their contribution records for more than twelve months but still do not meet the criteria [art. 28-A (1)(a)]; who have initiated their contribution records less than twelve months before (b); and

<sup>25</sup> It is relevant to note the situation of lawyers and solicitors who were excluded from this regime because their social security status is distinguished. These independent workers have their own social security system, whose funding is not state-owned, provided by CPAS (*Caixa de Previdência dos Advogados e Solicitadores*). It is an autonomous pension institution, with legal personality and private management. Such differentiation raised controversial consequences, as many of them were in the same situation as the other self-employed workers, but did not received the same assistance. See, in this regard, the Portuguese ombudsman procedures, namely, Recommendation n.º 5/B/2020, of 21<sup>st</sup> March, and the Communications S-PdJ/2020/10855 Q/2075/2020 (UT3) and S-PdJ/2020/10864 Q/2075/2020 (UT3), both of 8<sup>th</sup> May.

who are exempt from contributing to the social system (c). So, apparently, self-employed who did not meet the original criteria of the contribution thresholds would now get emergency social protection, crucial in times of COVID-19, to face the economic breakdown and their radical loss of income, as the data show.

However, in art. 28-A (2) lies the ultimate question in view of the *decent standard of living*. It sets out that the financial support lasts a month renewable to a maximum of three months and that its *upper* limit equals half the amount of IAS, a total of EUR 219,41<sup>26</sup>. The minimum limit matches the lowest value of contribution base. The precise final number relies on the calculation of the reported income average between March, 1<sup>st</sup> 2019 and February, 29<sup>th</sup> 2020 *ex vi* art. 162 (1), CRCSPSS and art. 26 (8), *Decreto-Lei* n.º 20-C/2020.

Given its concrete amount and length, does this social protection benefit, guarantee, overall, adequate inclusion and prevent the risk of poverty, in light of EU law?

#### IV. LAWFUL BUT INSUFFICIENT AS REGARDS ITS PURPOSE? WHEN SOCIAL PROTECTION OF WORKERS DOES NOT ENSURE THE FIGHT AGAINST EXCLUSION

As provided for in EU law, social protection rights, while leaving a wide margin of appreciation for member states concerning conditions, amount and objective, can be self-executive. As such, the fundamental right enshrined in art. 34 (3), CFREU, in conjunction with arts. 151 and 153, TFEU, and expressed in Principle 12 of EPSR—plus Council Recommendation 2019/C 387/01—encompasses an adequate entitlement that reflects, as much as possible, independent workers' actual earnings in order to safeguard their decent standard of living, freeing them from the risk of poverty.

When analysing the Portuguese benefit of *Decreto-Lei* n.º 20-C/2020, it seems unquestionable that its adoption observed the conditions, amount and objective designed by public officials. It settles the manner through which the exceptional pay can be acceded; the financial value of the allowance in each individual case; and the intent of supporting the recipients during the effects of the pandemic. So, from the standpoint of competence, the legal measure looks flawless.

Also, irrespective of the unfulfillment of contributions' threshold, it provides a social protection entitlement to independent workers below that

<sup>26</sup> Less than a third of the national minimum salary.

level. Without assuming its nature explicitly in the wording of the art. 28-A, this approach possibly makes the extraordinary policy a non-contributory special benefit. Accordingly, it is fair to say that its mere existence upholds the fundamental social right CFREU states. Hence, the Portuguese benefit claims lawfulness — so far, considering those aspects, it is difficult to argue otherwise.

Yet, if we examine the action as regards its content and concrete dimension, some problems emerge, namely its adequacy, prevention of poverty and provision of a decent standard of living.

As mentioned before, to be deemed adequate the protection must comprise an *income replacement* that is enough to repeal any risk of falling into poverty, compliant with the national circumstances. Because relative poverty, in this sense, is defined as a preclusion to enjoy activities reputed as ordinary in his/her social sphere, if the self-employed finds him/herself under poor housing conditions, deficient healthcare and is excluded from educational, cultural and recreational doings, then his/her fundamental rights are unlawfully restricted. Bearing this concept in mind, it is necessary to contrast the amount and length of the benefit with their capability of guaranteeing in Portugal the development of behaviours socially embedded.

Perhaps an illustrative way to begin is to check housing costs. According to the *Instituto Nacional de Estatística* (National Institute of Statistics), the city of Belmonte, in the district of Castelo Branco, displayed the lowest costs of housing rental per square meter in 2019. INE figures show that one m<sup>2</sup> in Belmonte costs in average EUR 1,70<sup>27</sup>. If we take into account that in the EU the average floor area per person is 42,56 m<sup>2</sup><sup>28</sup>, we can project that one self-employed to live alone in Belmonte will spend EUR 72,35 per month.

In this exercise, assuming this independent worker requested and received the emergency benefit as laid out in art. 28-A and that this is her/his only income resource, she/he has EUR 219,41 to cover all life expenses. Debiting the cost of the rental out of the income, she/he will have remaining a total of EUR 167,26.

For energy costs, the main company in Portugal charges EUR 0,14270 for kWh in that city (public information) and if the person spends approximately 200 kWh per month, it equals to EUR 28,54. For water and sanitation costs, the basic fee in Belmonte costs EUR 0,48 per m<sup>3</sup> (public information), so an average of 7m<sup>3</sup>/month will add to EUR 3,36, plus taxes and tariffs.

This calculation leaves about EUR 135 available to pay for food (proper, balanced nutrition), transport, mobile and maybe internet. It does not

<sup>27</sup> Data available on: <https://bit.ly/389sYrX>, accessed on 22<sup>nd</sup> June 2020.

<sup>28</sup> Data available on: <https://bit.ly/3kY2nBQ>, accessed on 22<sup>nd</sup> June 2020.

seem easy to accommodate other expenses with hygiene products, clothing or unexpected illnesses (medicines against *influenza*, for instance), let alone books, newspapers, theatre or sports. All in all, even in the example of one of the cheapest towns to live in Portugal, the COVID-19 emergency benefit for self-employed below the contribution threshold fails to prevent poverty.

For its turn, the idea inserted in the decent standard of living embraces the maintenance of most of the worker's regular earnings in a way that she/he can keep their well-being by ensuring effective social inclusion. As I have argued, the sole benefit of EUR 219,41 is insufficient to accomplish the purpose of fighting exclusion, contradicting the essence of the fundamental right of social assistance (art. 34, CFREU). The genuine enjoyment of social protection relies upon counterbalancing inequalities and growing real equality. Therefore, any policy of social assistance that does not sustain these endowments will inevitably miss the obligation of inclusion (arts. 9 and 151, TFEU)<sup>29</sup>.

Social assistance enforces social inclusion through implementing collective integration in community relations and promoting the self-realisation of the personality. Unemployed as much as workers without sufficient income struggle to achieve such level of conviviality. In this scope, the absence or the shortcoming of equality policies menace the bedrock of republican democracy: non-exclusionary common good. Public welfare, thus, demands combating all forms of exclusion, including, if not mostly, the financial one.

## V. CONCLUDING REMARKS

Considering that the EU legal standard is applicable in the matter, what could the Union do to back the member states in the execution of this function? I submit that instead of facing this benefit as part of the social security scheme —a domain where the EU has powers to coordinate, but not to act directly—, the EU could interpret it as a hybrid social assistance instrument. This hybrid nature results from the fact that it is an extraordinary non-contributory pay while, at the same time, it is an entitlement directed to workers who would normally fit the social security system. Using this perspective, the EU would be able to fund an instrument belonging to some kind of emergency programme that workers could accede directly. This would

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<sup>29</sup> Similarly, this obligation of “real equality” also weights on the Portuguese state by virtue of art. 9 (d) of the Constitution. The Constitutional Court, in plenary session, once ruled that there exists a right to claim from the state a positive provision that assigns a dignified existence (Judgment 509/02).

be rather different than the initiative of SURE (*temporary Support to mitigate Unemployment Risks in an Emergency*)<sup>30</sup>, a funding programme of 100 billion euros, which consists of loans to member states that will manage how to invest the capital —provided that the loan conditions are met.

In my opinion, this alternative formula would best enhance the protection of the fundamental right to social assistance present in art. 34, CFREU and its corollary of decent standard of living. Consequently, the obligation of equality and the objective of social inclusion would as well be satisfied. In times of COVID-19 pandemic, it is vital that workers, particularly the most vulnerable and precarious self-employed, are not left behind.

In conclusion, we face a highly problematic economic structure which in recent years has been ignited by digital platforms and e-tools. Such background hampers the social protection rights of workers and in the context of the COVID-19 pandemic they find themselves further exposed. This deprotection is even more evident concerning the self-employed, as independent workers due to their precarious job relations are less covered by social assistance than contracted ones. In Portugal, this more vulnerable group of workers earns lower wages and they were most affected by the pandemic. As a response, the national government approved an emergency aid. Its first version in *Decreto-Lei* n.º 10-A/2020 excluded self-employed workers below the threshold of social security contributions and, then, it was amended by *Decreto-Lei* 20-C/2020 to cover those workers as well.

In light of EU law (CFREU, EPSR and Council Recommendation 2019/C 387/01), the national instrument seems lawful, but considering its amount and extension I demonstrated it is insufficient to fulfil the objective of combating poverty and exclusion and to ensure a decent standard of living. This shortcoming precludes the implementation of a real social equality. Therefore, to be effective the Portuguese emergency social assistance would benefit from an EU fund that workers could directly accede to complement and replace fairly their incomes lost after COVID-19.

In this way, member states and the EU alike will live up to their legal obligation of social inclusion.

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<sup>30</sup> Council Regulation 2020/672.



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