

The European Pillar of Social Rights: An Assessment of its Meaning and Significance

1. Introduction

In Gothenburg on the 17th of November 2017, the European Commission, Parliament and Council signed a ‘solemn’ Inter-Institutional Proclamation on the European Pillar of Social Rights.¹ As stated by one commentator, the Pillar ‘represents the most encompassing attempt to raise the profile of social policy in two decades, since the inclusion of the employment chapter in the Amsterdam Treaty and the formulation of the European Employment Strategy’.² The Pillar is a high-profile political re-affirmation of a broad set of social rights and principles, which in line with the Rome Declaration could be taken as an indication that in the future post-Brexit EU27, there may be a stronger commitment to EU social policy.³ The Pillar’s implementation envisages the deployment of the full array of EU governance instruments: regulations and directives, recommendations and communications, the creation of new institutions, funding actions and country-specific recommendations. As such, the static imagery evoked by the notion of a ‘pillar’ arguably does not capture the true nature and potential of the initiative, which is dynamic and fluid, wide-ranging and permeating.

An equation of the Pillar with the core set of 20 social rights and principles it proclaims similarly fails to capture its true legal and political significance, which lies mainly in its programmatic nature. The proof of the Pillar will be in its implementation. The precedent of the 1989 Community Charter on the Fundamental Social Rights of Workers with its accompanying Action Programme gives reason to be hopeful for those in favor of a more social Europe: an important part of the EU social *acquis* was progressively adopted on that basis. In the context of the Pillar, a range of important measures has already been proposed as part of this new social action plan for Europe, some of which are close to adoption by the co-Legislators. Furthermore, the EU’s arsenal is now even more extensive than it was in 1989, as it can not only rely on the Community Method and ‘old-style’ soft law, but also on a well-developed new governance infrastructure of policy coordination in the European Semester.

The present contribution analyses the Pillar’s meaning and its potential significance. To that end, the content of the Pillar as it currently stands will be considered (Section 2), and it will be placed in its broader context (Section 3). Regarding the latter, it is particularly insightful to assess the Pillar in terms of its relationship to the EU Better Regulation Agenda, to the recent clashes between EU and international law in the area of social rights, and to the constitutional asymmetry between ‘the market’ and ‘the social’ in the EU. In this respect, the paper argues that even if the Pillar does not, and cannot, address all of the fundamental social

¹ OJ C 428, 13.12.2017, p. 10–15.

² A. Plomien, ‘EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights’, *Social Policy & Society* (2018) 17:2, 281–296, at 292.

³ The Rome Declaration of the leaders of 27 EU Member States on 25 March 2017 outlined the importance of a strong social Europe, based on sustainable growth, which promotes economic and social progress as well as cohesion and convergence, upholding the integrity of the internal market and taking into account the diversity of national systems and the key role of social partners, for the EU27 going forward.

concerns connected to the EU project, it has been able to put a surprising social spin on an Agenda that was threatening to erode the social *acquis*, it has rekindled the EU's relationship with the ILO and Council of Europe, and it helps rebalance the EU's output by reviving the use of the Treaty's Social Title.

2. What is the Pillar?

2.a. *The Pillar in a Narrow Sense*

In a narrow sense, the Pillar is a set of 20 social rights and principles, categorized in 3 chapters. Chapter I, entitled 'equal opportunities and access to the labour market' comprises the right to education, training and life-long learning, equal treatment between men and women, non-discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and 'active support to employment'. Chapter II is called 'fair working conditions' and features the rights to 'secure and adaptable employment', fair wages, information about employment conditions and protection in case of dismissals, social dialogue and involvement of workers, work-life balance and healthy, safe and well-adapted work environment and data protection. Chapter III entitled 'social protection and inclusion' contains the rights and principles concerning childcare and support for children, social protection, unemployment benefits, minimum income, old-age income and pensions, health care, inclusion of people with disabilities, long-term care, housing and assistance for the homeless, and access to essential services. The Proclamation states that the aim of the Pillar 'is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people's essential needs, and towards ensuring better enactment and implementation of social rights'.⁴ It 'should be implemented at both Union level and Member State level within their respective competences'⁵, and 'does not entail an extension of the Union's powers and tasks as conferred by the Treaties'.⁶

As a proclamation, however solemn, the Pillar is not legally binding.⁷ This means that the rights and principles it features are not, by virtue of the Pillar, enforceable against either the EU Institutions or the Member States. Most of the rights and principles it contains, however, are legally binding on the EU and/or the Member States by virtue of other measures, such as the EU Charter of Fundamental Rights, the European Social Charter of the Council of Europe⁸

⁴ Recital 12.

⁵ Recital 17.

⁶ Recital 18.

⁷ The Pillar was first launched by means of a Commission Recommendation adopted on the basis of Article 292 TFEU and subsequently endorsed by the Inter-Institutional Proclamation of 17 November 2017. In both these different manifestations, the Pillar is a non-binding 'soft law' instrument, meaning that its legal value is limited to a source of interpretation of EU law, which the CJEU may or may not use in its case law, and that it potentially circumscribes the actions of the signatories on the basis of the legal certainty principle. For recommendations, their non-binding nature is stated explicitly in Article 288 TFEU. Proclamations are not mentioned as a legal instrument in the Treaties and their legal status is therefore somewhat more 'obscure'. See on this point Z. Rasnača, 'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' [2017] 5 *ETUI Working Paper*, p. 14.

⁸ The European Social Charter is a Treaty of the Council of Europe, adopted in 1961 (CETS No.035, ratified by 23 EU Member States, including the UK) and revised in 1996 (CETS No.163, ratified by 20 EU Member States). It guarantees a broad range of human rights related to employment and working conditions, housing, education,

and various Conventions of the International Labour Organization. The Commission's explanations indicate that the Pillar 'draws on' these instruments and that nothing in it shall be interpreted as restricting or adversely affecting them.⁹ The Pillar

'reaffirms the rights already present in the EU and in the international legal acquis and complements them to take account of new realities. As such, the Pillar does not affect principles and rights already contained in binding provisions of Union law: by putting together rights and principles which were set at different times, in different ways and in different forms, it seeks to render them more visible, more understandable and more explicit for citizens and for actors at all levels. In so doing, the Pillar establishes a framework for guiding future action by the participating Member States'.¹⁰

In some ways, the Pillar is thus a repackaging or consolidation exercise, in which a range of social rights and principles contained in different instruments with various addressees are assembled in a single document, politically endorsed as a whole by the EU and the Member States. While in a legal sense, the Pillar cannot directly affect the meaning of these rights and principles as featured elsewhere, it does provide an indication of how the political institutions at present understand these rights and principles and how they thus may give effect to them in the context of their current policies. Since especially fundamental social rights depend to an important extent on the legislator and policy-maker to give them full effect,¹¹ the Pillar could be taken as an indication on the content and direction of the 'implementation' of the rights and principles it contains. Moreover, the CJEU, as well as national courts, may use the Pillar as a source of interpretation of the rights and principles as laid down in other instruments, especially where a new act, at EU or national level, refers to the Pillar in the preamble or in the preparatory works.

2.b. The Pillar in a Broader Sense

In fact, such 'implementation' of the Pillar through new legislative and other acts, should arguably be considered as part of the Pillar itself. Such a broader understanding, not as a one-off, static instrument but instead as a broader process, better captures the dynamic and evolving nature of the initiative and allows a more meaningful appreciation of its (potential)

health, medical assistance and social protection. The Charter is based on a ratification system, which enables signatory states, under certain conditions, to choose the provisions they are willing to accept as binding international legal obligations. While all EU MS are party to either the 1961 Charter or the Revised Charter, not all of them have accepted both or all provisions contained in the Charters.

⁹ European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, p. 2 and 3.

¹⁰ European Commission, Communication to the Parliament, Council, the EESC and the Committee of the Regions, Establishing a European Pillar of Social Rights, COM(2017) 250 final.

¹¹ See generally on how fundamental rights are given (further) effect through legislation in the EU legal order: E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges', *Common Market Law Review* [2014] 51: 219–246

significance.¹² Understood as such, the Pillar comprises not only its core set of 20 social rights and principles (the Pillar *stricto sensu*), but also a range of legislative and non-legislative proposals, some pre-dating the Pillar and some amending existing law and/or policy, and some new (the Pillar *sensu largo*). As such, while the precedent of a ‘proclamation’ was set by the EU Charter of Fundamental Rights,¹³ the format of the overall Pillar initiative is perhaps more reminiscent of the Community Charter of the Fundamental Social Rights of Workers, which is a political declaration signed in 1989 by (then) all the EU Member States except the UK, which signed in 1997.¹⁴ The Community Charter is declaratory¹⁵, but it is a source of inspiration for the CJEU, especially in the interpretation of the rights featured in the EU Charter of Fundamental Rights that are based on rights first set out in the Community Charter.¹⁶ Most importantly, many rights listed in the Community Charter were implemented in secondary law through the Social Charter Action Programme,¹⁷ such as on occupational health and safety, written statement, posted workers, working time, pregnant workers and younger workers. The Pillar *sensu largo* could be likened to such an action plan.¹⁸

The 2018 Commission Staff Working Document ‘Monitoring the implementation of the European Pillar of Social Rights’¹⁹ provides the general overview of what, under the Pillar’s broader conceptualisation, can be considered to be a part of it. The document lists per right/principle the most relevant existing measures at EU level, the ongoing and new initiatives, as well as national measures that are relevant ‘in the spirit of the Pillar’. It does not identify specifically which instruments are considered to be an implementation of the Pillar, but it would seem to include most of the measures that are featured in the category entitled ‘recent and ongoing initiatives at EU level’. This comprises a few dozens of EU actions, ranging from country specific recommendations on minimum wage to a proposed Regulation on a pan-European Pension Product,²⁰ from a proposal for a Recommendation on promoting common values, inclusive education, and the European dimension of teaching²¹ to a proposal for a Regulation to strengthen EU cooperation on health technology assessment.²²

Of course, not all of these measures are equally ‘integral’ to the Pillar. The proposal on

¹² S. Garben, ‘The European Pillar of Social Rights: Effectively Addressing Displacement?’ *European Constitutional Law Review* [2018] 14: 210–230.

¹³ The Commission draws this comparison itself, stating that ‘[a]s it was done for the Charter of Fundamental Rights, the proposal for an interinstitutional proclamation will be discussed with the European Parliament and the Council’. See Commission Communication on the Pillar, *op cit*.

¹⁴ For a discussion see P. Watson, ‘The Community Social Charter’, *Common Market Law Review* [1991] 28, p. 37.

¹⁵ The Community Charter is a proclamation devoid of legal effect. See Opinion of AG Jacobs in CJEU, C-67/96, *Albany*, ECLI:EU:C:1999:28, para. 137.

¹⁶ Eg. Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Line Eesti*, ECLI:EU:C:2007:772, paras. 43 – 44; Opinion of AG Trstenjak of 24 January 2008 in Case C-350/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund*, ECLI:EU:C:2008:37, para. 38.

¹⁷ COM(89)568.

¹⁸ The comparison with the 1989 Community Charter carries a little further, in the sense that like the Pillar it initially also had a ‘differentiated’ scope of application, excluding the UK. On the issue of the Pillar’s territorial scope, see the discussion below (Section 2.c.).

¹⁹ European Commission, ‘Monitoring the implementation of the European Pillar of Social Rights’, SWD(2018) 67 final.

²⁰ COM (2017) 343: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a pan-European Personal Pension Product (PEPP)

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a recast of the Electricity Directive,²³ which is mentioned in relation to Principle 20 on ‘Access to Essential Services’, is arguably not as central to the Pillar project as the proposed Directive on Predictable and Transparent Working Conditions.²⁴ And a number of measures that are thematically closely connected to the Pillar, such as the Equality directives discussed below, are stalled legislative proposals that (long) pre-date the Pillar. Can these therefore really be said to be an ‘implementation’? The mere fact that the Pillar post-dates these proposals should arguably not prevent them as being conceptualized as part, or even an implementation, of it. In the case of the Charter of Fundamental Rights, some of the social directives that pre-dated it have been considered to give expression to a Charter right and have been interpreted in light of it.²⁵ Moreover, if these pending proposals are successfully adopted now, post-Pillar, it arguably proves the usefulness of the latter in unlocking the blockages. One of the Pillar’s main values could indeed be to facilitate the advancement of the social *acquis* by providing political leverage: it increases the cost of opposing or down-leveiling social initiatives for all institutions that have ‘solemnly’ proclaimed their attachment to these values, which includes the Member States in the Council.

It is also true that many of the central Pillar implementation initiatives are themselves, like the Pillar *stricto sensu*, ‘repackaging’ exercises. The Work-Life Balance²⁶ Directive, Predictable and Transparent Working Conditions Directive²⁷ and the Social Scoreboard²⁸ are not entirely new but (would) replace the existing Maternity Leave²⁹ and Written Statement Directives³⁰ and the Scoreboard of Key Employment and Social Indicators³¹ respectively. Is the Pillar therefore merely putting old wine in new bottles? The extent to which these initiatives develop new rights and policies should not be underestimated, as discussed below (Section 2.d.). The mere fact that they would replace existing measures does not detract from their value either in a self-standing sense or as part of the Pillar *sensu largo*. It could be argued that for every measure, whether old or new, whether closely or loosely connected to the Pillar’s themes, the fact that it is mentioned in the Pillar’s context is relevant, because the association to it may have political consequences for negotiation, adoption and, subsequently, interpretation. Furthermore, the Pillar package does also introduce a number of novelties, such as the proposal for a European Labour Authority³² and the initiative on Access to Social Protection for Workers

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²⁵ As AG Bobek states in his Opinion of 5 September 2018 in Case C-385/17, *Torsten Hein v Albert Holzkamm GmbH & Co.*, ECLI:EU:C:2018:666, para. 38 in relation to the Working Time Directive: ‘Pursuant to Article 31(2) of the Charter, every worker has the right to an annual period of paid leave: no further details are provided on that right. Article 7(1) of Directive 2003/88, which the Court has ruled has direct effect, gives specific expression to that right.’ Note however that the Court has been cautious in its approach to conceptualize the rights laid down in the Working Time Directive as a ‘specific expression’ of Article 31(2) of the Charter, avoiding the issue in Case C-282/10, *Dominguez*. See on that issue E. Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’, *Common Market Law Review* [2014] 51: 219–246, at 231 ; L. Pech, ‘Between judicial minimalism and avoidance: The Court of Justice’s sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*’, *Common Market Law Review* [2012] 49, 1841–1880.

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2.c. *The Pillar's Ambiguity*

This ‘blend of old and new elements’ indeed results in one of the Pillar’s main ‘ambiguities’, as Plomien has argued.³⁴ It makes it more difficult to fully grasp the Pillar’s material scope and content. In this respect it will be enlightening to consider the Pillar in its relation to the EU Better Regulation Agenda, as discussed in Section III below, as this will elucidate part of its rationale and approach in this respect. In any event, this ambiguity is arguably not something to be resolved either academically or in practise, but instead to be understood as an intrinsic part of this fluid, constantly evolving initiative, with uncertain and shifting content and boundaries. This uncertainty gives leeway especially to the Commission as the policy entrepreneur and main driver of the Pillar process, to assess strategically and flexibly in what areas and in relation to which actions it can ‘play the Pillar card’ to best effect. On the one hand, it thus has an incentive to keep the potential scope of the Pillar *sensu largo* as broad as possible, to be able to use it as leverage in the widest possible context. On the other hand, it will have to be careful not to overplay the Pillar scope, as this may diminish its impact and, in case of a failure of a specific action, risks being seen as a failure of the Pillar initiative overall.

In this light, it is understandable that the Commission has been a little vague on which actions are seen as Pillar measures. The wide array of EU actions mentioned in the 2018 Staff Working Document ‘Monitoring the implementation of the European Pillar of Social Rights’ that we have argued can all be seen as within the Pillar *sensu largo*, are not explicitly conceptualized as such. On its website,³⁵ the Commission identifies four measures specifically as ‘delivering on the European Pillar of social rights’, namely (i) the ‘New Start to support work-life balance for parents and carers’ which includes the proposal for a Work-Life Balance Directive, (ii) the ‘Access to social protection’ initiative, which has resulted in the proposal for a Recommendation on Access to Social Protection for Workers and the Self-Employed³⁶, (iii) the proposal to revise the Written Statement Directive into a Directive on Transparent and Predictable Working Conditions,³⁷ and (iv) the interpretative communication on the Working Time Directive.³⁸ In addition, the Social Scoreboard is presented as the central tool to monitor progress on the Pillar in the context of the European Semester.³⁹ Most recently, in its press release on the proposal for a European Labour Authority, the Commission explicitly stated that it was ‘part of the roll-out of the European Pillar of Social Rights’⁴⁰ and in relation to the proposal to include new exposure limit values for five chemicals in the Carcinogens and Mutagens Directive, reference was similarly made to the Pillar.⁴¹

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³⁴ A. Plomien, ‘EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights’, *Social Policy & Society* (2018) 17:2, 281–296, at 289.

³⁵ <http://ec.europa.eu/social/main.jsp?catId=1310&langId=en>, accessed 26 October 2018.

³⁶ COM(2018) 132 final

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³⁹ <http://ec.europa.eu/social/main.jsp?langId=nl&catId=89&newsId=9163&furtherNews=yes&furtherNews=yes>

⁴⁰ http://europa.eu/rapid/press-release_IP-18-1624_en.htm

⁴¹ http://europa.eu/rapid/press-release_IP-18-2662_en.htm

While the proposals for a Work-Life Balance Directive, a Directive on Transparent and Predictable Working Conditions, and for a Recommendation on Access to Social Protection for Workers and the Self-Employed are rightly singled out as the Pillar package's signature initiatives, as they all tackle important new issues that go to the core of the Pillar's themes, the qualification of the Interpretative Communication on the Working Time Directive 'as part of the Pillar Package'⁴² is somewhat less intuitive. In fact, while the Pillar *stricto sensu* includes a relatively wide range of social rights and principles and generally gives them a generous reading, a conspicuous absence is precisely the right to a maximum weekly working time, adequate rest periods and paid annual leave, as laid down in Article 31(2) of the EU Charter and in the Working Time Directive 2003/88/EC and further sector-specific legislation. The CJEU has held these to constitute 'social rights of fundamental importance'.⁴³ Puzzlingly, the Pillar does not mention workers' dignity⁴⁴, nor does it mention the EU's fundamental social rights to maximum working time and minimum rest period and annual paid leave. While, as explained above, the Pillar cannot affect the rights laid down in the Charter in a direct way, this does raise the question whether the right to healthy and safe working conditions is politically being redefined to exclude the issue of working time. The fact that the Commission conceives its interpretative communication on working time as part of the Pillar package, however, provides an argument to quell that concern.

Another substantive ambiguity is whether the revision of the Posting of Workers Directive, to ensure the principle of 'equal pay for equal work', is considered part of the Pillar. The proposal was presented by the Commission in its 'Mobility Package' on the same day as the Pillar in its 'Social Package', but it did not seem to be conceptualized as a part of it. Of course, in overall terms, both the launch of the Pillar and the Revised Posting Directive are the product of Commission President Juncker's commitment to social values and to deliver on election promises made. They are both part of the Commission's efforts to ensure a 'Social Triple A Rating' for Europe. Accordingly, several stakeholders and politicians have explicitly linked the Pillar and the Revision of the Posting Directive,⁴⁵ and this link is also underlined by the fact that the Council reached agreement on the Directive⁴⁶ on the same day as it approved the Inter-Institutional Proclamation on the Pillar.⁴⁷ Seeing the successful adoption of the Directive,⁴⁸ and the tangible social improvement it makes to a field where the imbalance between 'the market' and 'the social' has been most keenly felt⁴⁹, one would expect the Commission to celebrate this success as one of the Pillar's main achievements.

On the other hand, a reason to keep the issue of posting separate from the Pillar is

⁴² SWD p. 30

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⁴⁴ It does mention dignity in reference to old age (Principle 15), disability (Principle 17) and minimum income (Principle 14).

⁴⁵ <http://www.aedh.eu/en/social-pillar-and-directive-on-posted-workers-the-two-sides-of-the-eu-social-policy/>
European Economic and Social Committee SOC/541

⁴⁶ <https://www.consilium.europa.eu/en/press/press-releases/2017/10/24/posting-of-workers-council-reaches-agreement/>

⁴⁷ <https://www.consilium.europa.eu/en/meetings/epsco/2017/10/23/>

⁴⁸ Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173/16.

⁴⁹ S. Garben, 'The Constitutional (Im)balance between 'the market' and 'the social' in the European Union', *European Constitutional Law Review* [2017] 13: 23 – 61.

because at least originally, the Pillar has not been conceived as, nor designed to, resolving the clashes between social and market values that have arisen in the area of the internal market (or economic governance). Steeped in centrist language about improving the situation of both citizens and businesses across Europe, reconciling security and flexibility on the labour market, and combining high social standards with economic adaptability and competitiveness, the Pillar was intended to canvass broad, cross-spectrum appeal and support. The Pillar has not engaged in the more difficult exercise in which the internal market, budgetary balance and social justice are not presented as synergetic, non-controversial, a-political issues that benefit citizens, workers and businesses alike, but instead are recognized for sensitive, political issues that are, at least partially, at odds with each other. From this perspective, it is perhaps sensible to keep posting separate from the Pillar.

A final ambiguity that deserves some attention is about the Pillar's territorial scope. The Commission's original Pillar was 'primarily conceived for the euro area'.⁵⁰ The explanation was that '[a] stronger focus on employment and social performance is particularly important to increase resilience and deepen the Economic and Monetary Union'. This only seems part of the story, however, and perhaps Euro-membership was equally used as a proxy for political likelihood of approval and participation. The Euro-countries generally constitute a smaller, more deeply integrated group of Member States that can be expected to be slightly more convergent including in their social outlook. Still, such a differentiated scope of application would be inappropriate for an initiative like the Pillar. To limit the scope of application of fundamental rights and principles within a constitutional order, which the EU can reasonable be claimed to be, to only parts of the territory, seems questionable from a Rule of Law perspective. Surely it should not depend on whether one's Member State uses the Euro whether one is considered to be entitled to social assistance, for instance. Even if the Pillar *strictu sensu* is not enforceable, its symbolic value is equally (or all the more?) undermined by such a fragmented approach. It is therefore fortunate that on this crucial point, there is a difference between the original Pillar Recommendation and the subsequent Inter-Institutional Proclamation. Although both indicate that the Pillar is 'primarily conceived' for the Euro area, the former considered that the Pillar would be 'applicable to all Member States that wish to be a part of it', while the latter instead states that 'it is addressed to all Member States'.⁵¹ It could therefore be argued that since the adoption of the Proclamation, the Pillar *stricto sensu* no longer has a differentiated scope. The Pillar's implementation through economic governance mechanisms may still differ for the Euro-area, but the core statement of social values is at least shared by all. Furthermore, none of the proposed legal implementation measures have been proposed as enhanced cooperation and instead are conceived to apply to all Member States.

2.d. The Pillar's Most Important Implementation Measures

(i) Pre-Existing Equal Treatment Proposals

⁵⁰ European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final, p. 4.

⁵¹ Recital 13 of the Commission Recommendation and the Inter-Institutional Proclamation respectively.

The Pillar package subsumes three existing legislative proposals in the field of non-discrimination, some of which had been stalled in the Council for some time. The hope is that the Pillar itself, as well as the changed political climate of which the Pillar is part, may lead to a breakthrough in the arduous negotiations on some of these measures.

The most contentious is the Proposal for a Council Directive on implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation,⁵² that has been blocked in the Council for almost a decade.⁵³ The proposal was the result of pressure by civil society associations and the European Parliament to prohibit discrimination on grounds of religion or belief, disability, age, and sexual orientation in areas outside the labour market,⁵⁴ in order to reduce the discrepancy in scope of protection between these grounds as compared equal treatment on grounds of gender⁵⁵ and race,⁵⁶ which benefit from a more protective regime under EU law (‘hierarchy of equalities’).⁵⁷ The new Directive would ‘level up protection from discrimination for these grounds to replicate the material scope of the Racial Equality Directive’.⁵⁸ However, facing unanimity under Article 19 TFEU, the necessary consensus has proven difficult to reach. The issue of non-discrimination, and the EU’s role in relation to it, is politically sensitive and as Waddington notes, in the decade following the proposal, the economic crisis led to concerns that the new Directive ‘would result in additional costs and red tape for business’.⁵⁹ Arguably, the Pillar is precisely the necessary change of outlook. Under the 2017 Estonian Presidency, the Council continued its examination of the proposal, and the recitals were amended to include a reference to the Commission's Pillar Recommendation. It was reported that ‘real progress’ had been made,⁶⁰ although this has not yet resulted in agreement. It remains to be seen whether the Pillar can build further momentum for this proposal.

A second stalled instrument that the Pillar hopes to recover is the proposed Gender Balance on Boards Directive, submitted by the Commission in November 2012.⁶¹ The Directive is aimed at improving gender balance in corporate boards of large listed companies, setting the aim of a minimum of 40% of non-executive members of the under-represented sex on company boards, to be achieved by 2020 in the private sector and by 2018 in public-sector companies. Appointments will have to be made on the basis of pre-established, clear and neutral criteria and in the situation that candidates are equally qualified, advantage would be

⁵² European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426.

⁵³ For discussion, see L. Waddington, “Future prospects for EU equality law. Lessons to be learnt from the proposed equal treatment Directive”, 36 *EL Rev.* (2011), 177.

⁵⁴ Within the labour market, this is covered by the Employment Equality Directive.

⁵⁵ Recast Directive (2006) consolidated and updated earlier gender equality directives, addressing gender discrimination in the areas of employment and vocational training and the Gender Goods and Services Directive (2004) addresses discrimination relating to the provision of goods and services.

⁵⁶ Racial Equality Directive.

⁵⁷ See M. Bell, ‘The principle of equal treatment: widening and deepening’, in P Craig and G de Búrca, *The evolution of EU law*, Oxford, OUP, 2011, 611 – 639.

⁵⁸ *Ibid.* It would, then, leave gender as the least protected ground. Emanuela Lombardo & Mieke Verloo (2009) Institutionalizing Intersectionality in the European Union?, *International Feminist Journal of Politics*, 11:4, 478-495.

⁵⁹ L. Waddington, “Future prospects for EU equality law. Lessons to be learnt from the proposed equal treatment Directive”, 36 *EL Rev.* (2011), 163–184.

⁶⁰ <http://data.consilium.europa.eu/doc/document/ST-14867-2017-INIT/en/pdf>

⁶¹ COM(2012) 614.

given to the under-represented sex. The Directive is strongly supported by the Parliament⁶² and the Commission.⁶³ However, even though the legal basis of Article 157(3) TFEU requires only QMV in the Council, and despite the fact that an increasing number of Member States has adopted similar binding or non-binding targets nationally, the necessary support has not yet been reached. The main bone of contention seems to be subsidiarity and proportionality. Several national parliaments submitted reasoned opinions,⁶⁴ and some scholars have expressed concern that the Directive with its ‘compulsory gender quotas’ goes beyond what is necessary.⁶⁵ Other scholars have however argued that most opposition to the Directive is based on prevailing misunderstandings as to its actual legal obligations, as ‘the draft Directive does not oblige Member States to introduce quotas in the strictest sense, i.e. to achieve a minimum representation of women on non-executive boards, but it prescribes a number of criteria that recruitment procedures must meet and a preferential treatment procedure if Member States have so far failed to adopt any rules and policies to improve the gender balance in company boards’. They argue that the proposal must be seen as a necessary and modest step towards long-awaited progress.⁶⁶

A third existing proposal that the Pillar absorbs, is the Proposal for a for a European Accessibility Act.⁶⁷ As Waddington has noted in the context of the Proposal for the Directive on implementing the Principle of Equal Treatment discussed above, a notable exception to the apprehension among Member States for additional EU equality law is the issue of disability.⁶⁸ The Commission had announced a proposal for an Accessibility Act in January 2011, scheduled for adoption at the end of 2012, although it ultimately took until 2 December 2015 for the actual proposal to materialize. Based on Article 114 TFEU concerning the internal market, the Act justifies the rationale of the directive in reference to divergent national standards on accessibility. It thus proposes to harmonize these accessibility requirements, which would be in the interest of the internal market, as well as of disabled persons. The Commission had initially associated this pending initiative with Pillar Principle 20 on ‘Access to essential services’⁶⁹ but in the 2018 Staff Working Document it is instead linked to Principle

⁶² Since adopting its original position, Parliament has continued to push for progress, including its 2017 resolutions on Equality between women and men in the European Union in 2014-2015 and on Women’s economic empowerment in the private and public sectors in the EU. See <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards>

⁶³ It underlined it as a priority in its 2016 work programme and it has reaffirmed that it will continue to work towards the adoption of the directive in the 2018 Staff Working Document on the Pillar and its November 2017 proposal for an EU Action Plan to tackle the gender pay gap. 2018 report on equality between men and women in the EU Luxembourg: Publications Office of the European Union,

⁶⁴ http://ec.europa.eu/commission_2010-2014/redirecting/pdf/m13_10_en.pdf, national parliaments of Denmark, the Netherlands, Poland, Sweden, the United Kingdom, and one of the two chambers of the Parliament of the Czech Republic (Chamber of Deputies).

⁶⁵ M. Szydło, ‘Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance’, *European Law Journal* [2015] Vol. 21, No. 1, pp. 97–115.

⁶⁶ L. Senden and M. Visser, Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies, *European Gender Equality Law Review* [2013] Vol. 2013, Issue 1, pp. 17 – 33.

⁶⁷ COM/2015/0615 final.

⁶⁸ L. Waddington, “Future prospects for EU equality law. Lessons to be learnt from the proposed equal treatment Directive”, *European Law Review* [2011] 36, p. 178.

⁶⁹ SWD(2017) 201 final, p. 77.

17 ‘Inclusion of people with disabilities’⁷⁰, which seems more appropriate. The main points of contention are whether the obligations should apply to the built environment and to transport, as well as emergency services, but it seems reasonable to expect that this measure will be adopted in the near future.⁷¹

(ii) Replacements

The Pillar package contains two proposals that would replace existing measures, namely the proposal for a Work-Life Balance Directive,⁷² to replace Directive 92/85/EEC on maternity protection and the 2010 Parental Leave Directive, and the proposal for a Directive on Predictable and Transparent Working Conditions,⁷³ to replace the Written Statement Directive 91/533/EEC. Furthermore, the Social Scoreboard has already replaced the previous Scoreboard in the context of the European Semester.

The proposed Work-Life Balance Directive commendably takes a broad approach to the issue of gender equality and caring duties, and proposes several important new minimum rights, such as (i) the possibility for flexible uptake (piecemeal and part-time) of the 4 months’ individual entitlement to parental leave (Article 5(6)) and payment thereof at sick pay level (Article 8); (ii) allowing the 4-month’s entitlement to be taken up until the child reaches the age of 12 (instead of 8) and making it non-transferable between parents (Article 5(1) and (2)); (iii) an entitlement to 10 working days of paternity leave when a child is born, paid at sick pay level (Article 4), and (iv) an entitlement to 5 days of leave paid at sick pay level per year per worker to take care of seriously ill or dependent relatives (Article 6). The Directive would be based on Article 153(1)(i) TFEU. The Parliament and Council have adopted their negotiating positions.⁷⁴ It seems fair to say that this Directive, if adopted in a not too watered-down form, would significantly improve the existing rights and possibilities of millions of women and men in Europe to combine work with family life in many Member States, and as such could be expected to yield significant social (and possibly economic) benefits.

The proposed revision of the Written Statement Directive aims to reinforce the rights already contained in that Directive about the information the worker is entitled to receive in their employment contract by applying them to all workers irrespective of the form of their employment. In addition to these more procedural rights, the proposal introduces more important substantive elements to the Directive, in defining core labour standards for all workers, particularly for the protection of atypical, casual forms of employment such as on-call work and zero-hours contracts.⁷⁵ The proposal lays down a maximum duration of probation

⁷⁰ ‘The Commission continues to support negotiations for the adoption of the proposed European Accessibility Act. The Act aims to ensure accessibility of certain products and services in the internal market, thus facilitating people with disabilities’ employment and participation in society on an equal basis with others.’ P. 77.

⁷¹ <http://www.edf-feph.org/newsroom/news/open-letter-eu-institutions-we-need-strong-european-accessibility-act-and-we-need-it>

⁷² COM(2017) 252 final. COM(2017) 253 final.

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⁷⁴ The Council agreed its negotiating position - general approach on the directive on transparent and predictable working conditions on 21 June 2018: <https://www.consilium.europa.eu/nl/press/press-releases/2018/06/21/transparent-and-predictable-working-conditions-council-reaches-general-approach/>

⁷⁵ The Commission’s consultation document refers to Eurofound’s definitions for these terms, as given in the

of 6 months (where a probation period is foreseen), the right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time, the prohibition of exclusivity clauses, the right to request a new form of employment (and employer's obligation to reply), the right to training, and strong enforcement mechanisms in relation to the rights provided.⁷⁶ It would be very useful if the Directive would somehow address the specific precariousness connected to certain casual, on-call contracts, where the employer is free to reduce or increase the number of working hours at will within a very short timeframe.⁷⁷ This allows the employer to *de facto* dismiss a worker through a sudden, drastic reduction or complete elimination of their assigned working hours, without an official termination of the contract. The effectiveness of all the rights accorded to workers on such contracts depends on the impossibility for the employer to use the threat of such *de facto* dismissal as a disincentive for the worker to assert their rights and entitlements.

In addition to the above-mentioned legislative initiatives, the European Semester is to embed the implementation of the Pillar's principles on minimum wages, the right to a minimum income and 'the reform of social housing, the accessibility and affordability of housing, as well as the effectiveness of housing allowances'. Considering the fact that Article 153(5) TFEU excludes the issue of 'pay' from that legal basis, and that its paragraph 4 stipulates that the provisions adopted pursuant to that article shall not affect the right of Member States to define the fundamental principles of their social security system and must not significantly affect the financial equilibrium thereof, it is not surprising that no legislative action on these points has been proposed. Action through the European Semester means that Member States may receive Country Specific Recommendations to introduce or improve their minimum wage and income schemes, something which has already been a feature of the Semester in previous years. These recommendations are not legally binding, but do take place in the context of a structured framework with a coercive force derived from the possibility of financial sanctions for non-compliance in the case of recommendations issued based on the Macro-Economic Imbalance or Excessive Deficit procedures.⁷⁸ The new Social Scoreboard is a central tool to monitor the implementation of the Pillar in the Semester.⁷⁹ It replaces the scoreboard of key employment and social indicators and provides a number of Headline Indicators to screen the employment and social performance of Member States along three broad dimensions, identified in the context of the Pillar, namely: (i) equal opportunities and access to the labour market,⁸⁰ (ii)

report 'New forms of employment' (Publications Office of the EU, 2015), p.46.

⁷⁶ COM/2017/0797 final.

⁷⁷ In its Resolution on the Pillar, the Parliament has called for a framework directive on decent working conditions to include and limits regarding on-demand work. European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights, para 5.

⁷⁸ While it is unlikely that any sanctions would be issued for non-compliance with social standards, the fact remains that the European Semester and its CSR's are a particularly coercive form of soft law. For discussion, see S. Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union', *op cit.*

⁷⁹ SWD(2017) 200 final, accompanying the Communication COM(2017) 250 final of 26 April 2017. In 2018 the Joint Employment Report (JER) presents for the first time the Social Scoreboard that monitors in relation to the European Pillar of Social Rights.

⁸⁰ Share of early leavers from education and training, age 18-24 ; Gender gap in employment rate, age 20-64 ; Income inequality measured as quintile share ratio - S80/S20 ; At-risk-of-poverty or social exclusion rate (AROPE) ; Young people neither in employment nor in education or training (NEET rate), age 15-24.

dynamic labour markets and fair working conditions,⁸¹ and (iii) public support / social protection and inclusion.⁸²

(iii) New Measures

The ‘Access to social security initiative’⁸³ envisaged a potential directive addressing the challenges of access to social protection for people in all forms of employment and self-employment⁸⁴. It aimed to tackle the problem that up to half of people in non-standard work and self-employment are at risk of not having sufficient access to social protection and/or employment services across the EU, likely to become a growing impediment to the well-functioning of labour markets, the sustainability of social protection systems and the welfare of a rising share of the workforce. The gap in protection is often linked to the labour law status of people in non-standard employment and due to the growing number of transitions between and combinations of dependent employment and self-employment, causing problems of accessibility and transferability. In its original consultation, the Commission had suggested as one option for the potential action an EU Directive with provisions ensuring (i) similar social protection rights for similar work, and (ii) the transferability of acquired social protection rights.⁸⁵ However, in view of the opposition of Member States, the Commission has decided to propose a Recommendation on Access to Social Protection for Workers and the Self-Employed⁸⁶ instead.

Secondly, an important new initiative in the implementation of the Pillar is the proposal for a Regulation establishing a European Labour Authority, published on 13 March 2018.⁸⁷ As the Parliament notes, ‘this new concept of a European Labour Authority is closely related to three principles of the European Pillar of Social Rights, on active support for employment, on secure and adaptable employment and on social protection’. The tasks of the new Authority would be to strengthen the administrative cooperation and mutual trust for a fair mobility in the Single Market, among others by solving possible disputes between national authorities, to create a pool of existing tools for cross-border mobility to provide a one-stop shop for citizens, business and public authorities⁸⁸, to fight abuse of labour and social legislation and organise joint cross-border control activities, and to build on existing agencies and structures to manage better cross-border and joint activities. The EMPL Committee of the European Parliament submitted a draft report on 22 June 2018. The report states that there is need for a Labour Authority with

⁸¹ Employment rate, age 20-64 ; Unemployment rate, age 15-74 ; Gross disposable income of households in real terms, per capita.

⁸² Impact of social transfers, other than pensions, on poverty reduction (measured as the difference, among total population, between the share of people at risk of poverty rate before and after social transfers) ; Children aged less than 3 years in formal childcare ; Self-reported unmet need for medical care ; Share of population with basic overall digital skills or above.

⁸³ European Commission (2016): Commission Work Programme 2017 - Delivering a Europe that protects, empowers and defends, point 11.

⁸⁴ The Commission has launched the first-phase consultation of the Social Partners required on the basis of Article 154 TFEU, C(2017) 2610 final.

⁸⁵ European Commission, C(2017) 2610 final.

⁸⁶ COM(2018) 132 final

⁸⁷ COM(2018) 131 final

⁸⁸ EURES – the European job mobility portal, EU social security coordination, European Health Insurance Card, EU blue card, etc.);

an operational mandate, a clear focus on enforcement and sufficient competences and power to achieve its goals. The Labour Authority has to have a clear-defined role, a limited number of tasks and use the means available as efficiently as possible in areas where the Authority can provide the greatest added value, mostly in the field on enforcement. The Council is currently considering the proposal, but it has been reported that agreement will be difficult.⁸⁹

3. The Pillar in Context

3.a. EU Better Regulation

In trying to understand the Pillar's 'working method', and particularly the way it ties existing instruments, existing proposals and new elements into the overall initiative, it is particularly insightful to assess the Pillar in relation to the EU Better Regulation Agenda.⁹⁰

While this Agenda has been around in EU policy-making in various incarnations for several decades,⁹¹ it was arguably under the previous administration that it became particularly powerful, impacting EU social policy to an important extent.⁹² The Agenda is based on a number of, partially contradictory, rationales: (i) improving the quality of EU legislation, (ii) reducing the quantity of EU legislation, (iii) increasing public participation in the legislative process, (iv) promoting science-based governance, and (v) enforcing the subsidiarity and proportionality principles.⁹³ While it would be ill-informed to paint a picture of EU Better Regulation as an unequivocal drive towards de-regulation in the interests of businesses,⁹⁴ many scholars have argued that certain elements of the Agenda carry a risk of systematic bias against regulatory standards, particularly to pursue non-economic interests such as social policy.⁹⁵ One of the main methodologies used in the obligatory Impact Assessment of new EU initiatives and wide-spread Evaluations of existing legislation, is cost-benefit analysis, which poses a number

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⁹⁰ See Commission Communication of 19 May 2015, 'Better regulation for better results: An EU agenda', COM(2015)215 final; Commission Staff Working Document of 19 May 2015, 'Better Regulation Guidelines', SWD(2015)111 final, European Commission Communication, EU Regulatory Fitness, COM(2012) 746 final.

⁹¹ See earlier initiatives such as the Commission Staff Working Document "Making Single Market Rules More Effective, Quality in Implementation and Enforcement", SEC(1998) 903, p. 3-5, "Better Law-Making" in the early 2000s: European Commission Communication, *European governance: Better Law-Making*, COM(2002)275 final, and "Smart Regulation" in the late 2000s: European Commission Communication, *Smart regulation in the European Union*, COM(2010)543 final.

⁹² For a comprehensive discussion of the Agenda and its impact: S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda: a Critical Assessment*, Oxford: Hart Publishing, 2018. One high-profile example is the Commission's refusal, on the basis of the Better Regulation Agenda, to submit the successfully concluded Collective Agreement in the Hairdressing Sector for implementation in the form of an EU Directive to the Council. The Agreement, aimed at improving the health and safety of workers in the hairdressing sector concluded by workers and employers, was publicly denounced by the European Commission as an example of bad regulation. See REFIT - Fit for growth": Examples how EU law is becoming lighter, simpler and cheaper, http://europa.eu/rapid/press-release_MEMO-13-833_en.htm.

⁹³ See S. Garben, 'An 'Impact Assessment' of EU Better Regulation', in S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda: a Critical Assessment*, Oxford: Hart Publishing, 2018, pp. 217 – 242.

⁹⁴ B. Smulders and J. Paquet, 'The European Commission and its Better Regulation Agenda', in S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda: a Critical Assessment*, Oxford: Hart Publishing, 2018, pp. 79 – 104.

⁹⁵ For a thorough discussion, see M. Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics', *Common Market Law Review* [2016] 53, 1209 – 1236.

of problems in terms of its reliance on certain assumptions and the quantification of non-quantifiable benefits.⁹⁶ It was out of concern for the expected negative consequences of the Agenda in this sense, that in 2015 more than fifty civil society groups set up of a ‘Better Regulation watchdog’⁹⁷ concerned that the Agenda would erode important existing rights and policies and hamper the development of new initiatives. Even if their fear of a Grand Repeal of the *acquis* has not come to pass,⁹⁸ perhaps because it turned out to be more difficult than expected to reach the necessary levels of political agreement to repeal legislation, it has kept Commission busy ‘running on the spot’⁹⁹. Significant administrative resources were spent on the laborious *ex ante* and *ex post* evaluation exercises of the social *acquis*, discouraging the development of new social initiatives.

The Pillar has drastically changed this picture. The Pillar turns the EU Better Regulation Agenda squarely on its head, deploying its very methodology to upgrade the EU social *acquis*. In some ways, the entire Pillar process can be seen as a giant Better Regulation exercise, whereby the European floor of social rights comprising the EU and international social *acquis* is considered for its ‘fitness for purpose’. The Pillar *strictu sensu* sets out what is this floor, and the Pillar *sensu largo* identifies the holes in the floor (in the sense of missing or inadequate social protection, due to a lack of standards, implementation and/or enforcement thereof), and proposes concrete measures to plug them (making use of the entire EU regulatory and governance arsenal). This explains why the Pillar is an amalgam of ‘the old’ and ‘the new’. More concretely, precisely the evaluations of the social *acquis* that worried social stakeholders and kept Commission services’ hands full over the past years, are now seized to support the new initiatives taken in the implementation of the Pillar. The initiative to revise and strengthen the Written Statement Directive 91/533 builds on the findings of an earlier REFIT evaluation,¹⁰⁰ the proposal to include new exposure limit values for five chemicals in the Carcinogens and Mutagens Directive follows the evaluation of the EU’s occupational health and safety *acquis*,¹⁰¹ and the proposed Work-Life Balance Directive follows the withdrawal of the Commission’s 2008 proposal to revise the Maternity Leave Directive 92/85/EEC, which was part of the Better Regulation Agenda.¹⁰² The fact that the Pillar’s Staff Working Document mentions specifically that ‘in 2018, the Commission expects to complete a REFIT evaluation of the Directives which give effect to the Social Partner Framework Agreements on fixed-term and part-time work’¹⁰³ suggests that further Pillar-related initiatives could be based on the outcomes thereof.

All this may lend some credence to the argument that Better Regulation’s core methodologies of evidence-based policy-making and analytical underpinning of regulation are

⁹⁶ A. Renda, ‘Cost-Benefit Analysis and EU Policy: Limits and Opportunities’, in S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda: a Critical Assessment*, Oxford: Hart Publishing, 2018, pp. 49 – 62.

⁹⁷ See: www.betterregwatch.eu/BRWN_Founding_Statement_and_Members.pdf.

⁹⁸ R. Zbiral, ‘The Better Regulation Agenda and the Deactivation of EU Competences’ in S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda: a Critical Assessment*, Oxford: Hart Publishing, 2018, pp. 63 – 78.

⁹⁹ C. Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’, *Cambridge Legal Studies Research Paper Series* [2014] 43, p. 14.

¹⁰⁰ See European Commission, *REFIT Evaluation of the ‘Written Statement Directive’*, SWD(2017) 205 final.

¹⁰¹ http://europa.eu/rapid/press-release_IP-18-2662_en.htm

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¹⁰³ SWD p. 30

in fact neutral as to the amount and level of rules and regulation they prescribe: if a problem is identified, the analysis may very well suggest that new EU action is needed to address it. It also shows that the idea of simplification, in the form of presenting various EU measures in the form of comprehensive ‘packages’ and trying to reduce the number of instruments but upholding or improving the level of protection they guarantee, does not necessarily entail deregulation but may go hand in hand with an ambitious policy-agenda. And it shows that legislation may well be the instrument of choice in instances where the EU possesses the necessary (direct) competence, with soft law being preferred for instances where these powers are lacking. On the other hand, the radically different use of the Better Regulation Agenda by this Commission compared to the previous administration, also provides an argument to qualify the Agenda as a political instrument that can be used by any powers that be to justify and rationalize their political choices; that the Agenda takes the political color of the power that steers it. While these two views appear contradictory, perhaps both can be true. And in any event, from a social perspective, there is something particularly pleasing about the fact that one of the main systemic threats to Social Europe has been turned into an important force supporting its revival and development.

3.b. Clash of International and EU Law in the Area of Social Rights¹⁰⁴

Looking at the rich EU social *acquis* that the Pillar aims to reinforce, it can easily be forgotten that the EU initially played only a limited role in the area of social rights, which to a certain extent can be explained by the existence of other actors that were considered better placed. The EU’s purview was that of economic integration, and social issues were either left to the Member States or, as regards a minimum floor of social rights, to the Council of Europe and the United Nations. Experts of the ILO, the tripartite UN agency established in 1919 bringing together governments, employers and workers representatives of 187 countries to set labour standards and policies promoting decent work, drafted the influential ‘Ohlin report’ that provided ‘the theoretical basis for the social policy chapter of the Rome Treaty’¹⁰⁵ indicating that the creation of the European Economic Community did not require the harmonisation of labour standards.¹⁰⁶ The ILO’s eight ‘fundamental’ conventions have been ratified by all 28 EU Member States and the EU has observer status. At the European level, the most important source of social rights was the Council of Europe’s European Social Charter, already mentioned further above. Things have clearly changed since those early days of European integration. But the gradual but expansive evolution of EU social rights has taken place not instead of, but alongside the continuing existence and development of international social rights particularly in the context of the ESC and the ILO conventions.

The Pillar extensively engages with this international social *acquis*. The 2016 Staff Working Document on the EU social *acquis* accompanying the Commission’s initial

¹⁰⁴ See on this issue generally S. Garben, ‘The Problematic Interaction between EU and International Law in the Area of Social Rights’, *Cambridge International Law Journal* [2018] Vol. 7, Issue 1, pp. 77 – 98.

¹⁰⁵ M. Rocca, ‘Enemy at the (Flood) Gates: EU ‘Exceptionalism’ in Recent Tensions with the International Protection of Social Rights’ (2017) 7 *European Labour Law Journal*, p. 55.

¹⁰⁶ ILO, ‘Social Aspects of European Economic Co-operation: Report by a Group of Experts’ (1956) 74 *International Labour Review* 99–123.

consultation on an European Pillar of Social Rights devoted a sub-section to ‘social rights and principles as laid down in international law’,¹⁰⁷ the 2017 Commission Communication establishing a Pillar of Social Rights stresses that ‘the Pillar takes direct inspiration from the existing wealth of good practices across Europe, and builds on the strong body of law which exists at EU and international level’ mentioning in particular the ESC and the ILO,¹⁰⁸ and the preamble of the Inter-Institutional Proclamation ‘the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation’.¹⁰⁹ More concretely, in the 2018 Staff Working Document ‘Monitoring the Implementation of the European Pillar of Social Rights’, the specific Pillar principles are connected to relevant international law, and the Pillar is used as a catalyst for Member States’ engagement with these international measures. For instance, in relation to Pillar Principle 6 on wages, the Commission points out that ‘Member States may ratify (if they have not already done so) and apply (i) ILO N° 131 Convention on minimum-wage fixing and (ii) Convention N° 154 on the promotion of collective bargaining’,¹¹⁰ in relation to Principle 7 on ‘Information about employment conditions and protection in case of dismissals’, ‘Member States are invited to ratify (if they have not already done so) and apply relevant ILO Conventions such as (i) Convention N° 122 on Employment Policy, (ii) Convention N° 144 on Tripartite Consultations, (iii) Convention N° 135 on Workers’ Representatives and (iv) Convention N° 154 on Promotion of Collective Bargaining’,¹¹¹ and in relation to Principle 12 on Social Security, the Commission suggests that Member States ratify/apply ‘the relevant ILO conventions on social security, the European Code of Social Security and the Revised European Social Charter, and may review the reservations made for some Articles of the revised European Social Charter’.¹¹²

This mindful treatment of international sources fits a long tradition of harmonious and fruitful interaction between EU and international social law. Generally, international social standards were seen as a minimum floor of social protection that the EU’s actions in all areas would respect, and would go beyond whenever it intervened actively on social rights. The EU could act as a catalyst for the adoption and enforcement of the international standards through its external action, particularly its accession policy, and internally. EU law and international social norms could not only peacefully co-exist in the same legal space, they could establish positive synergies. And indeed, the EU legal order explicitly accommodates, and thus to a certain extent internalises, these international social instruments, particularly the ESC. Prominently referenced in the preamble of the TEU¹¹³ and article 151 TFEU, the ESC is further mentioned in the preamble of the EU Charter of Fundamental Rights, which ‘reaffirms’ ‘the rights as they result, [...] from the Social Charters adopted by the [...] Council of Europe’. Although the non-regression clause of Article 53 of the Charter only explicitly mentions the

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¹¹⁰ SWD p. 32

¹¹¹ SWD p. 35

¹¹² SWD, p. 50

¹¹³ The Member States confirm ‘their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961’.

ECHR and not the ESC, the CJEU refers to the ESC¹¹⁴ as well as the case law of the Committee of Social Rights¹¹⁵ as a source of inspiration for the interpretation of EU law.¹¹⁶ Sometimes, secondary EU law makes explicit reference to the ESC.¹¹⁷ Similarly, EU law also occupies a special position in the context of the ESC. For instance, the Revised Charter contains amendments to the original Charter of 1961 that builds on higher standards included in EU law, such as concerning gender equality, young workers and collective redundancies.¹¹⁸

This situation however changed a decade ago, and the Pillar needs to be seen in this context. Indeed, over the past ten years, before the launch of the Pillar, a number of important tensions emerged between EU and International law in this area.¹¹⁹ Problems have firstly arisen in the context of the austerity policy pursued in the economic crisis and, more particularly, through the national reforms that had to be executed in countries in return for receiving financial assistance in accordance with Memorandums of Understanding signed by the Commission and the national government. The legal status of these instruments under EU law is unclear¹²⁰ but even if they were to be considered EU norms, they would not be subject to the direct scrutiny of either the European Committee of Social Rights or the ILO enforcement bodies, as the EU is not a signatory to these instruments. As such, it is only the compliance of the national measures implementing the Memoranda that can be brought under review.

On several occasions, the European Committee of Social Rights has held that the national implementing measures infringed the Social Charter. It upheld the complaint of Greek trade unions against the introduction of special ‘apprenticeship contracts’ for young workers, which provided for a minimum wage lower than the poverty line, did not provide 3 weeks’ paid annual leave and did not mandate any type of training, as being contrary to articles 4(1),

¹¹⁴ Joined Cases C-395/08 and C-396/08 *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci* [2010] ECLI:EU:C:2008:677, para 31; Case C-579/12 *RX-II Réexamen European Commission v. Guido Strack* [2013] ECLI:EU:C:2013:570. See also Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* [2016] ECLI:EU:C:2016:429, Opinion of AG Wahl, para 60.

¹¹⁵ See recently Case C-190/16 *Werner Fries v Lufthansa CityLine GmbH* [2017] ECLI:EU:C:2017:225, Opinion of AG Bobek.

¹¹⁶ However, according to Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion of AG Jacobs, para 146 in relation to the right to bargain collectively recognised by article 6 ESC, ‘the mere fact that a right is included in the [European Social] Charter does not mean that it is generally recognized as a fundamental right.’

¹¹⁷ Eg Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

¹¹⁸ See Council of Europe, *The Relationship between European Union Law and the European Social Charter* (2014) European Committee of Social Rights Working Paper, 22 <<https://rm.coe.int/16806544ec>> accessed 9 March 2018.

¹¹⁹ Ibid. See also M. Rocca, ‘Enemy at the (Flood) Gates: EU ‘Exceptionalism’ in Recent Tensions with the International Protection of Social Rights’ (2017) 7 *European Labour Law Journal*, 52.

¹²⁰ C. Kilpatrick, ‘Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’ (2014) 10 *European Constitutional Law Review* 393, 406; Michael Schwarz, ‘A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation’ (2014) 51 *Common Market Law Review* 389.

7(7), 10(2) and 12(3) of the Charter.¹²¹ It also upheld the complaint against compensation-free dismissal during a one year trial period as in breach of article 4(4)¹²² and against pension reforms.¹²³ With regard to the argument of the Greek government that it had no choice as it was due to comply with the Memorandum, the Committee noted that ‘the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter’.¹²⁴ Similarly, the ILO’s Committee on Freedom of Association has condemned certain austerity measures taken in Greece under Troika auspices. It noted that ‘while deeply aware that these measures were taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis’, the Committee found that there were ‘a number of repeated and extensive interventions into free and voluntary collective bargaining and an important deficit of social dialogue’.¹²⁵ The Committee warned that ‘the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers’ and employers’ organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98’.¹²⁶

A second problematic case of conflict has arisen in relation to the well-known and controversial judgments of the CJEU in *Viking* and *Laval*.¹²⁷ In those cases, the CJEU considered collective action undertaken by workers to protect their interests to be a *prima facie* restriction on companies’ free movement rights enshrined in the EU Treaties. While in *Viking*, the CJEU left it open to the national court to consider whether the restriction could be justified, in *Laval* it held that it could not. The CJEU did refer to the fundamental nature of the right to take collective action as recognised by the ESC, but did not refer to the case law developed by the Committee of Social Rights.¹²⁸ In response to the judgment, the Swedish government adopted the so-called *Lex Laval*, a package of measures to bring Swedish law into compliance with EU law. In response to the ensuing complaint, the European Committee of Social Rights stated that: ‘the facilitation of free cross-border movement of services and the promotion of the

¹²¹ *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece* (Complaint) European Committee of Social Rights No 66/2011.

¹²² *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece* (Complaint) European Committee of Social Rights No 65/2011.

¹²³ *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* (Complaint) European Committee of Social Rights No 76/2012.

¹²⁴ *Pensioners’ Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece* (Complaint) European Committee of Social Rights No 78/2012, p. 10.

¹²⁵ ILO, ‘ILO calls on Greece to Bring its Labour Relations System Back to Fundamental Rights’ (International Labour Organization, 15 November 2012) <http://www.ilo.org/brussels/press/press-releases/WCMS_193308/lang--en/index.htm> accessed 9 March 2018.

¹²⁶ Governing Body of the International Labour Office (316th Session) Reports of the Committee on Freedom of Association: 365th Report of the Committee on Freedom of Association (Geneva 1–6 November 2012) para 997.

¹²⁷ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I–10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I–11767.

¹²⁸ Rocca 64.

freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers’.¹²⁹ The Committee upheld the complaint and while only directly condemning the Swedish measures, it cast another shadow over the CJEU’s controversial judgment. The importance of the violation and connection to EU law was confirmed by the Report of the Secretary General of the Council of Europe on the State of Democracy, Human Rights and the Rule of Law in Europe, which mentions the ESC decision and the necessity to finding ‘pragmatic solutions to settle conflicts between the two sets of standards’.¹³⁰

The *Viking* and *Laval* saga similarly caused friction with the ILO. In a case concerning collective action taken by the British Air Line Pilots’ Association against its employer’s plans to launch a new subsidiary airline, which British Airways held to be contrary to the *Viking* doctrine, the ILO Committee of Experts denied the application of the principle of proportionality to the right to strike and wished to make clear that while ‘its task is not to judge the correctness of the ECJ’s holdings in *Viking* and *Laval* [...] but rather to examine whether the impact of these decisions at national level are such as to deny workers’ freedom of association rights under Convention No. 87’, nevertheless ‘the doctrine that is being articulated in these [...] judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention’.¹³¹

While the Pillar does not specifically address or resolve either of these two conflicts, as it does not pertain to Euro-crisis governance nor specifically to the qualification of collective action as a restriction of the internal market freedoms, it does constitute an important olive branch that the EU extends to the international organizations in question, which they seem to have accepted. The Council of Europe Secretary General published an Opinion on the Commission’s initiative to establish the Pillar,¹³² addressing it to the President of the European Commission on 2 December 2016. In his letter, after mentioning the increasing conflicts, the Secretary General welcomed the Pillar to ‘help consolidate the synergy between the standard-setting systems that protect these fundamental rights across the continent to ensure that they are effectively implemented by the states concerned’.¹³³ He also emphasized that legal certainty and coherence between European standard-setting systems protecting fundamental social rights needed to be promoted, ensuring that the European Social Charter, ‘the Social Constitution of

¹²⁹ *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* (Complaint) European Committee of Social Rights No 85/2012 (3 July 2013), para 122.

¹³⁰ Report by the Secretary General of the Council of Europe, ‘State of Democracy, Human Rights and Rule of Law in Europe’ (2014) SG (2014)1-Final, 41.

¹³¹ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part IA), General Report and Observations Concerning Particular Countries* (International Labour Office 2010) 209.

¹³²

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dd0bc>.

¹³³ Para. 42.

Europe’, is central to the Pillar.¹³⁴ Concretely, he recommended that ‘the provisions of the [Revised ESC] should be formally incorporated in the [Pillar] as a common benchmark for states in guaranteeing these rights’ and ‘the collective complaints procedure, based on the Additional Protocol to the [ESC], should be acknowledged by the [Pillar] for the contribution that it makes to the effective realisation of the rights established in the Charter and to the strengthening of inclusive and participatory social democracies’.¹³⁵ While his requests have not (yet) been met entirely, an important part has been clearly taken up by the Commission. The ILO political level has similarly welcomed the Pillar. ILO Director-General Guy Ryder spoke as a special guest at the European Social Summit organized in Gothenburg. He praised the ambition and values of the Pillar, which he said ‘resonate’ with the ILO. This includes the conviction that ‘prosperity must be shared, that human and labour rights underpin human dignity, and that social dialogue is an indispensable ingredient for social justice and fairness at work’.¹³⁶

3.c. The Constitutional Balance between ‘the Market’ and ‘the Social’

The above-mentioned two areas of conflict in the relationship between EU and International law are of course also the areas where controversy has arisen internally. The austerity measures taken in the Euro-crisis and the internal market case law of the Court of the past decade have been considered responsible for the ‘social displacement’¹³⁷ in the EU, that has been widely recognized and deplored.¹³⁸

Implicitly, the Pillar recognizes that the EU’s social credibility as it currently stands leaves something to be desired, and aims to redress this. The Parliament’s initial report on the Pillar stated that: ‘the social dimension of European integration has suffered a heavy blow with the protracted Eurozone crisis since 2010. Nearly €2 trillion of taxpayers’ money was used in state aid to the financial sector in 2008-14, triggering a sovereign debt crisis for several Member States. At the same time, many Member States were forced to implement harsh fiscal consolidation and internal devaluation measures, largely due to the lack of common stabilisation mechanisms within Europe’s incomplete Economic and Monetary Union. These policies resulted in severe social hardship which is still acute in many countries. Through the Eurozone crisis, the EU itself has come to be seen by many citizens as a machine for divergence, inequalities and social injustice. A project associated for decades with convergence, prosperity and progress is now being blamed for downgrading of welfare systems

¹³⁴ Para. 21.

¹³⁵ Para. 46.

¹³⁶ https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_598680/lang--en/index.htm

¹³⁷ C. Kilpatrick, special issue EUCons.

¹³⁸ See: C. Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’, 67 *Current Legal Problems* (2014) p. 199 ; C. Kilpatrick and B. de Witte, ‘Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges’, *EUI Working Paper LAW* (2014); F. de Witte, ‘EU Law, Politics and the Social Question’, 14 *ELJ* (2013) p. 581; A. Koukiadaki and L. Kretsos, ‘Opening Pandora’s Box: the Sovereign Debt Crisis and Labour Market Regulation in Greece’, 41 *Industrial Law Journal* (2012) p. 276; H. Augusto Costa, ‘From Europe as a Model to Europe as Austerity: the Impact of the Crisis on Portuguese Trade Unions’, 14 *ELJ* (2012) p. 397.

and seen a threat to people’s well-being’.¹³⁹ The Parliament also acknowledged the second set of challenges that Social Europe experienced over the past decade, namely those related to labour mobility in the internal market, in the context of the free movement of workers and the provision of services (posted workers). Taking position against ‘competition on the basis of labour conditions’ it considered that ‘without a common European framework, Member States are bound to be trapped in a destructive competition based on a race-to-the-bottom in social standards’¹⁴⁰.

While in the Pillar’s explanations the common currency and the internal market are staunchly defended¹⁴¹ and the Commission’s narrative continues to carry a streak of ‘economic growth equals social outcomes’¹⁴², it is also clearly stated that ‘the social consequences of the crisis have been far-reaching – from youth and long-term unemployment to the risk of poverty – and addressing those consequences remains an urgent priority’.¹⁴³ As discussed, Commission President Juncker has presented the initiative as part of his efforts to ensure a ‘Social Triple A Rating’ for Europe, and the Pillar has to be seen alongside the proposal to revise the Posting of Workers Directive to ensure the principle of ‘equal pay for equal work’, and with the initiative of the European Labour Authority, the issue of the balance between the economic freedoms in the internal market and social rights, is increasingly drawn into the Pillar process. And while the Pillar does not, and cannot, reform the Euro-crisis measures, it does attempt to imbue EU economic governance more generally with a more social approach, by using the European Semester as a vehicle for the implementation of certain Pillar principles.

As I have argued elsewhere,¹⁴⁴ the Pillar does not (and cannot) in itself resolve the constitutional imbalance between ‘the market’ and ‘the social’ in the EU. The most important social decisions continue to be taken not in the context of the Treaty’s Social Title, but in the internal market and economic governance. In the context of the internal market, the Court may have adjusted its harsh stance in the specific area of posting,¹⁴⁵ in other areas the internal market freedoms continue to receive precedence over labour protections,¹⁴⁶ and while the EU legislator managed to amend the Posting of Workers Directive to allow more space for the application of

¹³⁹ European Parliament, Report on a European Pillar of Social Rights (2016/2095(INI)), p. 25.

¹⁴⁰ Ibidem, p. 26.

¹⁴¹ European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final, p. 3: “*The completion of the European single market in the last decades has been accompanied by the development of a solid social acquis which has resulted in progress in the freedom of movement, living and working conditions, equality between women and men, health and safety at work, social protection and education and training. The introduction of the euro has provided the Union with a stable common currency shared by 340 million citizens in nineteen Member States, facilitating their daily lives and protecting them against financial instability. The Union has also enlarged significantly, increasing economic opportunities and promoting social progress across the continent.*”

¹⁴² Ibidem, for instance on p. 4: “*To a large extent, the employment and social challenges facing Europe are a result of relatively modest growth, which is rooted in untapped potential in terms of participation in employment and productivity. Economic and social progress are intertwined, and the establishment of a European Pillar of Social Rights should be part of wider efforts to build a more inclusive and sustainable growth model by improving Europe’s competitiveness and making it a better place to invest, create jobs and foster social cohesion.*”

¹⁴³ Ibidem, p. 4.

¹⁴⁴ S. Garben, ‘The European Pillar of Social Rights: Effectively Addressing Displacement?’ *European Constitutional Law Review* [2018] 14: 210–230.

¹⁴⁵ Elektrobudowa, Regiopost

¹⁴⁶ Com v Spain 9port labour), AGET

social standards, proposals in other areas¹⁴⁷ threaten to undermine such attempts to ‘socialize’ the internal market. In economic governance, the most important social damage has been done in the context of the Euro-crisis measures, and the national reforms effected under Troika auspices remain in force, and moreover continue to fit in the overall economic approach to budgets and spending as operated in the context of the European Semester. Indeed, stakeholders have noted that while the implementation of the Pillar through the Semester should in general be welcomed, the process overall still needs to ‘shift the narrative from austerity to social investment in social rights and standards, and finance adequate and sustainable welfare states through tax justice and progressive taxation’.¹⁴⁸ The Pillar may continue to ‘socialise’¹⁴⁹ the European Semester, it does not amount to the sea change that it has affected in the context of the Better Regulation Agenda.

4. Conclusion

As one commentator has noted, the Pillar ‘initiative entails some meaningful developments for social [...] progress. However, its current form and content represents an adjustment to, rather than a transformation of, the unequal European economy and society’.¹⁵⁰ But what it does do, should also be recognized, namely significantly boosting the EU’s social credentials in a time where the EU needs a positive post-crisis narrative.¹⁵¹ This article has argued that the Pillar’s significance should be assessed not just in relation to its proclamation of 20 social rights and principles, but by conceptualising it as a broader social action plan, of which the various legislative and other proposals mentioned in the Pillar package form part. If effectively ‘implemented’ in this way, the Pillar will significantly improve the level of social protection of many European citizens. The article has shown that even if the Pillar does not, and cannot, address all of the fundamental social concerns connected to the EU project, it has been able to put a surprising social spin on the Better Regulation Agenda that was threatening to erode the social *acquis*, that it has rekindled the EU’s relationship with the ILO and Council of Europe, and that it helps rebalance the EU’s output by reviving the use of the Treaty’s Social Title, which taken altogether is no mean feat.

¹⁴⁷ E-services card

¹⁴⁸ European Anti Poverty Network

¹⁴⁹ Zeiltin and Vanhercke

¹⁵⁰ Ania Polemien, EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights, *Social Policy and Society*, Volume 17, Issue 2 April 2018, pp. 281-296

¹⁵¹ See for wide-ranging discussions on Social Europe and the crisis: C. Barnard and G. De Baere (eds), *A European Social Union after the Crisis* (CUP, Cambridge 2017) 407.