

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

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Abstract

The European Pillar of Social Rights is a high-profile political reaffirmation of twenty social rights and principles. Its implementation deploys the full EU governance arsenal: regulations, directives, recommendations, communications, new institutions, funding actions, and country-specific recommendations. As such, the static imagery evoked by a ‘pillar’ does not capture the true nature of the initiative, which is dynamic and fluid, wide-ranging, and permeating. An equation of the Pillar with the set of twenty rights and principles it proclaims similarly fails to capture its true significance, which lies in its programmatic nature. Several important measures have already been proposed as part of this new social action plan for Europe, some of which are close to adoption. This Article analyses the meaning of the Pillar and its potential significance, by considering its content *sensu largo*, and its broader context. It argues that even if the Pillar cannot address all the EU’s social failings, it has put a surprising social spin on the Better Regulation Agenda that was threatening to erode the social *acquis*, it has rekindled the EU’s relationship with the International Labour Organization and Council of Europe, and it helps rebalance the EU’s output by reviving the use of the Treaty’s Social Title.

Keywords: social rights, social Europe, Social Pillar, better regulation, international law

I. INTRODUCTION

In Gothenburg on 17 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 reaffirmation

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¹ [2017] OJ C428/10.

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

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 twenty 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 favour 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 use of the European Semester as an avenue for the implementation of the Pillar is especially interesting, considering that it is in this context of economic governance that many decisions with questionable social consequences have been taken over the past years, especially since the economic crisis.⁴ A similar displacement of social decision making, with consequences that are questionable from a social perspective, has taken place in the internal market in roughly the same period. As I have argued more extensively elsewhere,⁵ the Pillar does not address this displacement, nor does it resolve the constitutional imbalance between 'the market' and 'the social' in the

³ The Rome Declaration of 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, for the EU27 going forward.

⁴ For extensive discussion, see the various contributions to the special issue of the *Journal of European Public Policy* entitled 'EU Socio-Economic Governance since the Crisis: The European Semester in Theory and Practice' (2018), p 25.

⁵ S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2016) 13 *European Constitutional Law Review* 23; S Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210. See also F Scharpf, 'The Asymmetry of European Integration - or Why the EU Cannot Be a Social Market Economy' (2010) 8 *Socio-Economic Review* 211. For an analysis that nuances the claims of a socio-economic asymmetry in the case law of the Court of Justice of the European Union, see K Armstrong, 'Economic Constitutionalism and Social Policy Coordination' in K Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (Oxford University Press, 2010), p 188. As regards a broader constitutional asymmetry resulting from the economic crisis (measures) see M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817 and M Dawson and F de Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22 *European Law Journal* 204.

EU, even if these tensions do provide the background against which the initiative has been launched.⁶ But that finding in itself does not mean that the initiative is meaningless: this Article argues to the contrary that there is much potential treasure to be unearthed in the European Pillar of Social Rights.

To analyse the Pillar's meaning and its potential significance, the content of the Pillar as it currently stands will be considered (Part II), and it will be placed in its broader context (Part III). 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 aforementioned constitutional asymmetry between 'the market' and 'the social' in the EU. In this respect, the Article argues 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 an Agenda that was threatening to erode the social *acquis*, it has rekindled the EU's relationship with the International Labour Organisation ('ILO') and Council of Europe, and it helps rebalance the EU's output by reviving the use of the Treaty's Social Title.

II. WHAT IS THE PILLAR?

A. *The Pillar in a Narrow Sense*

In a narrow sense, the Pillar is a set of twenty social rights and principles, categorized in three 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'.⁷ It 'should be implemented at both Union level and Member State level within

⁶ 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, and while these areas may accommodate certain social goals and objectives, in the event of a clash between social and economic values, the constitutional configuration of these policy areas—and the democratic deficit that this configuration entails—will still lead to precedence being given to the latter.

⁷ Rec 12.

their respective competences’,⁸ and ‘does not entail an extension of the Union’s powers and tasks as conferred by the Treaties’.⁹

As a proclamation—however solemn—the Pillar is not legally binding.¹⁰ 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 Europe, and various Conventions of the ILO.¹¹ 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.¹² 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.¹³

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 Institutions, including the Member States in the Council. While in a legal sense, the Pillar cannot directly affect the meaning of these rights and principles

⁸ Rec 17.

⁹ Rec 18.

¹⁰ The Pillar was first launched by means of a Commission Recommendation (Article 292 TFEU) and subsequently endorsed by the Inter-Institutional Proclamation of 17 November 2017. In both manifestations, it is non-binding, meaning that its legal value is limited to a source of interpretation of EU law, which the Court of Justice of the European Union may use in its case law. For recommendations, their non-binding nature follows from Article 288 TFEU. Proclamations are not mentioned in the Treaties and their legal status is therefore somewhat more ‘obscure’. See Z Rasnacă, ‘Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-level Policymaking’ (5 *ETUI Working Paper*, 2017), p 14.

¹¹ The European Social Charter is a Council of Europe Treaty, 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, health, medical assistance and social protection. The Charter is based on a ratification system, which enables signatory states to choose the provisions they are willing to accept. While all EU Member States 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.

¹² SWD [2017] 200 final, p 2, *European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights*.

¹³ COM [2017] 250 final, *European Commission, Communication to the Parliament, Council, the EESC and the Committee of the Regions, establishing a European Pillar of Social Rights*.

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 policymaker to give them full effect, 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 Court of Justice of the European Union (‘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.¹⁴

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 initiative itself—or in any event the significance of the Pillar cannot be meaningfully assessed without taking its implementation agenda fully into account. Such a broader understanding of the initiative, not as a one-off, static instrument but instead as a broader process, better captures its dynamic and evolving nature and allows a more meaningful appreciation of its (potential) significance.¹⁵ Understood as such, the Pillar comprises not only its core set of twenty 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 broader Pillar initiative). As such, while the precedent of a ‘proclamation’ was set by the EU Charter of Fundamental Rights,¹⁶ 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 1997.¹⁷ The Community Charter is declaratory, 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.¹⁸ Most importantly, many rights listed in

¹⁴ 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’ (2014) 51 *Common Market Law Review* 219.

¹⁵ S Garben, ‘The European Pillar of Social Rights: Effectively Addressing Displacement?’, note 5 above.

¹⁶ 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 note 13 above.

¹⁷ For a discussion, see P Watson, ‘The Community Social Charter’ (1991) 28 *Common Market Law Review* 37.

¹⁸ Eg *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, paras 43–44; Opinion of Advocate General Trstenjak of 24 January 2008 in *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund*, C-350/06, EU:C:2008:37, para 38.

the Community Charter were implemented in secondary law through the Social Charter Action Programme,¹⁹ such as on occupational health and safety, written statement, posted workers, working time, pregnant workers, and younger workers. The broader Pillar initiative could be likened to such an action plan.²⁰

The 2018 Commission Staff Working Document ‘Monitoring the Implementation of the European Pillar of Social Rights’ provides the general overview of what can be considered part of the broader Pillar initiative.²¹ 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 wages, to a proposed Regulation on a pan-European Pension Product,²² and from a proposal for a Recommendation on promoting common values, inclusive education, and the European dimension of teaching,²³ to a proposal for a Regulation to strengthen EU cooperation on health technology assessment.²⁴

Of course, not all of these measures are equally ‘integral’ to the Pillar. The proposal on a recast of the Electricity Directive,²⁵ 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.²⁶ 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 conceptualised 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.²⁷ Moreover, if these pending proposals are

¹⁹ COM [1989] 568.

²⁰ 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 at I.I.C.

²¹ SWD [2018] 67 final.

²² COM [2017] 343.

²³ Adopted by the Council on 22 May 2018, OJ [2018] C195/1.

²⁴ COM [2018] 51 final.

²⁵ COM [2016] 864 final.

²⁶ COM [2017] 797 final.

²⁷ As Advocate General Bobek states in his Opinion of 5 September 2018 in *Torsten Hein v Albert Holzmann GmbH & Co.*, Case C-385/17, 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

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-levelling 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 proposed Work-Life Balance Directive,²⁸ Predictable and Transparent Working Conditions Directive and the Social Scoreboard,²⁹ are not entirely new but (would) replace the existing Maternity Leave and Written Statement Directives and the Scoreboard of Key Employment and Social Indicators 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 II.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 Authority³⁰ and the initiative on Access to Social Protection for Workers and the Self-Employed.³¹

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.³² 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 practice, 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

(Footnote continued)

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. See note 14 above, p 231.

²⁸ COM [2017] 253 final.

²⁹ SWD [2017] 200 final.

³⁰ COM [2018] 131 final.

³¹ COM [2018] 132 final.

³² See note 2 above, p 289.

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 part of the broader Pillar initiative, are not explicitly conceptualized as such. On its website,³³ the Commission identifies four measures specifically as ‘delivering on the European Pillar of social rights’, namely: (1) the ‘New Start to Support Work-Life Balance for Parents and Carers’, which includes the proposal for a Work-Life Balance Directive; (2) 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-Employed; (3) the proposal to revise the Written Statement Directive into a Directive on Transparent and Predictable Working Conditions; and (4) the interpretative communication on the Working Time Directive.³⁴ In addition, the Social Scoreboard is presented as the central tool to monitor progress on the Pillar in the context of the European Semester.³⁵ 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’³⁶ and in relation to the proposal to include new exposure limit values for five chemicals in the Carcinogens and Mutagens Directive, such reference was similarly made to the Pillar.³⁷

While the proposals on work-life balance, working conditions and access to social protection are rightly singled out as the Pillar package’s signature initiatives, as they all tackle important new issues at the heart of the Pillar’s themes, the qualification of the interpretative communication on the Working Time Directive ‘as part of the Pillar Package’ is somewhat less intuitive.³⁸ In fact, while the Pillar *stricto sensu* includes a relatively wide range of social rights and principles and gives them a generous reading, a conspicuous absence is precisely the right to a maximum weekly working time,

³³ European Commission, ‘European Pillar of Social Rights in Detail,’ <http://ec.europa.eu/social/main.jsp?catId=1310&langId=en>.

³⁴ Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, [2017] OJ C165/1.

³⁵ European Commission, ‘Employment, Social Affairs and Inclusion’, <http://ec.europa.eu/social/main.jsp?langId=nl&catId=89&newsId=9163&furtherNews=yes&furtherNews=yes>.

³⁶ European Commission, ‘Commission Adopts Proposals for a European Labour Authority and for Access to Social Protection’ (13 March 2018) http://europa.eu/rapid/press-release_IP-18-1624_en.htm.

³⁷ European Commission, ‘Commission Takes Further Action to Better Protect Workers Against Cancer-Causing Chemicals’ (5 April 2018) http://europa.eu/rapid/press-release_IP-18-2662_en.htm.

³⁸ SWD [2018] 67 final, p 30.

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.³⁹ Puzzlingly, the Pillar does not mention these fundamental social rights to maximum working time and minimum rest period and annual paid leave, nor does it reference workers' dignity.⁴⁰ 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 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 part of Commission President Juncker's commitment to social values and to deliver on election promises made 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,⁴¹ and this link is also underlined by the fact that the Council reached agreement on the Directive on the same day as it approved the Inter-Institutional Proclamation on the Pillar.⁴² Seeing the successful adoption of the Directive,⁴³ and the tangible social improvement it makes to a field where the imbalance between 'the market' and 'the social' has been most keenly felt,⁴⁴ 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 because at least originally, the Pillar has neither been conceived, nor designed, to resolve the clashes between social and market values that have arisen in the area

³⁹ *Schultz-Hoff and Stringer and Others*, C-350/06 and C-520/06, EU:C:2009:18.

⁴⁰ It does mention dignity in reference to old age (Principle 15), disability (Principle 17), and minimum income (Principle 14).

⁴¹ 'Social Pillar and Directive on Posted Workers: The Two Sides of the EU Social Policy?' (*AEDH*, 25 October 2017) <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, Opinion on the Revision of the Posting of Workers Directive, [2017] OJ C75/81.

⁴² See European Council, 'Posting of Workers: Council Reaches Agreement' (24 October 2017) <https://www.consilium.europa.eu/en/press/press-releases/2017/10/24/posting-of-workers-council-reaches-agreement>; European Council, 'Employment, Social Policy, Health and Consumer Affairs Council: Posting of Workers' (23 October 2017) <https://www.consilium.europa.eu/en/meetings/epsco/2017/10/23>.

⁴³ Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [2018] OJ L173/16.

⁴⁴ S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union', note 5 above.

of the internal market (or economic governance).⁴⁵ 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, apolitical issues that benefit citizens, workers, and businesses alike, but instead are recognised for sensitive, political issues that are, at least partially, at odds with each other. As will be discussed in Section III.C below, the Pillar does not (and cannot) resolve the more fundamental constitutional asymmetry between ‘the market’ and ‘the social’ in the EU. This could be argued to detract from its significance—especially since it is arguably precisely in the context of the increased public, legal, and political contestation of that asymmetry that the Pillar has been launched. But from a more pragmatic perspective, realising that optimising the chances of the Pillar having any effect (and being adopted at all) would mean keeping it as ‘centrist’, nonpolemic, and inoffensive as possible, it is perhaps sensible to keep issues like 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’.⁴⁶ 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 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 reasonably be claimed to be, to only parts of the territory, seems questionable from a Rule of Law perspective, in particular an individual’s equality before and under the law, and detracts from the inherent and fundamental nature of the proclaimed rights and principles. The constitutional problems of differentiated integration are well-known, and apply with all the more force in the case of fundamental rights.⁴⁷ 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

⁴⁵ Ibid.

⁴⁶ COM [2017] 251 final, p 4, *European Commission, Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights*.

⁴⁷ See A Miglio, ‘Differentiated Integration and the Principle of Loyalty’ (2018) 14 *European Constitutional Law Review* 475; J Wouters, ‘Constitutional Limits to Differentiation: The Principle of Equality’ in B de Witte et al. (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001), p 301; D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos, 2004).

Pillar Recommendation and the subsequent Inter-Institutional Proclamation.⁴⁸ 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’.⁴⁹ It could therefore be argued that since the adoption of the Proclamation, the Pillar *stricto sensu* no longer should have a differentiated scope. Moreover, none of the proposed legal implementation measures have been proposed as enhanced cooperation and instead are conceived to apply to all Member States.

D. The Pillar’s Most Important Implementation Measures

1. Pre-existing equal treatment proposals

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,⁵⁰ that has been blocked in the Council for almost a decade.⁵¹ 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,⁵² in order to reduce the discrepancy in scope of protection between these grounds as compared to equal treatment on grounds of gender,⁵³ and race,⁵⁴ which benefit from a more protective regime under EU law (‘hierarchy of equalities’).⁵⁵ The new Directive would ‘level up protection from discrimination for these grounds to replicate the material scope of the Racial Equality Directive’.⁵⁶ However, facing unanimity under Article 19 of the Treaty on the Functioning of the European Union (‘TFEU’), the necessary consensus has proven difficult to reach. The issue

⁴⁸ For the legal value of these instruments, see the discussion in Section II.A above.

⁴⁹ Rec 13 of the Commission Recommendation and the Inter-Institutional Proclamation.

⁵⁰ COM [2008] 426.

⁵¹ For discussion, see L Waddington, ‘Future Prospects for EU Equality Law. Lessons to Be Learnt from the Proposed Equal Treatment Directive’ (2011) 36 *European Law Review* 177.

⁵² Within the labour market, this is covered by the Employment Equality Directive 2000/78/EC.

⁵³ Directive 2006/54/EC on gender equality directives in the areas of employment and occupation; Directive 2004/113/EC on gender equality in access to and supply of goods and services.

⁵⁴ Racial Equality Directive 2000/43/EC.

⁵⁵ See M Bell, ‘The Principle of Equal Treatment: Widening and Deepening’, in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011).

⁵⁶ It would, then, leave gender as the least protected ground. See E Lombardo and M Verloo, ‘Institutionalizing Intersectionality in the European Union?’ (2009) 11(4) *International Feminist Journal of Politics* 478.

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'.⁵⁷ 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,⁵⁸ 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 2012.⁵⁹ The Directive is aimed at improving gender balance in corporate boards of large listed companies, setting the aim of a minimum of 40 percent of non-executive members of the underrepresented 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 given to the underrepresented sex. The Directive is strongly supported by the Parliament and the Commission.⁶⁰ However, even though the legal basis of Article 157(3) TFEU requires only Qualified Majority Voting 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,⁶¹ and some scholars have expressed concern that the Directive with its 'compulsory gender quotas' goes beyond what is necessary.⁶² 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, ie 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

⁵⁷ See note 51 above.

⁵⁸ Council of the European Union, Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation – Progress Report, 2008/0140 (24 November 2017) <http://data.consilium.europa.eu/doc/document/ST-14867-2017-INIT/en/pdf>.

⁵⁹ COM [2012] 614.

⁶⁰ See respectively European Parliament, 'Gender Balance on Boards', <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards>, and European Commission, '2018 Report on Equality between Men and Women in the EU' (Publications Office of the European Union, 2018).

⁶¹ Including the national parliaments of Denmark, the Netherlands, Poland, Sweden, the UK, and the Czech Chamber of Deputies.

⁶² M Szydło, 'Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance' (2015) 21(1) *European Law Journal* 97.

the gender balance in company boards'. As they argue, the proposal must be seen as a necessary and modest step towards long-awaited progress.⁶³

A third existing proposal that the Pillar absorbs is the Proposal for a for a European Accessibility Act.⁶⁴ 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.⁶⁵ 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 materialise. 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 harmonise 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',⁶⁶ but in the 2018 Staff Working Document it is instead linked to Principle 17 'Inclusion of People with Disabilities',⁶⁷ which seems more appropriate. On 19 December 2018, the EU's Council's Permanent Representatives Committee approved the provisional agreement reached with the European Parliament on 8 November 2018 regarding the proposal.⁶⁸ The agreement includes certain transport and emergency services in the scope of application of the Act, which were the most contentious issues in the Council negotiations.

2. Replacements

The Pillar package contains two proposals that would replace existing measures; the proposal for a Work-Life Balance Directive, 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, 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 takes a broad approach to the issue of gender equality and caring duties, and proposes several important new minimum rights, such as: (1) the possibility for flexible uptake (piecemeal and part-time) of

⁶³ 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' (2013) 1 *European Gender Equality Law Review* 17.

⁶⁴ COM [2015] 615 final.

⁶⁵ See note 51 above, p 178.

⁶⁶ SWD [2017] 201 final, p 77.

⁶⁷ Ibid, p 77.

⁶⁸ Council of the European Union, 'General Approach on the Proposal for a Directive of the European Parliament and of the Council on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States as Regards the Accessibility Requirements for Products and Services (7 December 2017) <http://data.consilium.europa.eu/doc/document/ST-15586-2017-INIT/en/pdf>.

the four months' individual entitlement to parental leave (Article 5(6)) and payment thereof at sick pay level (Article 8); (2) allowing the four-months entitlement to be taken up until the child reaches the age of twelve (instead of eight) and making it non-transferable between parents (Article 5(1) and (2)); (3) an entitlement to ten working days of paternity leave when a child is born, paid at sick pay level (Article 4); and (4) an entitlement to five 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 positions and interinstitutional negotiations started in September 2018.⁶⁹ 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. The proposal lays down a maximum duration for probation of six 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.⁷⁰

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'. Article 153 TFEU excludes the issue of 'pay' from that legal basis, and stipulates that the provisions adopted pursuant to it '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. In light of these limitations of the legal basis, 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

⁶⁹ N Milotay, 'A New Directive on Work-Life Balance' (*European Parliamentary Research Service*, 2018) [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI\(2018\)614708_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI(2018)614708_EN.pdf).

⁷⁰ COM [2017] 797 final.

the possibility of financial sanctions for non-compliance in the case of recommendations issued based on the Macro-Economic Imbalance or Excessive Deficit procedures.⁷¹ The new Social Scoreboard is a central tool to monitor the implementation of the Pillar in the Semester.⁷² 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: (1) equal opportunities and access to the labour market;⁷³ (2) dynamic labour markets and fair working conditions;⁷⁴ and (3) public support/social protection and inclusion.⁷⁵

3. *New measures*

The ‘Access to Social Security Initiative’ envisaged a potential directive addressing the challenges of access to social protection for people in all forms of employment and self-employment.⁷⁶ 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 (1) similar social protection rights for similar work, and (2) the transferability of acquired social protection rights.⁷⁷ However, the Commission has decided to propose a Recommendation on Access to Social Protection for Workers and the Self-Employed.⁷⁸ The Commission has justified the decision to propose a recommendation rather than a directive on grounds of proportionality and subsidiarity.⁷⁹ A non-binding recommendation instead of a binding directive clearly reduces the importance and impact of the

⁷¹ 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 CSRs 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’, note 5 above.

⁷² SWD [2017] 200 final, accompanying the Communication COM [2017] 250 final of 26 April 2017.

⁷³ Share of early leavers; Gender gap in employment; Income inequality; At-risk-of-poverty or social exclusion; Young people neither in employment nor in education/training.

⁷⁴ Employment rate age; Unemployment rate; Gross disposable income.

⁷⁵ Impact of social transfers, other than pensions, on poverty reduction; Children under three in formal childcare; Unmet need for medical care; Share of population with basic overall digital skills.

⁷⁶ COM [2016] 710 final, pt 11, *Commission Work Programme 2017*.

⁷⁷ COM [2017] 2610 final.

⁷⁸ COM [2018] 132 final.

⁷⁹ *Ibid*, pp 7, 8 and 12 of the Explanatory Memorandum.

measure. Furthermore, some substantive aspects of the proposed text have been criticised from a social perspective, such as the stipulation that ‘social protection can be provided through a combination of schemes, including public, occupational and private schemes and can involve contributions’ rather than stressing social protection as a universal human right that falls to the state to ensure through public and collectively financed statutory systems.⁸⁰ Nevertheless, should the Recommendation be adopted, it represents a promotion of social justice by the EU in an area that is highly sensitive to the Member States, and it would thus still qualify as a successful deliverable of the Pillar, even if not as ambitious as originally hoped by some.

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 2018.⁸¹ 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 authorities and to fight abuse of labour and social legislation and organise joint cross-border control activities. The EMPL Committee of the European Parliament submitted a draft report on 22 June 2018 supporting a European Labour Authority with an operational mandate, a clear focus on enforcement and sufficient competences and power to achieve its goals. On 6 December 2018, the Council agreed its position, which will serve as the basis for negotiations with the European Parliament. Considering these relatively swift developments, there is some reason to expect that it will be adopted in 2019. It is an important initiative that, if adopted, could facilitate the enforcement of EU rules on both the internal market and social standards.

III. THE PILLAR IN CONTEXT

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.⁸²

⁸⁰ Rec 2 of the proposed Recommendation. See ETUC, ‘Position: Proposal for a Council Recommendation on Access to Social Protection for Workers and the Self-Employed’, https://www.etuc.org/en/document/etuc-position-proposal-council-recommendation-access-social-protection-workers-and-self#_ftn2.

⁸¹ COM [2018] 131 final.

⁸² See COM [2015] 215 final, *Better Regulation for Better Results: An EU Agenda*; SWD (2015)111 final, *Better Regulation Guidelines*; COM [2012] 746 final, *EU Regulatory Fitness*.

While this Agenda has been around in EU policymaking in various incarnations for several decades,⁸³ it was arguably under the previous administration that it became particularly powerful, impacting EU social policy to an important extent.⁸⁴ The Agenda is based on a number of, partially contradictory, rationales: (1) improving the quality of EU legislation; (2) reducing the quantity of EU legislation; (3) increasing public participation in the legislative process; (4) promoting science-based governance; and (5) enforcing the subsidiarity and proportionality principles.⁸⁵ While it would be ill-informed to paint a picture of EU Better Regulation as an unequivocal drive towards deregulation in the interests of businesses,⁸⁶ 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.⁸⁷ One of the main methodologies used in the obligatory Impact Assessment of new EU initiatives and widespread Evaluations of existing legislation, is cost-benefit analysis, which poses a number of problems in terms of its reliance on certain assumptions and the quantification of non-quantifiable benefits.⁸⁸ 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 a ‘Better Regulation watchdog’ concerned that the Agenda would erode important existing rights and policies and hamper the development of new initiatives.⁸⁹ Even if their fear of a grand repeal of the *acquis* has not come to pass,⁹⁰ 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 the Commission busy

⁸³ See earlier initiatives such as SEC [1998] 903/3, *Making Single Market Rules More Effective, Quality in Implementation and Enforcement*; COM [2002] 275 final, *European Governance: Better Law-Making*; and COM [2010] 543 final, *Smart Regulation in the European Union*.

⁸⁴ For a comprehensive discussion: S Garben and I Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (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 European Commission, ‘REFIT - Fit for Growth: Examples How EU Law Is Becoming Lighter, Simpler and Cheaper (2 October 2013) http://europa.eu/rapid/press-release_MEMO-13-833_en.htm..

⁸⁵ See S Garben, ‘An “Impact Assessment” of EU Better Regulation’, in Garben and Govaere, note 84 above.

⁸⁶ B Smulders and J Paquet, ‘The European Commission and its Better Regulation Agenda’, in Garben and Govaere, note 84 above.

⁸⁷ For a thorough discussion, see M Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’ (2016) 53 *Common Market Law Review* 1209.

⁸⁸ A Renda, ‘Cost-Benefit Analysis and EU Policy: Limits and Opportunities’, in Garben and Govaere, note 84 above.

⁸⁹ See <https://www.betterregwatch.eu>.

⁹⁰ R Zbiral, ‘The Better Regulation Agenda and the Deactivation of EU Competences’ in Garben and Govaere, note 84 above.

‘running on the spot’.⁹¹ 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;⁹² 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*;⁹³ 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. 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’⁹⁴ 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 policymaking and analytical underpinning of regulation are 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 as 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 content-heavy 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

⁹¹ C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 199.

⁹² See SWD [2017] 205 final, *REFIT Evaluation of the ‘Written Statement Directive’*.

⁹³ European Commission, ‘Commission Takes Further Action to Better Protect Workers Against Cancer-Causing Chemicals’ (5 April 2018) http://europa.eu/rapid/press-release_IP-18-2662_en.htm.

⁹⁴ SWD [2018] 67 final, p 30.

powers are lacking. While it could still be argued that the administrative burden of impact assessment and the methodology of cost-benefit assessment inherently imply a certain bias against regulation,⁹⁵ the Pillar experience shows that this bias can clearly be overcome by political choices. Indeed, the radically different use of the Better Regulation Agenda by this Commission compared to the previous administration shows how methodologies can be used to fit very different purposes, providing a political instrument that can be used by any powers that be to justify and rationalise their political choices. As such, the Agenda takes the political colour of the power that steers it. 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.

B. Clash of International and EU Law in the Area of Social Rights

Looking at the rich EU social *acquis* that the Pillar aims to reinforce, it is easily forgotten that the EU initially played only a limited role in this area, which to a certain extent can be explained by the existence of other actors that were considered better placed.⁹⁶ 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',⁹⁷ indicating that the creation of the European Economic Community did not require the harmonisation of labour standards.⁹⁸ The ILO's eight 'fundamental' conventions have been ratified by all 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 ('ESC'), already mentioned above. Things have clearly changed since those early days of European integration. But the gradual yet 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 consultation on a European Pillar of Social Rights devoted a subsection to 'social

⁹⁵ See note 85 above.

⁹⁶ The discussion in this section draws on S Garben, 'The Problematic Interaction between EU and International Law in the Area of Social Rights' (2018) 7(1) *Cambridge International Law Journal* 77.

⁹⁷ 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* 55.

⁹⁸ ILO, 'Social Aspects of European Economic Co-operation: Report by a Group of Experts' (1956) 74 *International Labour Review* 99.

rights and principles as laid down in international law’,⁹⁹ 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 particularly the ESC and the ILO,¹⁰⁰ and the preamble of the Inter-Institutional Proclamation references the ESC and ‘the relevant [ILO] Conventions and Recommendations’. 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: (1) ILO No 131 Convention on Minimum-Wage Fixing; and (2) Convention No 154 on the Promotion of Collective Bargaining’.¹⁰¹ 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: (1) Convention No 122 on Employment Policy; (2) Convention No 144 on Tripartite Consultations; (3) Convention No 135 on Workers’ Representatives; and (4) Convention No 154 on Promotion of Collective Bargaining’.¹⁰² In relation to Principle 12 on Social Security, the Commission suggests that Members 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’.¹⁰³

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 coexist 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 Treaty on European Union¹⁰⁴ 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, ...

⁹⁹ SWD [2016] 50 final.

¹⁰⁰ See note 13 above.

¹⁰¹ SWD [2018] 67 final, p 32.

¹⁰² *Ibid*, p 35.

¹⁰³ *Ibid*, p 50.

¹⁰⁴ The Member States confirm ‘their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961’.

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 European Convention on Human Rights and not the ESC, the CJEU refers to the ESC as well as the case law of the Committee of Social Rights as a source of inspiration for the interpretation of EU law.¹⁰⁵ Sometimes, secondary EU law makes explicit reference to the ESC.¹⁰⁶ 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.¹⁰⁷

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 which are closely connected to the 'social displacement' in EU law by decisions taken in the context of the internal market and economic governance, which will be discussed in Part III.C below.¹⁰⁸ Indeed, 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 unclear 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.¹⁰⁹ 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

¹⁰⁵ For the ESC see *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, C-395/08 and C-396/08, EU:C:2008:677, para 31; *RX-II Réexamen European Commission v. Guido Strack*, C-579/12, EU:C:2013:570. See also Opinion of Advocate General Wahl in *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, C-201/15, EU:C:2016:429, para 60. For the Committee see recently Opinion of Advocate General Bobek in *Werner Fries v Lufthansa CityLine GmbH*, C-190/16, EU:C:2017:225.

¹⁰⁶ 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.

¹⁰⁷ See Council of Europe, *The Relationship between European Union Law and the European Social Charter* (European Committee of Social Rights Working Paper, 2014), p 22, <https://rm.coe.int/16806544ec>.

¹⁰⁸ *Ibid.* See also note 97 above, p 52.

¹⁰⁹ C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, p 406.

poverty line, did not provide three weeks' paid annual leave and did not mandate any type of training, as being contrary to Articles 4(1), 7(7), 10(2), and 12(3) of the Charter.¹¹⁰ It also upheld the complaint against compensation-free dismissal during a one-year trial period as in breach of Article 4(4)¹¹¹ and against pension reforms.¹¹² 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'.¹¹³ 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'.¹¹⁴ The Committee warned that 'the elaboration of procedures systematically favouring decentralised bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilisation 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'.¹¹⁵

A second problematic case of conflict has arisen in relation to the well-known and controversial judgments of the CJEU in *Viking* and *Laval*.¹¹⁶ 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

¹¹⁰ *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.

¹¹¹ *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.

¹¹² *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, (Complaint) European Committee of Social Rights No 76/2012.

¹¹³ *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.

¹¹⁴ International Labour Organization, 'ILO Calls on Greece to Bring its Labour Relations System Back to Fundamental Rights' (15 November 2012) http://www.ilo.org/brussels/press/press-releases/WCMS_193308/lang-en/index.htm.

¹¹⁵ 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.

¹¹⁶ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809.

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.¹¹⁷ 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 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.¹¹⁸

The Committee upheld the complaint and while only directly condemning the Swedish measures, it cast another shadow over the CJEU's controversial judgment.

The *Viking* and *Laval* saga similarly caused friction with the ILO. In a case concerning collective action taken by the British Airline 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'.¹¹⁹

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 organisations in question, a gesture that they have welcomed. The Council of Europe Secretary-General published an Opinion on the Commission's initiative to establish the Pillar, addressing it to the President of the European Commission on 2 December 2016.¹²⁰ In his letter,

¹¹⁷ See note 97 above, p 64.

¹¹⁸ *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.

¹¹⁹ International Labour Office, 'Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 1A), General Report and Observations Concerning Particular Countries' (2010), p 209.

¹²⁰ Opinion of the Secretary General of the council of Europe on the European Union Initiative to Establish a European Pillar of Human Rights (2 December 2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dd0bc>.

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’.¹²¹ He also emphasised 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 Europe’, is central to the Pillar.¹²² 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’.¹²³ 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 organised 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’.¹²⁴

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’¹²⁵ in the EU, that has been widely recognised and deplored.¹²⁶

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–

¹²¹ Para 42.

¹²² Para 21.

¹²³ Para 46.

¹²⁴ International Labour Organization, *European Pillar of Social Rights Central to an Equitable Future of Work* (17 November 2017) https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_598680/lang-en/index.htm.

¹²⁵ C Kilpatrick, ‘The Displacement of Social Europe: A Productive Lens of Inquiry’ (2018) 14(1) *European Constitutional Law Review* 62.

¹²⁶ See C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 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’ (2013) 14 *European Law Journal* 581.

2014, 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 and seen a threat to people's well-being'.¹²⁷ 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. 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'.¹²⁸

While in the Pillar's explanations the common currency and the internal market are staunchly defended¹²⁹ and the Commission's narrative continues to carry a streak of 'economic growth equals social outcomes',¹³⁰ 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'.¹³¹ 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'. 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, the Pillar does not (and cannot) in itself resolve the constitutional imbalance between 'the market' and 'the social' in the EU.¹³² 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

¹²⁷ European Parliament, 'Report on a European Pillar of Social Rights', 2016/2095(INI), p 25.

¹²⁸ *Ibid.*, p 26.

¹²⁹ COM [2017] 251 final, *Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights*, p 3.

¹³⁰ *Ibid.*, p 4.

¹³¹ *Ibid.*

¹³² Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?', note 5 above.

area of posting,¹³³ in other areas the internal market freedoms continue to receive precedence over labour protections.¹³⁴ While the EU legislator managed to amend the Posting of Workers Directive to allow more space for the application of social standards, other proposals arguably¹³⁵ threaten to undermine such attempts to ‘socialise’ 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’.¹³⁶ The Pillar may continue to ‘socialise’ the European Semester,¹³⁷ it does not amount to the sea change that it has affected in the context of the Better Regulation Agenda.

IV. CONCLUSION

As one commentator has noted, while the Pillar ‘entails some meaningful developments for social ... progress, its current form and content represents an adjustment to, rather than a transformation of, the unequal European economy and society’.¹³⁸ But what it does do, should also be recognised—namely significantly boosting the EU’s social credentials in a time where the EU needs a positive post-crisis narrative, going into the European elections.¹³⁹ This Article has argued that the Pillar’s significance should be assessed not just in relation to its proclamation of twenty social rights and principles, but by conceptualising it as a broader social action plan, of which the various proposals mentioned in the Pillar package form part. If effectively ‘implemented’ in this way, which depends not only on the current political powers but also the ones to take over, the Pillar will significantly improve the level of social protection of many European citizens. This Article has shown that even if the Pillar does not,

¹³³ *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, C-115/14, ECLI:EU:C:2015:86; *RegioPost GmbH & Co KG v Stadt Landau*, C-396/13, EU:C:2015:760.

¹³⁴ *Commission v Spain*, C-576/13, EU:C:2014:2430, *AGET Iraklis*, C-201/15, EU:C:2016:972.

¹³⁵ Such as the proposal for a European services e-card, COM/2016/0824 final, rejected by the Parliament. See European Parliament News, ‘Internal Market MEPs Reject Commissions “Services E-Card” Proposals’ (21 March 2018) <http://www.europarl.europa.eu/news/en/press-room/20180319IPR00020/internal-market-meps-reject-commission-s-services-e-card-proposals>.

¹³⁶ European Anti-Poverty Network, ‘Making Progress on Social Europe? Poverty Reduction, Social Rights and Standards’ (2017) <https://www.eapn.eu/wp-content/uploads/2017/05/EAPN-2017-EAPN-CountryReports-Assessment-1133.pdf>.

¹³⁷ J Zeitlin and B Vanhercke, ‘Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020’ (2014) *SIEPS Report*.

¹³⁸ Plomien, note 2 above.

¹³⁹ 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* (Cambridge University Press 2017).

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*, 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, which taken altogether is no mean feat.