

# A decade from the 'Laval Quartet': Return of 'the Social' or a Continuation of the European Economic Constitution by Other Means?

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## Introduction

In the *Laval* case C-341/05 (2007), the Court of Justice of the European Union (CJEU) has established that national labour law, and industrial action taken in accordance with such laws, can constitute unlawful barriers (restrictions) to the exercise of economic freedoms and free movement rights.<sup>1</sup> Departing from previous case law (e.g. *Rush Portuguesa* C-113/89), *Laval* and the rest of the infamous 'Laval quartet' (*Viking*, *Rüffert* and *Commission v. Luxembourg*) have called into question the previously accepted premises of the European Social Model, understood as a European variety of the embedded liberal compromise.<sup>2</sup> Member States' autonomy to shape their own labour constitutions<sup>3</sup> has been one part of that compromise, which after *Laval* has arguably become susceptible to limitations by market (economic) freedoms of firms (or individuals).<sup>4</sup> This tendency initiated by *Laval* and the rest of 'the Quartet' was developing simultaneously with the emerging Eurozone crisis and its governance through austerity politics.

This paper argues that both these trends together have led to the "crisis of the social" in the European Union over the past decade. That "crisis of the social" has severely affected the overall legitimacy of the European integration project, which has ultimately urged EU political elites to offer political responses. In this sense, the paper examines the synergy or the lack of it between two of those political responses to the crisis of the social, namely the Revision of the Posted Workers Directive (PWD Revision, Revision of the PWD or the Revision) and the European Pillar of Social Rights (the Social Pillar or the Pillar). I argue that understanding the political countermovement against the 'Laval quartet' at EU level that has

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<sup>1</sup> C-341/05 *Laval un Partneri* [2007] ECR I-117767; See Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* 1.

<sup>2</sup> Embedded liberalism is term coined by John Gerard Ruggie in, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379; For the European context see Fritz W Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211.

<sup>3</sup> Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

<sup>4</sup> ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; Claire Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' (2009) 34 *European Law Review* 844; Joerges and Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration' (n 1).

resulted in the recent Revision of the PWD is important, as it has wider conceptual implications for the future of the European social model. The final compromise on the PWD Revision has opted for a symbolic rescue of the national welfare state (in the sense of Milward).<sup>5</sup> Finding a compromise in the introduction of an (limited) “equal pay principle” for posted workers, the Revision attempts to sustain both national social standards and cross-border services provision but with clear determinacy to preserve the former. It rejects the “access justice” as EU’s own conception of social justice,<sup>6</sup> arguably endorsed by the CJEU in *Laval*, and the market rationality behind wealth distribution between the East and the West through merely granting service providers and their workforce from the East free access to Western markets (latest yellow card debate). In this sense, the Revision signals that the Member States’ welfare arrangements together with their industrial relations system, embedded in their respective socio-economic cultures, are worth being protected.

This rejection of “access justice” and the market as a main distributive mechanism between the East and the West will, however, unlikely reconcile the tension that arose during the yellow card debate on the Revision. Rejecting regulatory competition in the social domain and protecting the already existing national welfare arrangements might only be the very first and basic step to re-imagining Social Europe. The actual conflict between old core and the Eastern periphery, which is among others deeply rooted in the structural and economic inequality among Member States from the two counterparts, should further inform the debate on distributive fairness and social justice in Europe. The newly proclaimed Social Pillar, that explicitly aims at achieving social convergence might fall short to pick up from where the Revision has left off. The herald of the apparent return of the social might therefore reveal a continuation of the previous ratio between the economic and the social sphere in the EU.

The argument will proceed as follows. (1) Section one will provide the context by introducing the European “crisis of the social” of the past decade. (2) Section two will discuss the two initiatives symbolizing a potential return of the social, namely the Revision and the Social Pillar. (3) The third section concludes by connecting these reflections to the current state of the European social model and the economic constitution.

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<sup>5</sup> Alan S Milward et al, *The European Rescue of the Nation-State* (Routledge 1992). See also Christian Joerges, Vladimir Bogoeski and Lukas Nüse, ‘Economic Constitutionalism and the “European Social Model”’: Can European Law Cope with the Deepening Tensions between Economic and Social Integration after the Financial Crisis’ in Herwig CH Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar Publishing forthcoming 2019).

<sup>6</sup> “Access justice” is a concept coined by Hans-Wolfgang Micklitz. For an overview see his ‘Social Justice and Access Justice in Private Law’ (EUI 2011) Working Paper <<http://cadmus.eui.eu/handle/1814/15706>> accessed 27 October 2017.

## I. The crisis of the social: Laval's aftermath over a decade of austerity politics

EU political elites, but also EU scholars across disciplines are increasingly talking about a distorted balance between the economic and social dimension of the European Union.<sup>7</sup> Three important implications emerge from this ongoing discourse. First, it is no longer questioned if the EU, as a political entity, has and should have a social dimension as a counterpart to its undisputed economic dimension.<sup>8</sup> Second, based on the narrative of the existing imbalance between the social and the economic dimensions of the EU, the conclusion that ultimately unfolds from the scholarly critique is that these two dimensions should be rebalanced or put in balance in the first place. The third implication is the balancing language itself. Each of these three implications should first be considered separately.

Beginning from the first one, it is hardly disputed today that the European integration project has by now developed beyond the original functional entity focused merely on the construction of a common market.<sup>9</sup> The EU is now considered to be a political project, beyond a single market with a vague social dimension.<sup>10</sup> The European social model, Social Europe or the latest European Social Union<sup>11</sup> are some of the most prominent conceptions under which different imaginaries for the social in the EU are being discussed. The Lisbon Treaty has set EU's social dimension in stone, baptizing the EU as a (highly competitive) social market economy.<sup>12</sup> This new name for an old issue has, however, come in the midst of a critical stage of the European social history. The Lisbon Treaty has been signed on 13 December 2007. Only two days before and five days after, the CJEU has delivered its judgements in the cases of *Viking*<sup>13</sup> and *Laval* respectively, making it a "baptism of fire" for the new social market economy as a European social model. These cases, together with a growing body of case law that followed, have become a symbol for the growing East-West chasm upon the issue of workers and persons mobility in the EU after the Eastern enlargement in general.<sup>14</sup> As this alone would have not been enough, the

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<sup>7</sup> See Sacha Garben, 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union' (2017) 13 *European Constitutional Law Review* 23; Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *The Modern Law Review* 817.

<sup>8</sup> The term „diemnsion“ is itself obscure, which is why, Vandenbroucke et al, for instance, attempt to introduce the term European Social Union as an alternative designation. See Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017). See also Frank Vandenbroucke, 'The European Pillar of Social Rights: from promise to delivery - Introduction to the "European Social Union (ESU) public forum debate"' (*EuVisions*, 2 December 2018) <<http://www.euvisions.eu/europea-social-union-public-forum-debate-vandenbroucke/>> accessed 7 May 2019.

<sup>9</sup> Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016).

<sup>10</sup> Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017).

<sup>11</sup> *ibid.*

<sup>12</sup> Art. 3, TFEU.

<sup>13</sup> C-438/05 *The International Transport Workers Federation and the Finnish Seamen's Union* [2007] ECR I-10779

<sup>14</sup> Not only the progeny cases such as C-346/06 *Rüffert* and C-319/06 *Commission v Luxembourg*, but also C-396/13 *Sähköalojen ammattiliitto*, C-115/14 *Regiost*, C-333/13 *Dano*, C-67/14 *Alimanovic* etc.

introduction of the social market economy has intersected with the outbreak of the global financial crisis, and by the time the Lisbon treaty has entered into force (1 December 2009) Europe was amid its own sovereign debt crisis. Alongside the developments at EU's judiciary, the austerity driven governance of the ongoing crisis was another acid test for the European social model.

The political as well as the scholarly debate carried out during the decade between the above-mentioned events and today, imply an emergence of a "crisis of the social" in the EU.<sup>15</sup> *Viking* and *Laval* were quickly followed by *Rüffert*<sup>16</sup> and *Commission v. Luxembourg*<sup>17</sup>, which as settled case law have soon established a certain operational framework according to which the CJEU has handled subsequent similar tensions.<sup>18</sup> The austerity politics of the Eurozone crisis governance has at the same time considerably pressured social rights particularly in the affected member states.<sup>19</sup> In this sense, this "crisis of the social", I will argue, was different compared to previous debates addressing the social deficit of European integration in general.<sup>20</sup> Concerns about the lacking social dimension have existed since the beginning of EU's history.<sup>21</sup> Olivier de Schutter, for instance, discerns four stages of balancing between economic and social objectives in the European Treaties.<sup>22</sup> The Lisbon Treaty will accordingly mark the beginning of a fifth stage, the one in the focus of this study.

The discourse on the original asymmetry and the social deficit has started to become more nuanced with the growing body of EU social policy since the 80s and the CJEU case law in the area of first workers' and then persons' mobility, based on which Caporaso and Tarrow have memorably argued that EU law,

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<sup>15</sup> See Vandenbroucke, Barnard and De Baere (n 8); Stefano Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (Centro Einaudi 2013) Working Paper-LPF 2 <<http://www.centroeinaudi.it/lpf/working-papers/wp-all/8625-european-citizenship-and-social-rights-in-times-of-crisis.html>> accessed 29 October 2017; Claire Kilpatrick and Bruno De Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Working Paper LAW 2014/05 <<http://cadmus.eui.eu/handle/1814/31247>> accessed 30 October 2017; Nicola Countouris and Mark Freedland, *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013); Stefano Giubboni, 'The Rise and Fall of EU Labour Law' *European Law Journal* n/a.

<sup>16</sup> C-346/06 *Ruffert* [2008] ECR I-11767

<sup>17</sup> C-319/06 *Commission v Luxembourg* [2008] ECR I-4323

<sup>18</sup> Verica Trstenjak and Erwin Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU' (2013) 38 *European Law Review* 293; Francesco Costamagna, 'The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights' (2016) Working Paper 487 <<https://iris.unito.it/handle/2318/1627380#.WfX93hNSx-U>> accessed 29 October 2017; Menelaos Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 <span Class="italic">AGET Iraklis</span>' (2017) 13 *European Constitutional Law Review* 724.

<sup>19</sup> Florian Hoffmann, 'The Future of Social and Economic Rights' in Nehal Bhuta (ed), *The Futures of Human Rights (Collected Courses of the Academy of European Law)* (OUP Oxford forthcoming); Kilpatrick and De Witte (n 13); Countouris and Freedland (n 15).

<sup>20</sup> Christian Joerges, 'A New Alliance of De-Legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project' (2008) 19 *Law and Critique* 235.

<sup>21</sup> Scharpf (n 3); Martin Höpner and Armin Schäfer, 'Polanyi in Brussels?: embeddedness and the three dimensions of European economic integration' (MPIfG 2010) Discussion Paper 10/8; Christian Joerges and Florian Rödl, "'Social Market Economy" as Europe's Social Model?' (EUI 2004) EUI Working Paper LAW 200478 <<https://papers.ssrn.com/abstract=635362>> accessed 30 October 2017; Joerges (n 20); Christian Joerges and Florian Rödl, 'Das Soziale Defizit des Europäischen Integrationsprojekts' (2008).

<sup>22</sup> Olivier De Schutter, 'The Balance Between Economic and Social Objectives in the European Treaties' [2006] *Revue française des affaires sociales* 119.

and especially the Court, had an emerging embedding function.<sup>23</sup> Also the turn to governmental experimentalism<sup>24</sup> and the disputed social policy coordination through the emerging OMC<sup>25</sup> that have pointed to existing problems with the development of Social Europe were not the same with the “crisis of the social”, in the sense of the post-Laval and austerity decade. Therefore, this “crisis of the social” I describe, constituted a rupture from the previous muddling through,<sup>26</sup> because it has exposed the European social deficit in a significantly more radical fashion. In line with Ashiagbor’s argument, these events have unravelled the flaws of the inaptness of the embedded liberal compromise<sup>27</sup> to serve as a proxy for a European social model.<sup>28</sup>

Having established the existence of a “crisis of the social”, the question that arises is how can we proceed forward to overcome the imbalance unravelled through the events of the decade following the Laval quartet and the Eurozone crisis. Logically, the imbalance shall be countervailed by (re-)balance, but it remains unclear how that (re-)balancing should ultimately be achieved and to what extent such an exercise might be possible or desirable. States whose economies are ordered according to the social market economy model have not decided overnight to balance the market with social dimensions, making it this way possible for welfare states and industrial relation systems to thrive, but these have rather come about as a result of long lasting historical and socio-economic processes in the particular polities. Finally, does the balancing language help us find a solution or it is itself part of the problem? It might indeed itself be part of the problem, potentially having a depoliticizing effect over a more political social policy visions in Europe. Especially in the case of Labour law, the balancing language might lead to what Ruth Dukes has described as overestimation of the extent of shared or balanced [sic] interest between workers and employers.<sup>29</sup> The flexicurity model, for instance, might be considered an example of such a balanced idea of the relationship between labour and capital, or in the same manner between the social and the economic. The depoliticizing power of the balancing language might ultimately lead to replacing the political dimension of the social through a depoliticized ideal of the economic and the

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<sup>23</sup> James A Caporaso and Sidney Tarrow, ‘Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets’ (2009) 63 *International Organization* 593.

<sup>24</sup> Jonathan Zeitlin, ‘Social Europe and Experimentalist Governance’ (2005).

<sup>25</sup> Mark Dawson, ‘The Ambiguity of Social Europe in the Open Method of Coordination’ (Social Science Research Network 2009) SSRN Scholarly Paper ID 1350367 <<https://papers.ssrn.com/abstract=1350367>> accessed 2 January 2018; Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press 2011).

<sup>26</sup> Frank Vandenbroucke, ‘The Case for a European Social Union. From Muddling Through to a Sense of Common Purpose’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2989038 <<https://papers.ssrn.com/abstract=2989038>> accessed 30 October 2017.

<sup>27</sup> The term “embedded liberalism” was originally coined by John Gerard Ruggie in ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 *International Organization* 379.

<sup>28</sup> Diamond Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ (2013) 19 *European Law Journal* 303.

<sup>29</sup> Ruth Dukes, ‘From the Labour Constitution to an Economic Sociology of Labour Law’, Final draft of a contribution to a Book Symposium, forthcoming in the journal *Jurisprudence*.

social coexisting in a perfect balance, where a preference for the social can easily be considered a distortion of the balance ideal, but less so the other way around. This will be discussed in some greater detail in the following section.

After this decade of a crisis of the social, there still has not been a panacea proposal that will restore or introduce the “right balance” between the economic and the social in the EU, but some initiatives have emerged in the last couple of years. I consider two of these to be particularly addressing the crisis of the social *stricto sensu*, which, I argue, are demonstrating the current understanding and likely the future vision of “the social” in Europe. The question this paper seeks to answer is what are these initiatives telling us about the current state of Social Europe and could a disentangling exercise tell us about what pathway these two initiatives are paving for the future development of Social Europe. The one is the recently adopted Revision of the Posted Workers Directive,<sup>30</sup> the other one is the European Pillar of Social Rights.<sup>31</sup> The remainder of the article discusses them.

## II. The Social Returns?

### A. The Revision of the Posted Workers Directive

#### 1. Previous political reactions to the ‘Laval quartet’

A lot has been written on the “Laval quartet”. A vast and still growing body of literature examines the respective decisions from various perspectives across disciplines. As Barnard has similarly argued,<sup>32</sup> the period of ten years after the Court has delivered these, still widely contested decisions, gives us the benefit of a hindsight to reflect on the consequences they had for Social Europe. The case law has arguably triggered various kinds of responses,<sup>33</sup> the last and most prominent of which I consider to be the Revision of the Posted workers directive (the Revision)<sup>34</sup>. Its prominence does not solely lie in the political salience of the Revision process, but also in its potential to substantively address some of the

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<sup>30</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance) PE/18/2018/REV/1, OJ L 173, 9.7.2018, p. 16–24

<sup>31</sup> European Pillar of Social Rights in 20 Principles

<sup>32</sup> Catherine Barnard, ‘The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval’ (Social Science Research Network 2015) University of Cambridge Faculty of Law Research Paper 55/2015 <<https://papers.ssrn.com/abstract=2667476>> accessed 27 October 2017.

<sup>33</sup> Susanne K Schmidt, *The Interaction of Judicial and Legislative Policymaking* (Oxford University Press 2018) <<http://www.oxfordscholarship.com.ezproxy.eui.eu/view/10.1093/oso/9780198717775.001.0001/oso-9780198717775-chapter-4>> accessed 3 April 2019; Dorte Sindbjerg Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015).

<sup>34</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (PE/18/2018/REV/1), OJ L 173, 9.7.2018, p. 16–24.

normative problems of the posting model that have ultimately materialized in *Laval*. In order to contextualize the meaning of the recently adopted Revision, an account for the previous developments over the decade is not only helpful, but necessary. Before moving to the Revision itself, I will therefore first briefly reflect on the responses to the Laval quartet prior to the Revision. I will start from 1) the initial “Polanyian countermovement” against the decisions,<sup>35</sup> continuing through the 2) ostensible attempt to overturn the case law that has resulted in the failed Monti II Regulation<sup>36</sup> and led to 3) an interim shift towards “Enforcement politics”.<sup>37</sup>

The Laval quartet has constituted a fundamental departure from previously accepted premises about the relationship between fundamental market freedoms and national industrial relations autonomy.<sup>38</sup> Applying a Polanyian framework, one could argue that this departure of the Court from its stance in *Albany* and *Rush Portuguesa*<sup>39</sup> has had a disembedding effect and thus broke the “embedded liberal compromise”<sup>40</sup> which has by then tolerated considerable autonomy of national industrial relations systems as they operate within the framework of the national labour constitutions.<sup>41</sup> The double movement and later by many reimagined as a countermovement, was conceptualized by Polanyi as the counterforce aiming at limiting the effects and influence of market expansion.<sup>42</sup>

Although, it is admittedly hard to make a meaningful comparison between 19<sup>th</sup> century England or early 20<sup>th</sup> century Europe and the present European context without having a list of caveats potentially surpassing the length of the argument itself, by applying a soft reading of the Polanyian counter movement thesis,<sup>43</sup> I argue that such a countermovement has emerged against the Laval quartet, especially against the cases *Viking* and *Laval*. This countermovement after the Laval quartet has occurred in both the academic and political realm, where academics, stakeholders and political actors have expressed their concerns about the developments that the case law was indicative of, and have

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<sup>35</sup> I draw on Polanyi’s conceptual work to understand the critique and reaction against the Laval quartet by employing Polanyi’s concept of double movement or later interpreted as a countermovement. See Karl Polanyi, *The Great Transformation* (Beacon Press 1957).

<sup>36</sup> COM (2012) 130: Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services

<sup>37</sup> Moment market with the adoption of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( ‘the IMI Regulation’ ), OJ L 159, 28.5.2014, p. 11–31

<sup>38</sup> Davies (n 5); Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (2015).

<sup>39</sup> C-67/96 – *Albany* and C-113/89 - *Rush Portuguesa v Office national d’immigration*

<sup>40</sup> See Ashiagbor (n 28).

<sup>41</sup> The notion of a national labour constitution in this context is coined by Dukes (n 3), who draws on the work by Hugo Sinzheimer and Otto Kahn-Freund.

<sup>42</sup> Geoff Goodwin, ‘Rethinking the Double Movement: Expanding the Frontiers of Polanyian Analysis in the Global South’ (2018) 49 *Development and Change* 1268 at 1.

<sup>43</sup> *Ibid.*

asked for adequate political responses.<sup>44</sup> Susanne Schmidt, in the context of the analysis of the aforementioned Monti II Regulation in her book, drawing on a study conducted by Martinsen,<sup>45</sup> writes that “the European Parliament had been particularly vocal in demanding a political response to the *Viking* and *Laval* rulings.<sup>46</sup> According to Schmidt and Martinsen, “the Parliament has actually tied its support for the re-election of Barroso to this question, and the Commission president promised to deliver such a political [sic] response in 2009.”<sup>47</sup> As most of the critique has targeted the construction of the relationship between fundamental market freedoms and the right to strike (or other collective action) in *Viking* and *Laval*, the Commission has deemed necessary to step in and clarify the status of the right to collective action in cross-border contexts.<sup>48</sup>

After various consultations with different stakeholders,<sup>49</sup> the first institutionalized attempt to raise the issue of politically addressing the case law at Commission level was the Monti Report.<sup>50</sup> Based on the report by Mario Monti, the Commission has proposed a Regulation (Monti II Regulation), stating that the respective case law “has brought to light the need to ensure setting the ‘right balance’ between the exercise of the right to strike (or other collective action) and the freedom of establishment and the freedom to provide services”.<sup>51</sup> Monti in the same line with existing scholarly critique has pointed out that the Court has established that the reach of EU law extends to collective labour disputes. He calls this “bringing of the social partners” in the heart of the economic constitution of the single market,<sup>52</sup> resonates with what Kerry Rittich describes as colonizing of the social by the economic sphere of society.<sup>53</sup> Monti, basing his proposal on proposal 7 of the prior impact assessment,<sup>54</sup> identifies three crucial challenges a legislative intervention would need to tackle. First, ensuring that the “right balance” can be set between exercising the right to strike and the freedom of establishment and the freedom to provide services. Second, examining if the PWD provides adequate protection of posted workers in situation of divergent social and employment conditions. Third, Monti notes that PWD’s

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<sup>44</sup> See for e.g. the statement by John Monks, General secretary of the ETUC at the time, in Catherine Barnard, ‘Fifty Years of Avoiding Social Dumping? The EU’s Economic and Not So Economic Constitution’ in Michael Dougan and Samantha Currie (eds), *50 years of the European treaties: looking back and thinking forward* (Hart Pub 2009) at 316.

<sup>45</sup> Martinsen (n 33) at 199.

<sup>46</sup> Schmidt (n 33).

<sup>47</sup> Schmidt (n 33) at 151.

<sup>48</sup> Marco Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’ (2014) 10 *European Constitutional Law Review* 90: 94.

<sup>49</sup> Social partners consultations etc

<sup>50</sup> Report to the President of the European Commission José Manuel Barroso by Mario Monti 9 May 2010.

<sup>51</sup> Monti II Proposal at 10.

<sup>52</sup> *Ibid.*

<sup>53</sup> Rittich rather referring the international context, see Kerry Rittich, ‘Global Labour Policy as Social Policy’ (Social Science Research Network 2008) SSRN Scholarly Paper ID 1627064 <<https://papers.ssrn.com/abstract=1627064>> accessed 2 November 2018.

<sup>54</sup> Impact assessment, Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, March 2012



application and enforcement has to be re-examined.<sup>55</sup> Important for the inquiry of this paper regarding the Revision of the PWD, is to note that Monti emphasises clearly that his proposal attempts “to clarify the general principles and applicable rules for exercising right to strike in the context of free movement of services and establishment, without reversing the case law”.<sup>56</sup>

The core message of Monti’s proposal is that general principles together with applicable rules should be clarified in order to reconcile the exercise of fundamental rights and economic freedoms in cross-border situations. Again, judicially balanced, and politically reconciled. The vocabulary attempts to depoliticise the inherent conflict between fundamental rights ingrained in the national labour constitution and the fundamental economic freedoms as the essence of EU’s Economic Constitution. The Commission’s Monti II Proposal explicitly states that there is no inherent conflict between the fundamental right to take collective action and the freedom to provide services or the freedom of establishment.<sup>57</sup> According to it, they have equal status – general equality. That equality at the same time leads to justified restriction of fundamental rights through exercise of fundamental freedom.

From a political science perspective, in Schmidt’s view, the Monti II Regulation demonstrates the impossibility of altering the Court’s interpretation politically.<sup>58</sup> For Martinsen on the other hand, the Monti II Regulation was an attempt of the EU executive to bring the case law into the political process and codify CJEU’s jurisprudence.<sup>59</sup> She argues that the Monti II Regulation was a strategic effort by the Commission to downplay the tensions between free movement principles and social rights, but has done so without success.<sup>60</sup> One might argue that the entire Monti II Project has been an attempt to provide a political response to the countermovement triggered by the case law. That attempt, however, without a genuine ambition to reverse the case law, has appropriated the balancing language of the Court and tried to solidify it as a regulation in the guise of a case law correction. The Monti II Regulation, in the attempt to create a non-hierarchical relationship of mutual respect between fundamental social rights and fundamental economic freedoms, has constructed a “self-dissolving framework”, which could hardly offer any concrete guidance to resolve a conflict between a fundamental market freedom and social rights. The best possible world would be accordingly the one where fundamental rights and fundamental freedoms would be exercised in a perfect balance and would operate in conditions of perfect reconciliation.<sup>61</sup> In this sense, what the Monti II Regulation has essentially tried to do, was following CJEU’s take in the Laval quartet and consolidating the application of the proportionality

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<sup>55</sup> Supra note 51 at 10.

<sup>56</sup> Ibid.

<sup>57</sup> Supra note 51 at 12.

<sup>58</sup> Schmidt (n 33) at 153.

<sup>59</sup> Martinsen (n 33) at 201.

<sup>60</sup> Ibid at 202.

<sup>61</sup> Art 2, Monti II Proposal.

principle in case of conflict between fundamental freedoms and fundamental rights.<sup>62</sup> This “self-dissolving” idea of proportionality, enshrined in Art 2 of the Monti II Proposal, has constituted the core novelty of the proposed Regulation. What I understand under the “self-dissolving” idea is the intentional creation of an undetermined legal norm, without meaningful guidance nor clear criteria for conducting the proportionality test. It is what Goldoni called an “irenic” conception of the relation between economic freedoms and fundamental rights.<sup>63</sup> That is clear also from the explanatory memorandum to the Proposal, where the Commission states that there was no inherent conflict between fundamental freedoms and fundamental rights, with no primacy of one over the other.<sup>64</sup> This attempt to codify the case law under the pretext of providing a shield against future similar judicial outcomes, has been recognized by parliaments of the member states, which have reacted in accordance with the early warning system procedure and reached the threshold for a yellow card.<sup>65</sup> The Commission has eventually withdrawn the proposal following the subsidiarity claims of the national parliaments.<sup>66</sup>

Monti being withdrawn, the other remaining political response has been the Enforcement directive.<sup>67</sup> These two initiatives, although considered to be a package, have been fundamentally different. The Monti II Regulation, initiated through the Monti Report, has been an attempt to address a fundamentally normative question, the one of the relationship between fundamental market freedoms and fundamental social rights. After the Monti II Regulation has failed, the normative question has been temporarily closed and the discourse has shifted towards enforcement of rights, uncovering fraudulent behaviour and cross-border cooperation of authorities. This has resulted with the adoption of the Enforcement Directive to the PWD. However, the political salience of the posting issue<sup>68</sup>, together with constant developments regarding this issue at CJEU level, have led towards reopening of the greater normative aspects of the posting question beyond enforcement.

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<sup>62</sup> Goldoni (n 41) at 95.

<sup>63</sup> *ibid.*

<sup>64</sup> Monti II Proposal.

<sup>65</sup> Ian Cooper, ‘A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike’ (2015) 22 *Journal of European Public Policy* 1406. Also see Marco Rocca, ‘The Proposal for a (So-Called) “Monti II” Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services: Changing without Reversing, Regulating without Affecting?’ (2012) 3 *European Labour Law Journal* 19.

<sup>66</sup> Procedure 2012/0064/APP COM (2012) 130: Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services

<sup>67</sup> Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)

<sup>68</sup> ‘Travailleurs Détachés : La Victoire Européenne de Macron - Libération’

<[http://www.liberation.fr/france/2017/10/24/travailleurs-detaches-la-victoire-europeenne-de-macron\\_1605391](http://www.liberation.fr/france/2017/10/24/travailleurs-detaches-la-victoire-europeenne-de-macron_1605391)> accessed 19 May 2018.

## 2. The Revision as a symbolic rescue of the welfare state<sup>69</sup>

The enduring critique of the original Laval quartet and the subsequent case law as well as the developments in the political realm after the Monti II withdrawal and the turn towards enforcement have ultimately led to a revival of the posting *problematique* and has brought the issue into the core of the social agenda of Juncker's Commission. Announced in his 2015 State of the Union speech, the first Proposal for a Targeted Revision of the Posted workers directive has been released on March 8 2016.<sup>70</sup> With no doubts regarding its political salience, posting of workers has become the Gordian knot of EU's social dimension and the one heroically tackling its normative gist through concrete measures could likely be able to praise themselves for restoring the faith in Social Europe. After two years of cumbersome negotiations culminating with another yellow card procedure,<sup>71</sup> on 29 May 2018 the final text of the Revision was voted at the European Parliament (EP) with great majority<sup>72</sup>, and was adopted by the EPSCO Council on June 21 2018.<sup>73</sup>

Aligning with the countermovement against the Laval quartet, which has accused the Court of facilitating the colonization of "the social" through "the economic" and depriving member states' labour constitutions of their autonomy, the Revision readdresses the territoriality principle<sup>74</sup> in Labour law. In the words of van Hoek, it might be seen as an attempt to re-embed the employment relationship, disembedded through CJEU's interpretation of the previous legal framework<sup>75</sup>. The Revision proposal tackled several important aspects of the regulatory framework of cross-border posting of workers (time period of posting, posted temporary agency workers etc.), but at least its political relevance was mostly reduced to "the equal pay principle" or the normativity it has promoted through abolishing undermining national systems of wage-setting, thus re-empowering national labour constitutions and industrial relations systems of the member states.<sup>76</sup> It was indeed not the talk of "equal pay" *strictu sensu* as known from equality law, which would in theory mean that the posted workers for the same work in the same workplace will be entitled to the same payment and working conditions as domestic ones.

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<sup>69</sup> Milward (n 5).

<sup>70</sup> SOTEU speech 2015

<sup>71</sup> Diane Fromage and Valentin Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive' (2017) 10 *European journal of legal studies* 125.

<sup>72</sup> 456 votes yes to 147 no, with 49 abstentions, see more at <http://www.europarl.europa.eu/news/en/press-room/20180524IPR04230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>

<sup>73</sup> 'Posting of Workers: Council Adopts the Directive - Consilium', accessed 28 June 2018, <http://www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/>.

<sup>74</sup> For a detailed understanding of territoriality see Uglješa Grušić, 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 *The Modern Law Review* 722.

<sup>75</sup> Van Hoek Aukje, 'Re-Embedding the Transnational Employment Relationship: A Tale about the Limitations of (EU) Law?' (2018) 55 *Common Market Law Review* 449.

<sup>76</sup> recital 16, Art 1 (e) In Article 1, a paragraph 5

The Revision has introduced the right to the same minimum standard regarding remuneration and working conditions listed in Article 3, paragraph 1 of the original PWD.

The introduction of this reform of “equal pay” for posted workers (*lato sensu*) has turned out to be quite controversial. The reaction the initial Proposal has triggered from parliaments in the new member states unveiled again the much deeper tension behind the posting of workers, namely the West-East division upon the issue of labour mobility in general.<sup>77</sup> Concerned by losing an important competitive advantage in the cross-border trade in services due to the announced “equal pay” principle, the national parliaments of eleven member states have sent reasoned opinions to the European Commission right after the Revision Proposal has been released, reaching the threshold for a yellow card.<sup>78</sup> The reasoned opinions were formally backed by subsidiarity concerns,<sup>79</sup> which the Commission has dismissed advancing the Revision procedure that resulted in the text voted by the Parliament on May 25, and adopted by the EPSCO council few weeks later. The text finally adopted is in some aspects more ambitious than the original proposal.

The “protection vs. protectionism dilemma” of Countouris and Engblom<sup>80</sup> has been in depth analysed through the core-periphery lenses,<sup>81</sup> where authors troubled by the one-sidedness of this discourse of harm arguably under western bias have asked for more nuance in the constructing of the analytical framework as well as the analysis itself. Similar argument along the lines of Kukovec’ reversed perspective of the economic and the social using Wittgenstein’s duck-rabbit metaphor, has been made in international context, based on concerns about increasing substantive fairness and reaching a level of egalitarian justice (by libertarian approach of reasoning) globally, which in this case would apply to the EU as an integrated community of (economically) unequal MS. The idea is that the opening of the borders to free movement of labour and services in order to benefit structurally disadvantaged market agents will contribute to substantively fairer distribution of overall market gains.<sup>82</sup> Especially for low qualified workers from the periphery, who otherwise would probably not make use of their mobility rights, the possibility to be mobile within the scope of their home country employment relationship

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<sup>77</sup> See Maurizio Ferrera, ‘The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights’, 22 *ELJ* (2016) p. 791.

<sup>78</sup> Probably only Denmark has convincingly argued against based on subsidiarity concerns. See more in Fromage and Kreilinger (n 71).

<sup>79</sup> Art 5 (3) TEU. See *ibid*.

<sup>80</sup> Nicola Countouris and Samuel Engblom, ‘Protection or Protectionism?’ – A Legal Deconstruction of the Emerging False Dilemma in European Integration’ (UCL Labour Rights Institute 2015) On-Line Working Paper 1/2015 <<http://discovery.ucl.ac.uk/1451970/>> accessed 27 October 2017.

<sup>81</sup> Damjan Kukovec, ‘Law and the Periphery’ (2015) 21 *European Law Journal* 406. Dorota Leczykiewicz, ‘Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval’ in Mark Freedland and Jeremias Prassl (eds), *EU Law in the Member States: Viking, Laval and beyond* (Hart Publishing 2015) <<https://papers.ssrn.com/abstract=2432720>> accessed 19 May 2018.

<sup>82</sup> Sylvie Loriaux and Alexia Herwig, ‘International Trade, Fairness, and Labour Migration’ (2014) 1 *Moral Philosophy and Politics*.

might be seen as an opportunity for them to raise their standard of living and thus enjoy wider range of social rights and protection. Hence, the possibilities the single market offers to the different agents from its constituent polities are not equally distributed between agents and between polities.<sup>83</sup>

What makes the Revision worthy of scholarly attention is its attempt to indirectly return to the normative question abandoned after the failure of the Monti II Regulation, and thus readdress the relationship of labour mobility for cross-border services provision and the national labour constitution. National political circumstances provided for a minor social momentum, which has been used for securing support for the already adopted Revision of the PWD.

Mainly through the replacement of minimum rates of pay through remuneration and the extended wage (and working conditions mechanism), the Revision has made a symbolic statement in support of the member states' labour constitutions and thus attempted to launch, not a reversal, but a recovery of the "crisis of the social" caused by Laval and its subsequent jurisprudence of the last decade. In this sense, the Revision has opted for a symbolic rescue of the national welfare state and rejected access justice (*Zugangsgerechtigkeit*) as EU's conception of social justice.<sup>84</sup> arguably endorsed by the CJEU in Laval, and the market rationality behind wealth distribution between the East and the West through merely granting service providers and their workforce from the East free access to Western markets. In this sense, the Revision signals that the Member States' welfare arrangements together with their industrial relations system, embedded in their respective socio-economic cultures, are worth being protected. This rejection of "access justice" and the market as a main distributive mechanism between the East and the West will, however, unlikely reconcile the tension that arose during the yellow card debate on the Revision. Rejecting regulatory competition in the social domain and protecting the already existing national welfare arrangements is only the very first and basic step to re-imagining Social Europe. The actual conflict between old core and the Eastern periphery, which is among others deeply rooted in the structural and economic inequality among Member States from the two counterparts, should further inform the debate on distributive fairness and social justice in Europe.

What the Revision could not address, was left off to be potentially considered by other instruments with likely more visionary and programmatic aspirations. The minor social moment of the Revision has continued with a larger one with the concomitant Proclamation of the European Pillar of Social Rights.<sup>85</sup> Could it step in and take over from the Revision regarding the underlying conflict based on structural inequality between member states that has been unravelled? How does the Pillar help addressing the "crisis of the social"?

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<sup>83</sup> Kukovec (n 81).

<sup>84</sup> *Zugangsgerechtigkeit* as coined by Micklitz (n 6).

<sup>85</sup> The European Pillar of Social Rights has been solemnly proclaimed at the European Social Summit in Gothenburg, on 17 November 2017.

## B. The European Pillar of Social Rights

On 17 November 2018, Marianne Thyssen, EU Commissioner for Employment, Social Affairs, Skills and Labour Mobility, gave the following statement:

“Happy first anniversary to the European Pillar of Social Rights! Exactly one year ago all leaders of the European Union proclaimed the Pillar at the first Social Summit in twenty years, a **milestone in the social history of Europe**. I called it a signal of unity, hope and action. Because it's a joint promise to deliver on a **stronger social dimension for Europe**. To work and make a positive difference in the lives of Europeans. When the city of Helsinki manages to reduce homelessness, it is implementing the Pillar. When social partners bargain for fairer working conditions ... When teachers and trainers give the best of themselves to skill young and old... They implement the Pillar! Let's all together continue to work on turning the Pillar into reality.”<sup>86</sup>

What could possibly make the Social Pillar “a milestone in Europe's social history”? That is a serious statement, which implies a belief that the Pillar is a project with a considerable capacity to induce a wide social reform within the European Union. In this regard, it is, first, important to decipher the vision of the European social model the Pillar endorses. What are the problems it has identified and what responses to those it has to offer? More importantly, in what “language” the Pillar attempts to face the identified challenges and strengthen the social dimension of the European integration project? My initial impression after looking at the *travaux préparatoires* of the Pillar as well as the final text<sup>87</sup>, was that the enthusiasm accompanying the Pillar hardly corresponds to the capacity of the instrument to confront the challenges it has identified. An early analysis has therefore led me to describe it elsewhere as an example of the “EU political culture of total optimism”.<sup>88</sup>

More than three years have passed from the first announcement of the Pillar, and although it might still be early for empirical studies several authors have already written on the potential of this instrument and its possible implications for Social Europe. Kilpatrick et al. have early talked of the transition from austerity to legitimacy, understanding the symbolism of the Pillar as a departure from the austerity governance and thus as an attempt to legitimize the Eurozone (governance)<sup>89</sup> and the European Union

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<sup>86</sup> Marianne Thyssen, 17 November 2018.

<sup>87</sup> Proclamation, 17 November 2017

<sup>88</sup> Vladimir Bogoeski (2018), “The European Political Culture of Total Optimism is not Dead: Reflections on the European Pillar of Social Rights”, in Christian Joerges and Josef Hien (eds.), *Responses of European Economic Cultures to Europe's Crisis Politics: The Example of German-Italian Discrepancies*, Robert Schuman Center (EUI). Available at: <http://cadmus.eui.eu/handle/1814/59884>, based on the concept originally developed by Giandomenico Majone, ‘The Deeper Euro-Crisis or : The Collapse of the EU Political Culture of Total Optimism’ (2015) Working Paper <<http://cadmus.eui.eu/handle/1814/35281>> accessed 3 August 2018.

<sup>89</sup> For literature on the tensions between the Eurozone crisis governance and social rights see Countouris and Freedland (n 15); Giubboni, ‘European Citizenship and Social Rights in Times of Crisis’ (n 15); Geoff Kennedy,

as a whole through the rhetoric and potentially a vision of a strengthened social dimension.<sup>90</sup> Simon Deakin has discerned some potentially positive sides of the Pillar, but has also pointed to some pitfalls of this approach, framing the problem as a discrepancy between the Pillar's means and ends.<sup>91</sup> Florian Rödl has criticized the Pillar and its approach to offer a new imaginary of Social Europe by declaring (mostly) already existing individual social rights, ultimately describing the instrument as a misleading promise.<sup>92</sup> But there also have been readings of the Pillar, which in spite of its flaws and obscurity, have seen some potential and have seen it in general as a potentially positive development.<sup>93</sup>

This section aims to contribute towards further understanding of the Social Pillar's potential to genuinely contribute towards social convergence among member states and thus potentially address the chasm between the European core and the peripheries, witnessed during the latest yellow card procedure and the austerity governance. In order to understand the potential synergy between the Revision and the Pillar, first I will briefly go through the context and the motives for the Pillar. Equally important is to understand the Pillar's vision of the "social" in the European Union, based on the rights and principles of the final document, the accompanying staff working documents as well as the wider debate. Finally, the section will attempt to discern the main challenges for such a synergy between the Revision and the Pillar to succeed.

## 1. Behind the idea and motives of The Pillar: what is it responding to?

For any meaningful discussion on the Social Pillar, the financial and economic crisis is a good starting point. Florian Hoffmann, writing on the "Future of Social and Economic Rights",<sup>94</sup> reflects on the effects the successive financial and general economic crises since 2008 had on social and economic rights, in both the global North and the global South. Apart from the evidence of violations on economic and

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'Embedding Neoliberalism in Greece: The Transformation of Collective Bargaining and Labour Market Policy in Greece during the Eurozone Crisis' (2016) 97 *Studies in Political Economy* 253; Kilpatrick and De Witte (n 15).

<sup>90</sup> Claire Kilpatrick, Elise Muir and Sacha Garben, 'From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy Brief' (*EU Law Analysis*, 20 March 2017) <<http://eulawanalysis.blogspot.com/2017/03/from-austerity-back-to-legitimacy.html>> accessed 29 October 2017.

<sup>91</sup> Simon Deakin, 'What Follows Austerity? From Social Pillar to New Deal (Chapter 8) - A European Social Union after the Crisis' in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (2017).

<sup>92</sup> Florian Rödl, *Soziale Rechte in Europa: Von irreführenden Versprechen und notwendigen Kämpfen*, WSI-Herbstforum 2017.

<sup>93</sup> Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210; Zane Rasnača, 'European Trade Union Institute (ETUI) - Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-Level Policymaking' (ETUI 2017) Working Paper 2017.05 <<https://www.etui.org/Publications2/Working-Papers/Bridging-the-gaps-or-falling-short-The-European-Pillar-of-Social-Rights-and-what-it-can-bring-to-EU-level-policymaking>> accessed 27 October 2017. See the contribution to the debate on the Social Pillar launched by Frank Vandenbroucke and Maurizio Ferrera "The European Pillar of Social Rights: from promise to delivery – Introduction to the "European Social Union (ESU) public forum debate" at <http://www.euvisions.eu/europea-social-union-public-forum-debate-vandenbroucke/>.

<sup>94</sup> Hoffmann (n 19).

social rights,<sup>95</sup> he emphasizes how the general viability of these rights in times of crisis has been put into question.<sup>96</sup> In this context, social and economic rights have been back on the agenda, mainly being used by scholars, activists and stakeholders to express and frame the complex policy issues that threaten the contemporary welfare states in a globalized world.<sup>97</sup> Hoffmann's argument about the consequences of the decade of financial and economic crisis having impact on social and economic rights in both, the global North and the global South, is an invitation to reflect more closely on the European reality within this global context.<sup>98</sup> In the global debate, Europe or the European Union is often spoken of as being part of the global centre (North) in its entirety. But in the European discourse the notions of a European core/centre and a periphery existing within the Union itself have been introduced and reinforced during the crisis decade.<sup>99</sup> This discourse of a "European centre and periphery" rejects the assumption about the EU as only being part of the global centre, and opens the door to reflect about the existing socio-economic and structural discrepancies between different parts within the European Union itself. The "crisis of the social" described in first section has contributed to further entrenching the core-periphery division in the EU debate. These developments have seriously questioned the (social) legitimacy of the European integration project.<sup>100</sup> And this is where the Social Pillar comes into play.

Commission's President Juncker has first mentioned the Pillar in his State of the Union Address from September 2015 right after admitting that the Union has not been in a good state due to the consequences of the economic crisis:<sup>101</sup>

"... I will want to develop a European Pillar of Social Rights, which takes account of the changing realities of Europe's societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area. The European Pillar of Social Rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU. I will expect social partners to play a central role in this process. I believe we do well

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<sup>95</sup> Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 521.

<sup>96</sup> Hoffmann (n 19). See Gráinne de Búrca, Claire Kilpatrick and Joanne Scott, *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Bloomsbury Publishing 2013).

<sup>97</sup> For an example see Radika Balakrishnan and others, 'Maximum Available Resources & Human Rights: Analytical Report' (2011) <<https://www.cwgl.rutgers.edu/economic-a-social-rights/380-maximum-available-resources-a-human-rights-analytical-report->> accessed 7 April 2019.

<sup>98</sup> Radika Balakrishnan and others, 'Maximum Available Resources & Human Rights: Analytical Report' <<https://www.cwgl.rutgers.edu/economic-a-social-rights/380-maximum-available-resources-a-human-rights-analytical-report->> accessed 7 April 2019.

<sup>99</sup> For more on the core-periphery dynamics within the EU see Kukovec (n 71); Adelaide Duarte and Gabriela Carmen Pascariu, *Core-Periphery Patterns across the European Union: Case Studies and Lessons from Eastern and Southern Europe* (Emerald Group Publishing 2017).

<sup>100</sup> Jotte Mulder, 'Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness' (Thesis, 2016) <<http://cadmus.eui.eu/handle/1814/41264>> accessed 30 October 2017.

<sup>101</sup> President Jean-Claude Juncker, State of the European Union (SOTEU) Address, European Parliament, Strasbourg, 9 September 2015.



to start with this initiative within the euro area, while allowing other EU Member States to join in if they want to do so.”<sup>102</sup>

Hence, the Pillar is primarily meant to “deepen” the European Monetary Union (EMU), drawing on the concepts of competitive social market economy and social policy as a productive factor.<sup>103</sup> The missing coordination of economic and social policy in the EMU is meanwhile widely recognized as one of the problems exacerbating the crisis in the Eurozone.<sup>104</sup> One might ask, if the Pillar is addressing social shortcomings of the design of the EMU, what justifies my expectations that it should address the East-West chasm based on the issue of labour mobility. Although the Pillar is directly conceived as the social component of the European Semester and the Eurozone, one could argue that it has also come as a response to the wider concerns about the generally weak(end) social dimension of the European integration project.<sup>105</sup> In its preamble, at several points the upholding of the diversity of national welfare systems and industrial relations systems (social partners) have been emphasized as an issue of utmost importance.<sup>106</sup> One might argue that this directly translates as almost an apology to the criticism of the *Laval quartet* jurisprudence. Further, fact that the Pillar has been introduced at the same time with the Revision and the broader “Labour mobility package”,<sup>107</sup> might additionally speak of the Commission’s possible intentions to signal a broader social reform being underway.

Europe-wide consultations took place over the course of ten months in 2016 after the Pillar’s announcement, where stakeholders provided around 200 position papers and 16.500 replies were received to the online dedicated questionnaire, on the base of which the Commission has recommended a final text for the Pillar.<sup>108</sup> The consultations have identified four broad trends that the Pillar should address: (i) the social consequences of the crisis, including increasing poverty and exclusion, inequalities and unemployment, low growth and competitiveness; (ii) the future of work and the emerging digital labour market; (iii) demographic developments, namely the ageing of Europe’s population; and (iv) economic divergence across Member States.<sup>109</sup> After one year of consultations<sup>110</sup>, on 26 April 2017 the EPSR has been issued by the Commission and inter-institutionally proclaimed on 17 November in Gothenburg.<sup>111</sup> The Pillar is addressing both the EU institutions (Proclamation) and the

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<sup>102</sup> Ibid.

<sup>103</sup> Deakin (n 91).

<sup>104</sup> Kilpatrick and De Witte (n 13).

<sup>105</sup> As recognized by Garben (n 93).

<sup>106</sup> Para 7, 16, especially 19, Preamble, Social Pillar.

<sup>107</sup> The Labour Mobility Package, announced in the 2015 and 2016 Commission work programmes, aimed to support labour mobility and tackle abuse by means of the better coordination of social security systems, the targeted review of the Posting of Workers Directive and an enhanced European Network of Employment Services (EURES).

<sup>108</sup> SWD(2017) 206 final, Report on the public consultation, Brussels, 26.4.2017, at 5.

<sup>109</sup> COM(2017) 250 final, Establishing a European Pillar of Social Rights, Brussels, 26.4.2017, at 4.

<sup>110</sup> Additional note: the wide reaching consultations on the EPSR involving hundreds of concerned NGOs, social partners and stakeholders was something the “pillar process” has been widely praised for.

<sup>111</sup> Proclamation, Social Pillar.

Member States, as stated by Commission's President Jean-Claude Juncker in order to 'serve as a compass for the renewed convergence within the euro area'.<sup>112</sup> However, the proclamation is a soft law instrument without legally binding force. The fact that the Pillar has been inter-institutionally proclaimed could perhaps, at least in theory, increase its relevance as a non-legally binding instrument. Analogy could be made with the history of the EU Charter of fundamental rights (the Charter) as another instrument that have been first inter-institutionally proclaimed prior to being incorporated into EU's primary law in Lisbon 2009.<sup>113</sup> In the concert case of the Pillar, however, no such intentions could be claimed. It would be even confusing as many of the rights and principles it contains are already part of the Charter. The proclamation can be interpreted only as an expression of political commitment by the proclaiming actors, in this case the three EU institutions, to endorse the Pillar's principles.<sup>114</sup>

## 2. How the Pillar envisions the "social"?

The underlying Pillar's ambition is to complement the existing EU "social acquis" by "giving new and more efficient rights to citizens, which set an agenda for better performing economies and more equitable and resilient societies".<sup>115</sup> The accompanying documents repeatedly state that the Pillar needs to be seen as an instrument, which will serve as a "compass of convergence" within the Euro Area.<sup>116</sup> The social convergence that the Pillar should steer among the Member States of the Eurozone, is predominantly functional and needs to serve to reach deeper economic and monetary integration. The focus on social convergence as a process overshadows the concrete goal all Member States and the EU itself should converge to. This paradigm seems to be the contested "flexicurity" model that the Pillar intends to petrify as the European recipe for balancing social rights and economic freedoms,<sup>117</sup> by fostering the already well-known discourse of, in the words of Ruth Dukes, "overestimation of the extent of shared interest between workers and employers".<sup>118</sup>

Both the legal and ideational grounds of both the Pillar and the "flexicurity" model can be found in Article 3 of the Treaty on the European Union, which states that "the Union shall establish an internal market. It shall work for the sustainable development of Europe based on *highly competitive social market economy*...".<sup>119</sup> The inherent tension between the economic and the social within that phrase

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<sup>112</sup> COM(2017) 250 final.

<sup>113</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

<sup>114</sup> Rasnača (n 93).

<sup>115</sup> Supra note 33, at 4.

<sup>116</sup> SOTEU Address in supra note 101; COM(2016) 127 final, in supra note **Error! Bookmark not defined.**; COM(2017) 250 final, in supra note 109; COM(2018) 130 final, Monitoring the implementation of the European Pillar of Social Rights.

<sup>117</sup> COM(2016) 127 final, at 5; SWD(2017) 201 final, at 22 ff.

<sup>118</sup> Ruth Dukes, From the Labour Constitution to an Economic Sociology of Labour Law, Final draft of a contribution to a Book Symposium, forthcoming in the journal *Jurisprudence*.

<sup>119</sup> Preamble 1, Pillar; Art 3(3) TEU.

has extensively been commented elsewhere.<sup>120</sup> It is, however, again reflected in the Pillar's narrative where "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."<sup>121</sup> The further legal-ideational backing of the Pillar is listed on the outset of its Preamble, covering all the Articles from the Treaties according to which the European Union is able to set and regulate social objectives.<sup>122</sup>

The Pillar locates its aim in supporting the efforts for more inclusive and sustainable growth by "improving Europe's competitiveness and making it a better place to invest, create jobs and foster social cohesion."<sup>123</sup> According to paragraph 12 of its Preamble, the aim of the European Pillar of Social Rights 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 (emphasis added)". The minimalist approach is apparent and it reminds of other international instruments, for instance, the International Covenant for Economic, Social, and Cultural Rights, which strives for a minimum floor of protection in domains like housing, health, and food, rather than a fuller bodied egalitarianism<sup>124</sup>. The conceptual point, in other words, is that the Pillar fits in with the rest of economic and social rights agenda as it seems to offer much more minimalist than an egalitarian agenda.<sup>125</sup>

Content wise the principles included in the Pillar are divided into three chapters: Equal opportunities and access to the labour market; Fair working conditions; Social protection and inclusion.<sup>126</sup> Unfortunately the content and all the aspects of the potential usage of the Pillar cannot be discussed in details here, but they have been extensively covered elsewhere.<sup>127</sup> The "pillar package" consisted of many documents, two of which have been central<sup>128</sup> – a recommendation and a draft proclamation, both almost identical in their content and both setting out 20 principles covering a wide range of areas of social policy and labour law. Within the 20 principles, there are 35 discernible rights that citizens

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<sup>120</sup> Joerges and Rödl, "'Social Market Economy' as Europe's Social Model?" (n 21); Scharpf (n 1).

<sup>121</sup> Para 11, Preamble

<sup>122</sup> Pillar, Preamble, 2, 3, 4, 5 and 6. Art 9 TFEU, Art 151 TFEU, Art 152 TFEU.

<sup>123</sup> Para 11, Preamble, Social Pillar.

<sup>124</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Hoffmann (n 19).

<sup>125</sup> Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2015) 77 *Law and Contemporary Problems* 147.

<sup>126</sup> Zane Rasnača, '(Any) Relevance of the European Pillar of Social Rights for EU Law?' (*European Law Blog*, 17 November 2017).

<sup>127</sup> Klaus Lörcher and Isabelle Schömann, 'The European Pillar of Social Rights: Critical Legal Analysis and Proposals' (ETUI 2016) 139 <<https://papers.ssrn.com/abstract=2859976>> accessed 30 October 2017; Rasnača (n 93).

<sup>128</sup> On 26 April 2017 the Commission issued the so-called "Pillar package" consisting of about 17 documents.

could claim against their member states.<sup>129</sup> The language of principles and rights is itself obscure.<sup>130</sup> The proposed initiatives relate to the work-life balance of parents and caretakers, access to social protection, the regulation of employees' working time, etc. Many of these can be found in pre-existing documents such as the EU Charter of Fundamental Rights, the European Social Charter from Turin 1961 and the Community Charter of the Fundamental Social Rights of Workers 1989.<sup>131</sup>

Regarding the Pillar's relationship with other national and international instruments in the field of social rights, "the European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation."<sup>132</sup>

### 3. The language of (social) rights in the context of member states' diversity and inequality

The last to examine is the rationale behind the Pillar's rights approach. Susan Marks, for example, analysing Naomi Klein's argument regarding the human rights movement, states that a defining characteristic of the new movement was its "non-political creed".<sup>133</sup> In the same vein, in his previous and also in his latest book "Not Enough: Human Rights in an unequal world", Samuel Moyn argues that economic and social rights have failed to challenge inequality and distributive fairness both in national and global political economy.<sup>134</sup> In a similar manner, the creators of the Pillar seem to fail to recognize the constraints of the rights approach, thus possibly foreclosing other visions for alternative redistributive politics.

One might fairly argue that it would be unfair to test the Pillar's aptness in regard to inequality and distributive fairness, which in the European context can rightly be considered within and between polities. Their argument would likely be that the main goal of the Pillar is to contribute to completion of

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<sup>129</sup> Martin Höpner, 'Mogelpackung: Warum soziale Individualrechte die Europäische Union nicht sozialer machen' (25 May 2017) <<http://www.ipg-journal.de/rubriken/europaeische-integration/artikel/mogelpackung-2047/>> accessed 15 May 2018.

<sup>130</sup> Frank Hendrickx, 'Editorial: The European Pillar of Social Rights: Interesting Times Ahead' (2017) 8 *European Labour Law Journal* 191.

<sup>131</sup> Rec. 3, Preamble, Social Pillar.

<sup>132</sup> Para 16, Preamble, Pillar.

<sup>133</sup> Susan Marks, *Four Human Rights Myths* in David Kinley, Wojciech Sadurski and Kevin Walton, *Human Rights: Old Problems, New Possibilities* (Edward Elgar Publishing 2013); Moyn (n 125).

<sup>134</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge (Massachusetts): Harvard University Press, 2018.

the Eurozone by emphasizing the importance of a “genuine social dimension” in relation to a common monetary (and fiscal) policy. But bearing in mind the inequality of economic development or strength of the polities within the Eurozone and even more so in the Union, and the Pillar’s strive for convergence, challenging the existing inequality and thinking about distributive fairness is already on the table. Therefore, understanding the Pillar’s ambition and its *de facto* potential through reflecting on the choice of the rights approach is of a great importance. In this sense, Florian Rödl, without an explicit reference to it, implies understanding of social rights in a similar fashion as TH Marshall in his seminal work “Citizenship and Social Class”<sup>135</sup>, and describes the pursuit of structural social objectives merely through the language of rights as the “juridical misconception” (*juridisches Missverständnis*) of social rights.<sup>136</sup> The Social Pillar will, therefore, likely face difficulties establishing the required legal framework and institutional structure in the Member States where these are not available, nor could respond to the most critical point of weakness of such previous declarations of social rights, namely that Member States could still invoke the pretext of “maximum available resources”.<sup>137</sup> This together with the injusticiability of some of the rights due the unbinding nature of the Pillar significantly reduces its potential.

The majority of the rights and principles, with a few possible exceptions referring to non-discrimination and fair working conditions, require active policy and legislative measures, as well as substantial budgetary means, in order to establish the institutional structures indispensable for a meaningful realisation of these rights. Almost all rights and principles from the third chapter “Social Protection and Inclusion” (childcare and support to children, social protection, unemployment benefits, minimum income, old age income and pensions, *etc.*) express rights and entitlements to public services and benefits, and they are all likely are of a programmatic nature. The realisation of most of these rights will depend on the structural and material capacity of each Member State, the current diversity of national social models and differences in terms of the availability of the resources in the respective Member States will certainly be reflected in the Pillar’s outcome. However, the Pillar does not make any clear reference regarding transfer of budgetary resources, which leaves unclear how exactly the necessary structures in the respective Member States will be built, bearing in mind the current European reality reflecting high degree of socio-economic inequality among Member States.<sup>138</sup>

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<sup>135</sup> TH Marshall, *Citizenship and Social Class* (Pluto Press 1987).

<sup>136</sup> See Florian Rödl, *Soziale Rechte in Europa: Von irreführenden Versprechen und notwendigen Kämpfen*, WSI-Herbstforum 2017.

<sup>137</sup> SWD(2017) 201 final, at 4. See Article 2, The Covenant.

<sup>138</sup> See Vandenbroucke, ‘European Unemployment Insurance: What Citizens Really Think’ (*Institut Jacques Delors*) <<http://institutdelors.eu/publications/european-unemployment-insurance-what-citizens-really-think/?lang=en>> accessed 2 May 2019.

Social rights have without doubt been of paramount importance for improving people's lives globally.<sup>139</sup> In the EU context, adding a social dimension to market integration through "individual" rights has been the rule rather than the exception in the history of the European integration project,<sup>140</sup> therefore the political choice of the rights approach of the Pillar should not come as a surprise. But even if we agree that the rise approach has been partly chosen due to the difficulty to adopt substantive social policy measures in the present conditions of welfarism diversity in the Union, the Pillar might fall short addressing structural challenges of market integration and years of austerity policy, such as for example inequality, poverty and inclusion, through declaring individual rights.

Finally, this section will address the weaknesses of the Pillar's territorial scope. The reflection paper published alongside the Pillar proposed three scenarios: limiting the social dimension of the EU to free movement, deepening the social dimension with all (27) Member States, or going further with the countries in the Eurozone. The Pillar is at the moment focused on the Eurozone, other Member States are welcome to participate on voluntary basis. While the Southern member states are covered, most of the new member states from the East which have entered the Union with a generally weaker social sphere inherited from their neo-liberal reforms for the radical market opening in the 90s,<sup>141</sup> are currently left out from the Pillar initiative. Following the logic of multi speed Europe and differentiated integration<sup>142</sup> and reserving a mandatory character of the Pillar for the Eurozone, the EU is losing a chance for at least addressing if not closing the currently acute East-West division/divergence.

### III. Embedded neo-liberalism 2.0?<sup>143</sup>

What both processes have successfully done, the Eurozone crisis governance and the judicial resolution of conflicts between supranational economic and national social rights, was the questioning of the

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<sup>139</sup> See Phillip Alston, 'Does the Past Matter? On the Origins of Human Rights' [2019] Harvard Law Review <<https://harvardlawreview.org/2013/05/does-the-past-matter-on-the-origins-of-human-rights/>> accessed 7 May 2019.

<sup>140</sup> Martin Höpner and Armin Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe' (Social Science Research Network 2007) SSRN Scholarly Paper ID 976162 <<https://papers.ssrn.com/abstract=976162>> accessed 29 October 2017; Höpner and Schäfer (n 21).

<sup>141</sup> Laszlo Bruszt and Visnja Vukov, 'Making States for the Single Market: European Integration and the Reshaping of Economic States in the Southern and Eastern Peripheries of Europe' (2017) 40 West European Politics 663; Andreas Nölke and Arjan Vliegthart, 'Enlarging the Varieties of Capitalism: The Emergence of Dependent Market Economies in East Central Europe' (2009) 61 World Politics 670.

<sup>142</sup> See Vivien Schmidt, 'Inventing a New Future for Europe: Differentiated Integration with More EU and More Member-States?' (2017).

<sup>143</sup> The notion of embedded neo-liberalism is coined by Colin Crouch in 'Entrenching neo-liberalism: the current agenda of European social policy' in N Countouris and M Freedland (eds), *Resocializing Europe in a Time of Crisis* (Cambridge, CUP, 2013).

embedded liberal compromise<sup>144</sup> that has previously served as a European social model or a proxy for a genuine European social dimension.<sup>145</sup> The embedded liberal compromise as a European social model has already been criticised by many as leading to the “social deficit” of the European integration project,<sup>146</sup> due to its considerable lag behind the economic dimension of integration. Hence, these two processes, the austerity governance of the economic crisis and the completion of the Single Market in conditions of increased socio-economic inequality among Member States, have exposed the fragility of the European embedded liberalism and the various consequence of the lack of social sphere *en par* with the economic one.

Even if Kukovec’ diagnosis regarding the missing voice of the periphery in the framing of these conflicts is accurate, the Revision has signalled that addressing the deep economic inequality and structural disparity between the core and the periphery will require a different kind of response than the *Zugangsgerechtigkeit* (access justice)<sup>147</sup> we saw in *Laval’s* outcome. If goods dumping is hurting the economies of the periphery,<sup>148</sup> the social dumping to the centre should not be the response, according to the Revision. The non-universality or the diverse conception of “the social” within the Union has been accepted, and access justice as well as fairness based on pure market rationality have been rejected. The Revision importantly rejects redistribution only through the internal market as a European conception of social justice and fairness. This rejection of “access justice” and the market as a main distributive mechanism between the East and the West will, however, unlikely reconcile the tension that arose during the yellow card debate on the Revision. Rejecting regulatory competition in the social domain and protecting the already existing national welfare arrangements is only the very first and basic step to re-imagining Social Europe. The actual conflict between old core and the Eastern periphery, which is among others deeply rooted in the structural and economic inequality among Member States from the two counterparts, should further inform the debate on distributive fairness and social justice in Europe.

And that is where one would expect from a broad-reaching and arguably ambitious initiative such as the Social Pillar to step into this minor social momentum created by the Revision. The Pillar, however, does not address this issue in such a way to inject substance into the mere rejection of the market rationality as a replacement for a meaningful redistributive social policy. Instead, it re-entrenches the flexicurity as a European social model, which conceptualizes “the social” as functional to “the economic”. According

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<sup>144</sup> The concept of “embedded liberalism” has originally been coined by Fritz W Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211.

<sup>145</sup> Ashiagbor (n 28).

<sup>146</sup> Scharpf (n 12); Fritz W Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40 *Journal of Common Market Studies* 645; Joerges (n 11).

<sup>147</sup> Micklitz (n 6).

<sup>148</sup> Kukovec (n 81).

to this conception of “the social”, social objectives are desirable as long as they serve to the creation of (sustainable) growth or to the functioning of the Eurozone. This functional conception of “the social” runs the risk of undermining an alternative, dignitarian conception, and thus perceiving social objectives as desirable only if these would be a means to the higher ends of economic or monetary integration.

In this sense, the Revision symbolically rescues the member states’ labour constitutions (welfare state) putting them, at least in theory, on an equal footing with the economic one.<sup>149</sup> The Pillar however failed to provide a social vision, which would take this resemblance of the original embedded liberal compromise to the next level. It has instead officially domesticated the flexicurity narrative in the European social domain. The previous analysis leads me, therefore, to conclude that the symbolic rescue of the national welfare state of the Revision restores to embedded liberalism nostalgia from EU’s foundational period, but the Pillar on the other hand resembles rather an appendix to the European economic constitution. The following years will show if these events have brought Collin Crouch’s “embedded neo-liberalism”<sup>150</sup> under the label of a “milestone in the social history of Europe”.

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<sup>149</sup> Christian Joerges, ‘Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation’ (2014) 15 *German Law Journal* 985; Dagmar Schiek, ‘The EU Constitution of Social Governance in an Economic Crisis in Defence of a Transnational Dimension to Social Europe’ (2013) 20 *Maastricht Journal of European and Comparative Law* 185; Barnard (n 44).

<sup>150</sup> Colin Crouch, ‘Entrenching neo-liberalism: the current agenda of European social policy’ in N Countouris and M Freedland (eds), *Resocializing Europe in a Time of Crisis* (Cambridge, CUP, 2013).