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Is equality (of rights) going to be enough? The East-West divide in the aftermath of the Revision  
of the Posted Workers Directive

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## I. 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, *Albany* C-67/96), *Laval* and the rest of the infamous ‘Laval quartet’ (*Viking*, *Riiffert* 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)

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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).

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.<sup>5</sup>

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 it is important to understand the political countermovement against the ‘Laval quartet’ at EU level that has resulted in the recent Revision of the PWD, as it contains wider conceptual implications for the future of the European social model. The final compromise on the PWD Revision, anchored in the “equal pay principle”, could be seen as a symbolic rescue of the national welfare state in its broadest sense.<sup>6</sup> Striking a compromise in the introduction of an (limited) “equal pay principle” for posted workers, the Revision promises to sustain both national social standards and cross-border services provision, but with a higher degree of determinacy to preserve the former. It rejects the “access justice” as EU’s own conception of social justice,<sup>7</sup> 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 itself will, however, unlikely reconcile the main tension that arose during the political discussion on the Revision and culminated in a yellow card. 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

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<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).

<sup>5</sup> See 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.

<sup>6</sup> “The rescue of the nation state” is a phrase coined in a seminal book of Alan Milward that I consider to capture the symbolic effect of the Revision of the PWD. For further details see 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>7</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.

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 across Member States 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 asymmetrical ratio between the economic and the social sphere in the EU.

The argument of the paper 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 political and legislative initiatives potentially implying a return of the social, namely the Revision of the PWD and the Social Pillar. (3) The third section concludes by reflecting on the wider implications of the two instruments for the current state of Social Europe.

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

Both politicians and EU scholars across disciplines are increasingly talking about a distorted balance between the economic and social dimension of the European Union.<sup>8</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>9</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 politics of the balancing language itself. Each of these three implications should first be considered separately.

Beginning from the first one, it is widely recognized today that the European integration project has by now developed politically and constitutionally beyond the original functional entity focused merely on the construction of a common market.<sup>10</sup> The EU is now considered to be a political project, beyond a single market with a vague social dimension.<sup>11</sup> The European social model, Social Europe or the latest European Social Union<sup>12</sup> are some of the most prominent conceptions under which different imaginaries for the social

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<sup>8</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>9</sup> The term „dimension“ is itself obscure, which is why Vandembroucke et al, for instance, attempt to introduce the term European Social Union as an alternative designation. See Frank Vandembroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017). See also Frank Vandembroucke, ‘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-vandembroucke/>> accessed 7 May 2019.

<sup>10</sup> Turkuler Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016).

<sup>11</sup> Frank Vandembroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017).

<sup>12</sup> *ibid.*

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>13</sup> This new name for the model of political ordering of EU's economy, however, came 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>14</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>15</sup> As this alone would have not been enough, the 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>16</sup> *Viking* and *Laval* were quickly followed by *Rüffert*<sup>17</sup> and *Commission v. Luxembourg*<sup>18</sup> and have soon arguably established a certain operational framework according to which the CJEU has handled subsequent similar tensions.<sup>19</sup> The austerity politics of the Eurozone crisis governance has at the same time considerably pressured social rights particularly in the so called debtor Member States.<sup>20</sup> This "crisis of the social" that have emerged from these events, I will argue, was different compared to previous debates addressing the social deficit of European integration in general.<sup>21</sup> Such concerns about the lacking social dimension have existed since the beginning of EU's

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<sup>13</sup> Art. 3, TFEU.

<sup>14</sup> C-438/05 The International Transport Workers Federation and the Finnish Seamen's Union [2007] ECR I-10779

<sup>15</sup> Not only the progeny cases such as C-346/06 *Rüffert* and C-319/06 *Commission v Luxembourg*, but also C-549/13 *Bundesdruckerei*, C-396/13 *Sähköalojen ammattiliitto*, C-115/14 *Regiopost*, C-333/13 *Dano*, C-67/14 *Alimanovic* etc.

<sup>16</sup> See Vandenbroucke, Barnard and De Baere (n 10); 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; Kilpatrick and De Witte (n 6); 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>17</sup> C-346/06 *Rüffert* [2008] ECR I-11767

<sup>18</sup> C-319/06 *Commission v Luxembourg* [2008] ECR I-4323

<sup>19</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>20</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>21</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.

history.<sup>22</sup> Olivier de Schutter, for instance, discerns four stages of balancing between economic and social objectives in the European Treaties.<sup>23</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 decoupling (asymmetry) and the social deficit has been partly countered by 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, and especially the Court, had an emerging embedding function.<sup>24</sup> Also the turn to governmental experimentalism<sup>25</sup> and the disputed social policy coordination through the emerging OMC<sup>26</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 discussions on muddling through with the social dimension,<sup>27</sup> because it has exposed the well-observed European social deficit in a significantly more radical fashion. In line with Ashiagbor's argument, these events have unravelled the flaws and the inaptness of the embedded liberal compromise<sup>28</sup> to serve as a proxy for a European social model in enlarged Europe.<sup>29</sup>

If such "crisis of the social" exists, the question that arises is what options might be out there 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

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<sup>22</sup> Scharpf (n 2); 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>23</sup> Olivier De Schutter, 'The Balance Between Economic and Social Objectives in the European Treaties' [2006] *Revue française des affaires sociales* 119.

<sup>24</sup> James A Caporaso and Sidney Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization* 593. Höpner and Schäfer's response has, however, demonstrated how the alleged embedding function that the CJEU has embraced in the social domain has actually gone along with the original asymmetry. The increase in individual social rights in the context of mobility has thus sustained the market building project and the weak social dimension the integration project had from the start. See Höpner and Schäfer (n 22).

<sup>25</sup> Jonathan Zeitlin, 'Social Europe and Experimentalist Governance' (2005).

<sup>26</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>27</sup> Frank Vandebroucke, '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>28</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>29</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.

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 interest between workers and employers.<sup>30</sup> The flexicurity model, that has been already critically analysed, 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 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.

After this decade of a crisis of the social some initiatives have emerged in the last couple of years. I consider two of these to be particularly addressing the crisis of the social, which 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 they are paving for the future development of Social Europe. The one is the recently adopted Revision of the Posted Workers Directive,<sup>31</sup> the other one is the European Pillar of Social Rights.<sup>32</sup> The remainder of the article discusses them.

### III. The Social Returns?

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

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<sup>30</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>31</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>32</sup> European Pillar of Social Rights in 20 Principles

## 1. The Revision as a symbolic rescue of the welfare state<sup>33</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<sup>34</sup> and the turn towards enforcement policies<sup>35</sup> have ultimately led to a revival of the posting issue 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>36</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>37</sup> on 29 May 2018 the final text of the Revision was voted at the European Parliament (EP) with great majority<sup>38</sup>, and was adopted by the EPSCO Council on June 21 2018.<sup>39</sup>

Following the countermovement against the Laval quartet, the Revision readdresses the territoriality principle in Labour law.<sup>40</sup> 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>41</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 and normative intervention was mainly reduced to "the equal pay principle" that would prevent further undermining of national systems of wage-setting, and would thus re-empower national labour constitutions and industrial relations systems of the member states. It was indeed not the question of "equal pay" *strictu sensu* as known from equality law, which would in theory mean that the posted workers for the

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<sup>33</sup> Milward (n 6).

<sup>34</sup> Keith Ewing, 'The Draft Monti II Regulation: An Inadequate Response to Viking and Laval | The Institute of Employment Rights' (The Institute of Employment Rights; King's College London 2011) <<https://www.ier.org.uk/resources/draft-monti-ii-regulation-inadequate-response-viking-and-laval>> accessed 12 June 2019; Marco Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2014) 10 European Constitutional Law Review 90; 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>35</sup> Enforcement Directive 2014/67/EU.

<sup>36</sup> SOTEU speech 2015.

<sup>37</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>38</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>39</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>40</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>41</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.

same work in the same workplace will be entitled to the same payment and working conditions as domestic ones. The Revision has introduced the right to the same minimum standard regarding remuneration and working conditions, extending the list of Article 3, paragraph 1 of the original PWD. The Impact Assessment Study (IA) to the Revision, listing the different options for amendments to the original PWD, has introduced an option for “equal pay for equal work with respect to a reference undertaking”, which would incorporate the *strictu sensu* understanding of the “equal pay” principle.<sup>42</sup> This proposal would provide full equal treatment for posted workers compared with workers of the undertaking of reference.<sup>43</sup> However, the IA states right after it has presented the principle in its essence, that such an amendment would likely fail the proportionality test as well as would be rendered incompatible with the internal market. In some cases, it would mean that posting companies might be burdened to a greater extent compared to domestic ones. The IA also adds that the mechanism of identifying a reference or similar undertaking would be a highly complex exercise and may increase the risk of judicial litigation in the implementation phase.<sup>44</sup> Notwithstanding this, only through such a wider understanding of the equality principle company level collective agreements could obtain validity in posted workers cases, which is a significant part of the *Laval’s* regulatory conundrum and have been considered a gap in the original Directive.<sup>45</sup>

The equal pay principle as ultimately incorporated in the Revision deserves further attention. 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. The explanatory memorandum of the Revision Proposal briefly reconstructs the background and motives for the Revision’s intervention. The text explains how several member states, namely Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden (all high-wage member states from the core), have expressed their support for introduction of the “equal pay” principle.<sup>46</sup> Further, the preamble talks about ETUC’s commitment to a revision of the posting regulatory framework and introduction of an “equal treatment” principle.<sup>47</sup> The text of the preamble does not pay attention to the difference of these two principles, “equal pay” and “equal treatment”, or at least does not discuss nor emphasise such a difference. In any case, the equal treatment principle understands equality in every domain regarding the employment relationship and is therefore broader than the equal pay principle that strictly concerns the pay requirements.

In this sense, it is important to note that the Preamble of the Revision proposal introduces both the principle of “equal treatment” as well as “equal pay” (as a key element of equal treatment), as well as the prohibition of any **discrimination based on nationality**. These are, however, not brought in a direct relation to posting and

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<sup>42</sup> IA, 27.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Kilpatrick (n 4).

<sup>46</sup> Revision proposal, 4.

<sup>47</sup> Ibid, 5.

the recital itself does not explicitly state that the Revision sets out for posted and domestic workers to be treated equally.<sup>48</sup> The final text of the Revision has extended the recital originally proposed, stating:

“The principle of **equal treatment** and the **prohibition of any discrimination** on grounds of nationality have been enshrined in Union law since the founding Treaties. **The principle of equal pay** has been implemented through secondary law not only between women and men, but also between employees with fix term contracts and comparable permanent workers, between part-time and full-time workers or between **temporary agency workers and comparable workers of the user undertaking**. [Those principles include the prohibition of any measures which directly or indirectly **discriminate** on grounds of nationality. In applying those principles, the relevant case-law of the Court of Justice of the European Union is to be taken into consideration.]”<sup>49</sup>

Attention shall be paid to the part of the recital that emphasizes the importance of equal treatment not only in the already, in theory at least, established field of gender equality, but also in the context of equality between different categories of workers:

“The principle of **equal pay** has been implemented through secondary law not only between women and men, **but also between workers** with fixed term contracts and comparable permanent workers, between part-time and full-time workers and between temporary agency workers and **comparable workers** of the user undertaking.”<sup>50</sup>

Although far from straightforwardly granting posted workers equal treatment with domestic ones, this recital re-introduces the principle of equal pay (treatment) into the posting vernacular. That principle has been absent from the posted workers regulatory framework and no mentioning of it has been included in the original PWD, except for the equality of treatment between men and women provision with a vague hint of applicability of “other provisions of non-discrimination”.<sup>51</sup> The implications from this symbolic turn and the introduction of the notion equal treatment/pay in the posting context are at least twofold. First, referring to equal treatment or pay in this context opens the door for questioning the conceptualization of the posted workers and thus labour as only another one of the factors of production, contextually disembedded from the socio-economic reality of the workplace in the host country. Second, it might offer fertile soil to reconsider workers’ solidarity and the role of organized labour as a crucial value for democratic ordering of the economy. However, escaping the balancing discourse and integrating equality into the posting workers regime requires a larger shift of imaginaries of the relationship between the single market and European society(ies). The Revision flirts with this paradigm shift, but ultimately continues to operate within the default mode of market rationality and non-restrictiveness of freedom of movement of service providers.

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<sup>48</sup> Recital (5) Revision Proposal.

<sup>49</sup> Revision final text, Recital (6).

<sup>50</sup> Ibid.

<sup>51</sup> PWD, Art. 3 (1) (g).

The strategy adopted to reconcile political promises and the established imaginary of market rationality has been to search for a middle ground, which the Commission has found in the “technical approach” that has shaped the Revision. The technical approach consists of replacing the terminology of “equal rates of pay” with “equal remuneration”. That strategy shall result in extending the different components of payment posted workers shall be entitled to in the host country, in order to bridge the pay gap between posted and domestic workers. As the term (minimum) “rates of pay” has previously been interpreted in a considerably rigid fashion creating the situation where posted workers, contrary to their domestic counterparts, were not entitled to different elements of payment and were therefore legally constructed as cheap labour. The scholars writing the ETUC Paris manifesto have already recognized that the revising the PWD will not do the entire job, stating that “a Revision of the PWD will not in itself change the CJEU approach to Article 56 TFEU”, arguing that such an issue can only be addressed at Treaty level and not through secondary law.<sup>52</sup> The Social Progress Protocol has been a long lasting proposal by the ETUC in order to countervail the established relationship between Art. 56 TFEU and national industrial relations systems.<sup>53</sup>

Mainly through the replacement of minimum rates of pay through remuneration and the extended acceptance of Member States’ wage (and working condition)-mechanism, the Revision has made a symbolic statement in support of the Member States’ labour constitutions and thus attempted to launch, not exactly a reversal, but a recovery of the “crisis of the social” caused by *Laval* and its subsequent jurisprudence of the last decade. But even if the announcement of the 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>54</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>55</sup> The reasoned opinions were formally backed by subsidiarity concerns,<sup>56</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 Revision could not fully address the debate on justice and fairness in Europe epitomised in the yellow card, which was left off to be potentially considered by other instruments with likely more visionary and programmatic aspirations. The social momentum created by the Revision process has been carried further

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<sup>52</sup> ETUC Paris Manifesto, 18.

<sup>53</sup> Paris Manifesto, 34.

<sup>54</sup> See Maurizio Ferrera, ‘The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights’, 22 *ELJ* (2016) p. 791.

<sup>55</sup> Probably only Denmark has convincingly argued against based on subsidiarity concerns. See more in Fromage and Kreilinger (n 71).

<sup>56</sup> Art 5 (3) TEU. See *ibid.*

by the concomitant Proclamation of the European Pillar of Social Rights.<sup>57</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 address the “crisis of the social”?

## 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>58</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>59</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>60</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

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<sup>57</sup> The European Pillar of Social Rights has been solemnly proclaimed at the European Social Summit in Gothenburg, on 17 November 2017.

<sup>58</sup> Marianne Thyssen, 17 November 2018.

<sup>59</sup> Proclamation, 17 November 2017

<sup>60</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.

as an attempt to legitimize the Eurozone (governance)<sup>61</sup> and the European Union as a whole through the rhetoric and potentially a vision of a strengthened social dimension.<sup>62</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>63</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>64</sup> But there also have been readings of the Pillar, which in spite of its flaws and obscurity, have seen potential and have seen it in general as a potentially positive development.<sup>65</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 on the Revision 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.

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<sup>61</sup> For literature on the tensions between the Eurozone crisis governance and social rights see Countouris and Freedland (n 17); Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (n 17); Geoff Kennedy, '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 6).

<sup>62</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>63</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>64</sup> Florian Rödl, *Soziale Rechte in Europa: Von irreführenden Versprechen und notwendigen Kämpfen*, WSI-Herbstforum 2017.

<sup>65</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/>, in particular Sacha Garben, 'The European Pillar of Social Rights as a Revival of Social Europe' (*EuVisions*, 20 February 2019) <<http://www.euvisions.eu/esu-debate-epsr-a-revival-of-social-europe-garben/>> accessed 28 August 2019.

## 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>66</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 social rights,<sup>67</sup> he emphasizes how the general viability of these rights in times of crisis has been put into question.<sup>68</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>69</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>70</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>71</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, first in the Eurozone, but also in the EU debate in general, which is inherently related to the (social) legitimacy of the European integration project.<sup>72</sup> This “crisis of the social” and its impact on EU’s overall legitimacy<sup>73</sup> is where the Pillar intervenes.

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<sup>66</sup> Hoffmann (n 20).

<sup>67</sup> Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 521.

<sup>68</sup> Hoffmann (n 20). See Gráinne de Búrca, Claire Kilpatrick and Joanne Scott, *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Bloomsbury Publishing 2013).

<sup>69</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>70</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>71</sup> For more on the core-periphery dynamics within the EU see Damjan Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406; 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>72</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>73</sup> Writing on Courts’ legitimacy and the legitimacy of the CJEU in particular, Pollack differentiates normative and empirical legitimacy in the sense of acceptance. How I use the term legitimacy here is to be understood in the sense of acceptance in accordance with Pollack’s distinction, but acceptance not of the Court’s activity as in his case, but acceptance of the Union’s purpose as a whole. See Mark A Pollack, 'The Legitimacy of the European Court of Justice' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) </core/books/legitimacy-and-international-courts/legitimacy-of-the-european-court-of-justice/FDF5FFE5EAF7601FC6E634999DF23A79> accessed 26 August 2019.

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>74</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 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>75</sup>

Hence, the Pillar primarily seeks to “deepen” the European Monetary Union (EMU), referring to concepts of competitive social market economy and social policy as a productive factor.<sup>76</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>77</sup> One might ask, if the Pillar is addressing social shortcomings of the design of the EMU, how then I justify 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>78</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>79</sup> One might argue that this directly translates as a response to the countermovement to and criticism of the *Laval quartet* jurisprudence. Further, the fact that the Pillar has been introduced at the same time with the Revision and the broader “Labour mobility package”,<sup>80</sup> might additionally speak of the Commission's possible intentions to signal a broader social reform being underway.

The Europe-wide consultations<sup>81</sup> have helped identify 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

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<sup>74</sup> President Jean-Claude Juncker, State of the European Union (SOTEU) Address, European Parliament, Strasbourg, 9 September 2015.

<sup>75</sup> Ibid.

<sup>76</sup> Deakin (n 63).

<sup>77</sup> Kilpatrick and De Witte (n 5).

<sup>78</sup> As recognized by Garben (n 65).

<sup>79</sup> Para 7, 16, especially 19, Preamble, Social Pillar.

<sup>80</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>81</sup> SWD(2017) 206 final, Report on the public consultation, Brussels, 26.4.2017, at 5.

divergence across Member States.<sup>82</sup> After one year of consultations<sup>83</sup>, on 26 April 2017 the EPSR has been issued by the Commission and inter-institutionally proclaimed on 17 November in Gothenburg.<sup>84</sup> The Pillar is addressing both the EU institutions (Proclamation) and the 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>85</sup> However, the proclamation is a soft law instrument without legally binding force. 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>86</sup>

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

The Pillar's preamble and the accompanying documents express the Pillar's vision of the social through the language of efficiency and flexibility, operating within the balanced ideal of a highly competitive social market economy. 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>87</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>88</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>89</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>90</sup> The inherent tension between the economic and the social within that phrase has extensively been commented elsewhere.<sup>91</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

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<sup>82</sup> COM(2017) 250 final, Establishing a European Pillar of Social Rights, Brussels, 26.4.2017, at 4.

<sup>83</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>84</sup> Proclamation, Social Pillar.

<sup>85</sup> COM(2017) 250 final.

<sup>86</sup> Rasnača (n 65).

<sup>87</sup> SOTEU Address in supra note 74; COM(2016) 127 final, in supra note **Error! Bookmark not defined.**; COM(2017) 250 final, in supra note 82; COM(2018) 130 final, Monitoring the implementation of the European Pillar of Social Rights.

<sup>88</sup> COM(2016) 127 final, at 5; SWD(2017) 201 final, at 22 ff.

<sup>89</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>90</sup> Preamble 1, Pillar; Art 3(3) TEU.

<sup>91</sup> Joerges and Rödl, "Social Market Economy" as Europe's Social Model? (n 21); Scharpf (n 1).

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>92</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>93</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>94</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>95</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>96</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>97</sup> 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>98</sup> The "pillar package" consisted of many documents, two of which have been central<sup>99</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 could claim against their member states.<sup>100</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

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<sup>92</sup> Para 11, Preamble

<sup>93</sup> Pillar, Preamble, 2, 3, 4, 5 and 6. Art 9 TFEU, Art 151 TFEU, Art 152 TFEU.

<sup>94</sup> Para 11, Preamble, Social Pillar.

<sup>95</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Hoffmann (n 21).

<sup>96</sup> On the international instruments see Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2015) 77 *Law and Contemporary Problems* 147.

<sup>97</sup> Zane Rasnača, '(Any) Relevance of the European Pillar of Social Rights for EU Law?' (*European Law Blog*, 17 November 2017).

<sup>98</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 66).

<sup>99</sup> On 26 April 2017 the Commission issued the so-called "Pillar package" consisting of about 17 documents.

<sup>100</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.

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>101</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>102</sup>

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

It is understood by now that the Pillar should be rather seen as a social agenda setter rather than a rights declaration,<sup>103</sup> but the rationale behind the Pillar's rights approach could still reveal behind the political choices of such an approach. So what might speak against the language of rights instead of policies?

Susan Marks, for example, states that a defining characteristic of the new human rights movement was its "non-political creed".<sup>104</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>105</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) policies.

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 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

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<sup>101</sup> Rec. 3, Preamble, Social Pillar.

<sup>102</sup> Para 16, Preamble, Pillar.

<sup>103</sup> Garben, 'The European Pillar of Social Rights as a Revival of Social Europe' (n 65).

<sup>104</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 97).

<sup>105</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge (Massachusetts): Harvard University Press, 2018.

understanding of social rights in a similar fashion as TH Marshall in his seminal work “Citizenship and Social Class”<sup>106</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>107</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>108</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 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>109</sup>

Social rights have without doubt been of paramount importance for improving people’s lives globally.<sup>110</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>111</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 rights 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 (also the Union lacking formal competences), the

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<sup>106</sup> TH Marshall, *Citizenship and Social Class* (Pluto Press 1987).

<sup>107</sup> See Florian Rödl, *Soziale Rechte in Europa: Von irreführenden Versprechen und notwendigen Kämpfen*, WSI-Herbstforum 2017.

<sup>108</sup> SWD(2017) 201 final, at 4. See Article 2, The Covenant.

<sup>109</sup> See Vandembroucke, ‘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.

<sup>110</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>111</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 23).

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 was originally 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>112</sup> are currently left out from the Pillar initiative. Following the logic of multi speed Europe and differentiated integration<sup>113</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.

#### IV. Conclusion

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 embedded liberal compromise<sup>114</sup> that has previously served as a European social model or a proxy for a genuine European social dimension.<sup>115</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>116</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*

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<sup>112</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>113</sup> See Vivien Schmidt, 'Inventing a New Future for Europe: Differentiated Integration with More EU and More Member-States?' (2017).

<sup>114</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>115</sup> Ashiagbor (n 29).

<sup>116</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).

(access justice)<sup>117</sup> we saw in *Laval's* outcome. If goods dumping is hurting the economies of the periphery,<sup>118</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 symbolically 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 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 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).<sup>119</sup> The Pillar however fails 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>120</sup> under the label of a “milestone in the social history of Europe”.

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<sup>117</sup> Micklitz (n 7).

<sup>118</sup> Kukovec (n 71).

<sup>119</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; 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).

<sup>120</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).