The European Pillar of Social Rights: Effectively Addressing Displacement?

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An assessment of the 'European Pillar of Social Rights' by reference to its constitutional significance – Potential to significantly improve the social output of the EU by addressing the displacement of the Social Policy Title of previous years – Incapacity to redress the constitutional imbalance between 'the market' and 'the social' in the EU legal order – Continuing displacement of the (national and European) legislator in the internal market and economic governance

Introductory remarks

On 26 April 2017, following a year-long preparatory phase,[1] the European Commission officially launched a European Pillar of Social Rights.[2] The Pillar, as presented by the Commission, consists of a set of social rights and principles and is accompanied by a package of proposals, comprising pre-existing initiatives, new legislation and soft law measures. Steeped in centrist language about improving the situation of both citizens and businesses across Europe, reconciling labour market security and flexibility, and combining high social standards with economic adaptability and competitiveness, this policy initiative is canvassing broad, cross-spectrum appeal and support, as testified by the recent Inter-Institutional Proclamation on the Pillar signed by the Commission, the Parliament and the Council on 17 November 2017 in Gothenburg.

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[1] European Commission, Communication of 8 March 2016 launching a consultation on a European Pillar of Social Rights, COM(2016)0127.

[2] European Commission, Recommendation on the European Pillar of Social Rights, C(2017) 2600 final, and Communication of 26 April 2017 establishing a European Pillar of Social Rights, COM(2017) 250 final.

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However, while it undoubtedly constitutes a significant development, especially when considered in light of the criticism about the EU's social credentials mounting over the past decade,[3] the Pillar's precise implications are still unclear. This article analyses the Pillar from a substantive and constitutional perspective. It will discuss its context and content, and its uncertain legal significance. Since the Pillar is best understood not as a single, contained legal measure but instead as a more fluid, political initiative that is still developing, the aim is not to provide a conclusive interpretation but instead a set of reflections on its possible implications. In line with the topic of this special issue of *EuConst*, the core of this assessment will focus on the extent to which the Pillar addresses three different (albeit inter-related) types of displacement:[4] first, the low use of the Treaty's Social Chapter competences in recent years;[5] second, the increase in decision-making on social issues outside the Social Chapter in the internal market and economic governance over the past decade;[6] which, third, leads to the displacement of the (national and European) legislative process.[7] In essence, the analysis considers whether the Pillar has the potential

[3] For a comprehensive discussion *see* C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', 67(1) *Current Legal Problems* (2014) p. 199, and S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union', 13 *EuConst* (2017) p. 22.

[4] For a general conceptual discussion of 'social displacement', *see* the contribution of C. Kilpatrick to this special issue.

[5] Barnard has argued that 'EU employment law is going nowhere very fast' due to a crisis of regulation: *supra* n. 3, p. 199.

[6] As regards European economic governance, the economic crisis of 2008 was the pivotal moment where important social questions became absorbed in the euro-crisis measures and the revised and strengthened regulatory framework that emerged afterwards. As regards the internal market, the ECJ initially applied a more deferential proportionality assessment to national labour rules that it considered potential 'restrictions' on the free movement provisions: *see* e.g. ECJ 27 March 1990, ECLI:EU:C:1990:142, *Rush Portuguesa Lda* v *Office national d'immigration*; ECJ 23 November 1999, ECLI:EU: C:1999:575, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*; ECJ 15 March 2001, ECLI:EU:C:2001:162, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume*. The situation changed with the *Laval* and *Viking* judgments in 2007: ECJ 18 December 2007, ECLI:EU:C:2007:809, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*; ECJ 11 December 2007, ECLI:EU:C:2007:772, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*.

[7] *See also*, on the displacement of the legislator in European integration, F. Scharpf, 'De-constitutionalisation of European Law: The Re-empowerment of Democratic Political Choice' and S. Garben, 'Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator', both in S. Garben and I. Govaere (eds.), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (Hart 2017).

to help address the constitutional imbalance between 'the market' and 'the social' in the EU legal order that I have described in a previous contribution to this journal.[8]

It will be argued that, if actually implemented by means of the necessary measures as currently envisaged in the overall package, the Pillar has the potential to significantly improve the overall balance between social and economic values in the EU's output in substantive terms, by effectively addressing the displacement of the Social Policy Title in the regulation of Social Europe. However, it will also be explained why the Pillar is not capable of addressing the fundamental, constitutional asymmetry that underlies European integration's 'social problem', which mainly resides in the other two forms of displacement: the fact that the most fundamental social decisions continue to be made in other areas, namely the internal market and the European Semester, and that those decisions are not made by the (national or European) legislator but by the judiciary and executives respectively.

Context

The launch and subsequent endorsement of the Pillar needs to be seen against the background of an increasingly volatile, tense and complex social-political situation across the EU. Euro-sceptical and Euro-critical political movements seem to be on the rise, culminating in the UK's decision to secede from the Union.[9] There is a sense that, following a time where Euro-sceptics' concerns were mostly directed at perceived EU 'over-regulation' and generally stemmed from only a limited group of member states, they are now increasingly expressed in broader socio-economic terms, appealing to citizens that may feel 'left behind' or wronged by globalisation and Europeanisation processes.[10] This plays into an East-West divide between 'old' and 'new' member states, where the former are suspicious of the labour mobility that for the latter is an intrinsic and important part of their constitutional settlement in the EU.[11] A North-South divide has furthermore

[8] Garben, *supra* n. 3. The previous article provides the full theoretical framework for the analysis, which is applied to the Pillar in the present article. In order to avoid duplication, the present article discusses the general argument only in a summary manner.

[9] For a recent study of the phenomenon *see* J. FitzGibbon et al. (eds.), *Euroscepticism As a Transnational and Pan-European Phenomenon: The Emergence of a New Sphere of Opposition* (Routledge 2017).

[10] On the impact of income inequality on Euroscepticism, *see* T. Kuhn et al., 'An ever wider gap in an ever closer union: Rising inequalities and euroscepticism in 12 West European democracies, 1975–2009', 14 *Socio-economic Review* (2016) p. 27.

[11] On the increasing contestation of intra-EU mobility, *see* M. Ferrera, 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights', 22 *ELJ* (2016) p. 791.

opened up following the crisis, where both creditor and debtor states feel short-changed by the Euro-crisis measures, directing their discontent at each other and at the EU.[12]

Particularly the European Parliament has linked this context explicitly to the Pillar initiative. In its Report on the Pillar, it has stated that the social dimension of European integration 'has suffered a heavy blow' due to the Eurozone crisis. It mentions the sovereign debt crisis caused by the '€2 trillion of taxpayers' money […] used in state aid to the financial sector' and the 'harsh fiscal consolidation and internal devaluation measures' which many member states were forced to implement. The Parliament considers that as these policies have resulted in acute and severe social hardship, the EU itself has come to be seen 'as a machine for divergence, inequalities and social injustice', a 'threat to people's well-being' and as the cause of the downgrading of national welfare systems.[13] It furthermore acknowledges a second set of challenges that Social Europe has experienced over the past decade, namely those related to labour mobility in the internal market, in the context of the free movement of workers and the provision of services (posted workers). While Parliament emphasises free movement of people as one of the EU's greatest achievements,[14] it also takes a position against 'competition on the basis of labour conditions' and considers 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'.[15]

While such statements fall some way short of atonement, they do implicitly recognise that the EU's social credibility as it currently stands leaves something to be desired. This is a widely-shared view.[16] First and foremost, the austerity measures imposed on member states in return for financial assistance have led to an objectively reported deterioration in living conditions and increase in poverty

[12] *See* in general on the effects of the crisis on Eurosceptic voting, S. Hobolt and C. de Vries, 'Turning against the Union? The impact of the crisis on the Eurosceptic vote in the 2014 European Parliament elections', 22 *Electoral Studies* (2017) p. 504. On the rise of Euroscepticism in the debtor counties *see* D. della Porta et al., 'Left's Love and Hate for Europe: Syriza, Podemos and Critical Visions of Europe During the Crisis', in M. Caiani and S. Guerra (eds.), *Euroscepticism, Democracy and the Media* (Parlgrave 2017) p. 219.

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

[14] *Ibid.*, p. 21.

[15] *Ibid.*, p. 26.

[16] *See* Barnard, *supra* n. 3, p. 199; C. Kilpatrick and B. de Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges', *EUI Working Paper LAW* (2014); F. de Witte, 'EU Law, Politics and the Social Question', 14 *ELJ* (2013) p. 581; A. Koukiadaki and L. Kretsos, 'Opening Pandora's Box: the Sovereign Debt Crisis and Labour Market Regulation in Greece', 41 *Industrial Law Journal* (2012) p. 276; H. Augusto Costa, 'From Europe as a Model to Europe as Austerity: the Impact of the Crisis on Portuguese Trade Unions', 14 *ELJ* (2012) p. 397.

in the affected countries,[17] and some of the Euro-crisis measures have been condemned by international actors such as the International Labour Organisation and the Council of Europe's Committee of Social Rights for breaching international minimum social standards.[18] In purely technical terms, most of these condemnations are directed at the national implementation measures, which often went significantly further than was strictly speaking required under the Memorandums of Understanding,[19] and as such do not point the finger directly at the EU, but these developments have nevertheless done little good for its social image.

That image had already before the crisis suffered a blow in the context of the internal market. A string of controversial cases concerning the balance between fundamental social rights and standards on the one hand, and economic freedoms of establishment and to provide services, on the other hand, saw the European Court of Justice essentially subjecting the former (including the right to take collective action) to the latter.[20] The political fall-out has been significant, especially in 'old' member states that fear the systematic under-cutting of their labour standards by companies established in 'new' member states, particularly through the temporary posting of workers to their territory.[21] This issue played an important role in the 2014 European elections, and has cropped up in recent national elections as well.

The Pillar can be seen as the EU's response to these concerns. The European Commission is driving the process as a policy entrepreneur. The current Commission President, the first to be elected following the new '*Spitzenkandidaten*' system, had acknowledged the EU's social concerns

[17] The 2015 ILO Report provides a comprehensive overview. ILO, World Social Protection Report, 2015, pp. xxv, 9, 24 and 137.

[18] For discussion *see* M. Rocca, 'Enemy at the (flood) gates, EU "exceptionalism" in recent tensions with the international protection of social rights', 7 *European Labour Law Journal* (2017) p. 52.

[19] For instance, as regards the austerity measures in Greece, the first Memorandum of Understanding did provide that Greece was 'following dialogue with social partners, government to adopt legislation on minimum wages to introduces sub-minima for groups at risk such as the young and long term unemployed', but it did not specifically require the adoption of the apprenticeship contract with its regressive terms for which Greece was condemned by the Committee of Social Rights. Similarly, while the Memorandum did specify that Greece was to 'extend the probationary period for new jobs to one year', it did not require these to be without any protection against unjustified dismissal, which was the basis of the condemnation.

[20] *Laval supra* n. 6; *Viking supra* n. 6; ECJ 3 April 2008, ECLI:EU:C:2008:189; *Dirk Rüffert* v *Land Niedersachsen*; ECJ 19 June 2008, ECLI:EU:C:2008:350, *Commission* v *Luxembourg*.

[21] *See*, for instance, the letter from seven EU Member States ministers to EU Employment Commissioner on the exploitation of posted workers, 18 June 2015, <www.gmb.org.uk/about/gmb-in-europe/european-policy-issues/posting-of-workers> , visited 27 December 2017.

throughout the election campaign, and vowed on several occasions to ensure social fairness in the internal market and European integration more generally. The launch of the Pillar is a product of the Commission President's commitment to these values and to deliver on election promises made. Specifically, it is part of the Commission's efforts to ensure a 'Social Triple A Rating' for Europe,[22] and should be seen alongside the proposal to revise the Posting of Workers Directive to ensure the principle of 'equal pay for equal work', which – even after the yellow card issued by national parliaments – has gone forward.[23] But, importantly, the Commission's Pillar initiative has been swiftly and forcefully endorsed by the Parliament and the Council, with the Inter-Institutional Proclamation signed within seven months since its inception. Apparently, the view that the EU's social image needs strengthening is broadly shared. As such, this may furthermore be taken as an indication that between the various options for the future of Social Europe as presented by the Commission in its 2017 reflection paper,[24] scaling back[25] is not generally supported.

The Pillar's main features

The main content of the Pillar

What exactly is the European Pillar of Social Rights? In a narrow sense, it is a set of 20 rights and principles, categorised 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

[22] While in the Pillar's explanations the common currency and the internal market are staunchly defended, and the Commission's narrative continues to carry a streak of 'economic growth equals social outcomes', 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'. *See* European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final, p. 3 and 4.

[23] Proposal for a Directive amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final. The Council reached agreement in October 2017, see <www.consilium.europa.eu/en/press/press-releases/2017/10/23/epsco-posting-of-workers/>, visited 27 December 2017.

[24] European Commission, Reflection Paper on the Social Dimension of Europe, COM(2017) 206, available at <ec.europa.eu/commission/sites/beta-political/files/reflection-paper-social-dimension-europe_en.pdf>, visited 27 December 2017.

[25] In particular the scenario 'nothing but the single market', *supra* n. 24, p. 23.

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.

In the accompanying staff working document,[26] each right or principle is explained by reference to its current status under the EU *acquis*, to what extent it is (to be?) extended by the Pillar, and how it can be implemented. In that latter regard, a distinction is made between the national and EU level, and the position of the Social Partners is recognised. For several rights and principles, concrete implementation measures at EU level are envisaged, and these proposals are conceptualised as part of the overall Pillar package. Some of these implementation measures are legislative, both pre-existing[27] and new proposals; others are of a soft law nature such as recommendations, communications, funding or foreseen as policy coordination in the EU's yearly cycle of economic governance (the European Semester). As such, in a broader sense, the European Pillar of Social Rights can be understood as a larger package or even as an agenda or a process, which includes those legislative and soft-law proposals and initiatives in addition to the 20 rights and principles.

The main new legislative proposals and initiatives, to be adopted on the basis of the Treaty's Social Policy Title, are: (i) a 'New start to support Work-Life Balance for parents and carers initiative'[28] which features a Proposal for a Directive on work-life balance for parents and carers,[29] replacing the Commission proposal for a revision of Directive 92/85/EEC on maternity protection which was withdrawn in 2015; (ii) an 'Access to social security initiative' for a potential action addressing the challenges of access to social protection for people in all forms of employment and potentially also self-employment;[30] and (iii) a revision of the Written

[26] SWD(2017) 201 final.

[27] Such as 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, 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, COM/2015/0615 final and the Proposal for a Directive aimed at further ensuring greater equality among management positions in the corporate sphere, COM(2012) 614.

[28] COM(2017) 252 final.

[29] COM(2017) 253 final.

Statement Directive 91/533/EEC to introduce minimum standards applicable to every employment relationship and prohibiting abuse.[31]

The European Semester in turn is to embed the implementation of 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'. The Pillar's provisions on wages and income attracted much attention in the media after their announcement. Considering the fact that Article 153(5) TFEU excludes the issue of 'pay' from that legal basis, and that its paragraph 4 stipulates that the provisions adopted pursuant to that article shall not affect the right of Member States to define the fundamental principles of their social security system and must not significantly affect the financial equilibrium thereof, it is not surprising that no legislative action on these points has been proposed, even if it is not impossible to argue that the EU would have the legal competence for such action on other legal bases such as Article 352 TFEU[32] or Article 115 TFEU.[33] Action through the European Semester instead means that Member States may receive Country Specific Recommendations to introduce or improve their minimum wage and income schemes, something which has already been a feature of the Semester in previous years. These recommendations are not legally binding, but do take place in the context of a structured framework with a coercive force derived from the possibility of financial sanctions for non-compliance in the case of recommendations issued based on the Macro-Economic Imbalance or Excessive Deficit procedures.[34]

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

[31] The Commission has launched the first-phase consultation, C(2017) 2611.

[32] While the flexibility clause in its post-Lisbon manifestation provides that 'measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonization', it is an open question whether this would include the stipulation in Art.153(5) TFEU that '[t]he provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs', which is not a traditional prohibition of harmonisation as found elsewhere in the Treaties concerning the EU's complementary competences. Similarly, wording of the stipulation in Art. 153(4) TFEU that 'the provisions adopted pursuant to this Article shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof' does not seem to indicate that that same limit applies to EU action on other legal bases.

[33] The regulation of minimum wages in particular could be argued to facilitate the functioning of the internal market. The use of an internal market legal basis for social measures entails some disadvantages, however. For discussion, *see* C. Kilpatrick et al., 'From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy Brief', *EU Law Analysis Blogpost*, 20 March 2017.

[34] 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 Country Specific Recommendations are a particularly coercive form of soft law. For discussion, *see* Garben, *supra* n. 3.

Further planned soft law measures include new Recommendations and Communications on education and a Preparatory Action on a Child Guarantee. Funding will be directed toward the development of general minimum income benefits (in particular through the European Social Fund), the Youth Guarantee, and to the implementation of the principle relating to housing and assistance for the homeless, through various funds.[35]

The Pillar's legal status

The first set of questions that the Pillar raises relate to its legal value and its interaction with the already existing social rights instruments at EU and international level. The Pillar, understood in its narrow sense as a set of 20 rights and principles, was first launched by means of a Commission Recommendation adopted on the basis of Article 292 TFEU and subsequently endorsed by the Inter-Institutional Proclamation of 17 November 2017. In both of these different manifestations, the Pillar is a non-binding 'soft law' instrument,[36] meaning that its legal value is limited to a source of interpretation of EU law, which the European Court of Justice may or may not use in its case law, and that it potentially circumscribes the actions of the signatories on the basis of the legal certainty principle.[37] This does not render the Pillar meaningless, as it does have some potential indirect legal consequences, not to speak of its political importance as a (re-)statement of values at the highest level, but its lack of direct enforceability should be clearly recognised and does slightly detract from its own reference to social *rights*.

At the same time, had the Pillar become legally binding and accorded 'hard' rights to individuals, it would have complicated matters. After all, various important legal instruments already exist, containing by and large the same rights and principles. Most notably, of course, this includes the EU Charter of Fundamental Rights that has primary law status equal to the Treaties, but to a lesser extent also the European Social Charter of the Council of Europe, to which all Member States are signatories,[38] and the many International Labour Organisation Conventions regulating a range of issues dealt with in the Pillar.

[35] Including through the European Fund for Strategic Investments for social housing investments, the European Regional Development Fund for housing infrastructure, the European Social Fund for social services and the Fund for European Aid for the Most Deprived for food assistance to homeless persons.

[36] For recommendations, this is stated explicitly in Art. 288 TFEU. Proclamations are not mentioned as a legal instrument in the Treaties and their legal status is therefore somewhat more 'obscure'. *See* on this point Z. Rasnača, 'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' *ETUI Working Paper* 2017.05, p. 14.

[37] *See*, for a more elaborate analysis, Rasnača, *supra* n. 36.

[38] The original European Social Charter was signed in 1961 and was ratified by all the then Member States of the EEC, and currently by 23 of the 28 EU Member States. A revised European

In this respect, the Commission's staff working document indicates that it 'draws on' these instruments and that nothing in it shall be interpreted as restricting or adversely affecting these principles and rights.[39] 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.[40]

Thus, as the Commission indicates, the catalogue of 20 social rights and principles making up the core of the Pillar initiative is not, 'given the legal nature of the Pillar', directly enforceable, and 'will require a translation into dedicated action and/or separate pieces of legislation, at the appropriate level'.[41]

As such, while the precedent of a 'proclamation' was set by the EU Charter of Fundamental Rights,[42] 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.[43] The Community Charter is declaratory,[44] but it is a source of inspiration for the European Court of Justice, 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.[45] Most importantly, many rights listed in the Community Charter were

Social Charter was adopted in 1996, ratified by 20 of the current EU Member States. All Member States are party to either the 1961 or 1996 Social Charter.

[39] European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, pp. 2 and 3.

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

[41] European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, p. 3.

[42] The Commission draws this comparison itself, stating that '[a]s it was done for the Charter of Fundamental Rights, the proposal for an interinstitutional proclamation will be discussed with the European Parliament and the Council'. *See* Commission Communication establishing a European Pillar of Social Rights.

[43] For a discussion *see* P. Watson, 'The Community Social Charter' 28 *CMLRev* (1991) p. 37.

[44] The Community Charter is a proclamation devoid of legal effect. *See* Opinion of AG Jacobs in ECJ 21 September 1999, ECLI:EU:C:1999:28, *Albany*, para. 137.

[45] E.g. ECJ 11 December 2007, ECLI:EU:C:2007:772, *International Transport Workers' Federation, Finnish Seamen's Union* v *Viking Line ABP, OÜ Viking Line Eesti*, paras. 43-44;

implemented in secondary law through the Social Charter Action Programme,[46] such as on occupational health and safety, written statement on the employment relationship, posted workers, working time, pregnant workers and younger workers. The Pillar in its broader meaning could be likened to such an Action Plan.

The comparison with the 1989 Community Charter carries a little further, in the sense that it also had a 'differentiated' scope of application, initially excluding the UK. The Pillar in turn 'is primarily conceived for the Euro area'.[47] The explanation given is 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 is equally used as a proxy for political likelihood of approval and participation. Indeed, it seems difficult to deny that the Euro-countries generally constitute a smaller, more deeply integrated group of member states that can be expected to be slightly more convergent, including in their social outlook.

This notwithstanding, it could be argued that such a differentiated scope of application is inappropriate for an initiative such as the Pillar. The EU legal order is now fundamentally different from what it was in 1989 when the Community Charter was adopted, particularly in that it can now more convincingly be conceived as a constitutional order. To limit the scope of application of fundamental rights and principles within such an order to only parts of the territory seems questionable from a Rule of Law perspective. Surely, for instance whether one is considered to be entitled to social assistance should not depend on whether one's member state uses the Euro. Even if the Pillar in its narrow sense is not enforceable, its symbolic value is equally (or all the more?) undermined by such a fragmented approach.

As such, it is therefore fortunate that on this crucial point, there is a difference between the Pillar Recommendation and the Inter-Institutional Proclamation. Although both indicate that the Pillar is 'primarily conceived' for the Euro area, the former considered that the Pillar would in addition 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'.[48] It could therefore be argued that since the adoption of the Proclamation, the Pillar *stricto sensu* no longer has a differentiated scope. The Pillar's implementation through economic governance mechanisms

Opinion of AG Trstenjak of 24 January 2008 in ECJ ECLI:EU:C:2008:37, *Gerhard Schultz-Hoff* v *Deutsche Rentenversicherung Bund*, para. 38.

[46] COM(89)568.

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

[48] Recital 13 of the Commission Recommendation and the Inter-Institutional Proclamation, respectively.

may still differ between the Euro area and other member states, but the core statement of social values is at least shared by all. In line with the Rome Declaration, this could be taken as a further indication that in the future EU27, there will be a stronger commitment to EU social policy.[49]

The question remains, however, what the Pillar adds, considering the existence of the EU Charter of Fundamental Rights. Firstly, in some respects it goes slightly further than the EU Charter.[50] For instance, the Pillar includes rights to fair wages, minimum income and to long-term care services for persons who are reliant on care, which the EU Charter does not, as such, contain. The Pillar right to education and training throughout life goes further than Article 14 EU Charter by including quality and inclusiveness, the Pillar right to active support to employment goes beyond the right to a free placement service under Article 29 EU Charter to include employment services, such as job-search counselling and guidance, training, hiring subsidies and re-insertion support, and the right to housing assistance goes further than Article 34(3) EU Charter by referring to the provision of housing support in-kind. Secondly, and more importantly, the overall Pillar package contains a number of concrete implementation measures, discussed above, that would be legally binding when adopted, thereby ensuring the implementation of the respective EU Charter and Pillar rights in the Member States – something the EU Charter itself cannot do due to its limited scope of application.[51] It seems unlikely that any such legislative measures would be limited in their scope of application to the Euro-countries only,[52] thereby further neutralising the initial Euro area focus of the Pillar.

These latter observations of course add further significance to what already went without saying: that the merits of the Pillar depend heavily on whether it will actually be implemented through the envisaged further measures, or not. On the

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

[50] At the same time, it should be noted that the right to a maximum weekly working time, adequate rest periods and paid annual leave, laid down in Art. 31(2) of the EU Charter and which the Court has held to constitute 'social rights of fundamental importance' and which are laid down in the General Working Time Directive 2003/88/EC and further sector-specific legislation, is conspicuously absent from the Pillar. This is all the more noteworthy, because the decision not to revise the Directive and to issue an interpretative Communication instead is presented as part of the Pillar's implementation.

[51] On the basis of Art. 51, the EU Charter of Fundamental Rights is primarily addressed to the EU Institutions and only binds the member states when they act in the scope of EU law.

[52] No such indication of making use of enhanced cooperation under Title III of the TFEU has been given in the first-stage consultations launched on the new initiatives.

one hand, considering the difficulties in getting legislation successfully adopted in this area in the past years, an enthusiastic and swift enactment of all the proposals cannot be taken for granted. And to the extent that the follow-up is planned through soft law measures, the actual take-up of the Pillar cannot be guaranteed either. Even in the context of the arguably 'hardest' form of soft law, i.e. the European Semester, data suggests a relatively low rate of implementation of the Country Specific Recommendations on the national level.[53] If the Pillar remains largely without concrete transposition, as a self-standing document containing 20 non-enforceable social rights and principles, it will carry little weight. However, the rapid take-up of the Pillar initiative by the Parliament and Council must be considered, as well as the views outlined by the EU27 on social issues in the Rome Declaration. This means there is some reason to think that the political landscape has significantly shifted towards a more social outlook, which could ensure the Pillar's future implementation, and help avoid it turning into a 'damp squib'.[54]

The Pillar's potential to redress social displacement

The Pillar as a boost to the EU's social dimension through renewed use of the legal competences of the Social Policy Title

In addition to the social rights contained in the EU Charter of Fundamental Rights, the EU boasts an important social secondary *acquis*, consisting of a rich body of legislation concerning inter alia non-standard employment, information and consultation of workers, health and safety at work, working time, protection of workers in the event of structural changes in the company, as well as maternity and parental leave, non-discrimination, and mobile citizens and their families. Some of these measures were adopted on the general internal market mandate (Article 114 TFEU), but the bulk of this *corpus legi* has been developed on the basis of the Social Title. This allows for the adoption of directives on a number of (employment-related) social issues listed in Article 153 TFEU, and for the conclusion of Social Partner Agreements that can be implemented by a Council directive in accordance with Article 155 TFEU. Therefore, although EU action in this area remains circumscribed compared to national competence,[55] the EU has

[53] According to the European Parliament, only 'around 9% of the CSR's were fully implemented by the Member States in 2013', European Parliament resolution of 11 March 2015 on the European Semester for economic policy coordination: Annual Growth Survey 2015.

[54] Term borrowed from Barnard, who has used it to describe the EU Charter of Fundamental Rights in the context of social policy: *supra* n. 3, p. 207.

[55] In particular, EU legal measures in this area are limited to the objectives listed in Art. 153(1) TFEU, and there are several exclusions, such as the issues of pay, the right of association and the right to strike. They are also limited to the setting of minimum standards.

developed a strong social mandate and output during the course of European integration.

However, as commentators have rightly highlighted, in recent years this output has been relatively meagre, especially in terms of legislation.[56] Since the adoption of the Temporary Agency Work Directive 2008/104/EC in 2008, itself the result of two decades of arduous debates and negotiations,[57] there has been little EU legislative action undertaken on the basis of the Social Policy Title.[58] As also discussed elsewhere in this special issue in more detail, this constitutes a first type of 'social displacement': the low use of the EU's explicit social competences in the pursuit of strengthening the European Social Model.[59]

Various well-known factors of both a political and constitutional nature have contributed to this first sense of social displacement over the past decade or so. EU enlargement has made EU decision-making more complicated in this area by increasing the number of countries leaning towards a 'Liberal Market Economy',[60] and their bargaining positions have been further strengthened by the European Court of Justice's judgments on national social standards in the context of the internal market (as briefly discussed below).[61] National parliaments have proven an additional hurdle since the Lisbon Treaty's introduction of the Early Warning System, with two of the three yellow cards issued to date relating to social initiatives. It has furthermore been argued that the EU Better Regulation Agenda has held back the development of social initiatives in the Commission, at least under the Barroso administration.[62] And importantly, the financial crisis made the economic and political case for maintaining (let alone raising) social standards more difficult at both the national and European level. Ironically, while some of the factors (such as increased economic diversity due to enlargement and

[56] Barnard, *supra* n. 3; Rasnača, *supra* n. 36.

[57] *See* N. Countouris and R. Horton, 'The Temporary Agency Work Directive: Another broken promise?', 38 *Industrial Law Journal* (2009) p. 329.

[58] An exception being the platform on undeclared work, Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11.3.2016, p. 12.

[59] *See* E. Muir, 'Drawing Positive Lessons from the Presence of "The Social" outside of EU Social Policy *Stricto Sensu*' in this issue of *EuConst*.

[60] F. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', 8 *Socio-Economic Review* (2010) p. 211; F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', 40 *Journal of Common Market Studies* (2002) p. 645, P. Copeland, 'EU enlargement, the clash of capitalisms and the European social model', 10 *Comparative European Politics* (2012) p. 476.

[61] Scharpf (2010), *supra* n. 60.

[62] *See* M. Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics', 53 *Common Market Law Review* (2016) p. 1209, and S. Garben and I. Govaere (eds.), *The EU Better Regulation Agenda: Critical Reflections* (Hart Publishing forthcoming).

deteriorating social and economic conditions due to the crisis) increased the need for social integration and protection at the EU level, they at the same time made it more difficult.

Assuming, for the sake of argumentation, that the envisaged implementing measures on the EU level are indeed successfully adopted, would the Pillar then be able to boost the EU's social credentials? The answer is a resounding 'yes'. Especially the legislative proposals, both the re-packaged, pre-existing ones and the new initiatives would significantly improve the level of social protection for many European citizens, and would respond to a number of social challenges that have reared their head, particularly since the onset of the economic crisis, such as labour market precarity. This finding serves to underline how important the legal competence provided in the Social Policy is for the construction of Social Europe, how consequential its displacement has been, and the relevance of its current (potential) 'revival' by the Pillar. The Pillar itself can be seen as testimony to the change in some of the underlying factors that had caused this displacement, particularly the different ideological orientations of the current Commission and the member states, partially on the back of economic recovery, and – possibly – a decrease in the bargaining power of the Liberal Market Economies in EU decision-making in the wake of the Brexit-referendum.

The proposed Work-Life Balance Directive follows the withdrawal of the Commission's 2008 proposal to revise the Maternity Leave Directive 92/85/EEC and would replace the 2010 Parental Leave Directive while maintaining its existing rights and obligations. The Work-Life Balance Directive commendably takes a broad approach to the issue of gender equality and caring duties, and proposes several important new minimum rights, such as: (i) the possibility for flexible uptake (piecemeal and part-time) of the four months' individual entitlement to parental leave (Article 5(6)) and payment thereof at sick pay level (Article 8); (ii) allowing the four-month's entitlement to be taken up until the child reaches the age of 12 (instead of 8) and making it non-transferable between parents (Article 5(1) and (2)); (iii) an entitlement to 10 working days of paternity leave when a child is born, paid at sick pay level (Article 4), and (iv) an entitlement to 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 two-stage consultation of Social Partners has already taken place in accordance with Article 154 TFEU. It seems fair to say that this Directive, if adopted, 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 other two main potential legislative initiatives touch on a different core social challenge facing Europe's labour market(s) today: that of social

precariousness connected to non-standard forms of employment and (dependent) self-employment. The first-stage consultation of the Social Partners on these potential actions has been initiated on the occasion of the launch of the Pillar, so the proposals are not yet as concrete as in the case of the Work-Life Balance Directive. The consultation documents nevertheless clearly show the ambition of the two initiatives: to provide new and tangible minimum protection and security for workers in atypical employment and for the (dependent) self-employed. In view of the rise of precarious working arrangements, especially during the crisis, these measures are very welcome from a social perspective.

The Access to Social Security initiative[63] aims to tackle the problem that up to half of the 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, which is likely to become a growing impediment to the well-functioning of labour markets, to the sustainability of social protection systems and to 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 to and transferability of social benefits. One option for the potential action would be an EU Directive with provisions ensuring: (i) similar social protection rights for similar work; and (ii) the transferability of acquired social protection rights. As for the legal basis, the Commission indicates in the consultation document that 'Article 153(1)(c) of TFEU provides, within certain limits, for the EU to adopt legislation in the area of "social security and social protection of workers" and could be used to establish new *acquis* necessary to address the challenges of access to social protection for people in non-standard employment. A combination of Articles 151 and 352 of TFEU could be the base for EU legislation seeking to address access for people in self-employment'.[64]

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 consultation indicates the Commission's intention to introduce a more important substantive element 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.[65] The Commission,

[63] European Commission (2016): Commission Work Programme 2017 – Delivering a Europe that protects, empowers and defends, point 11.

[64] European Commission, C(2017) 2610 final.

[65] The Commission's consultation document refers to Eurofound's definitions for these terms, as given in the report 'New forms of employment' (Publications Office of the EU 2015) p. 46.

on a preliminary basis, identifies the rights that could be attached to any employment relationship: the right to a maximum duration of probation 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 right to a contract with a minimum of hours set at the average level of hours worked during a preceding period of a certain duration for very flexible contracts;[66] the right to request a new form of employment (and employer's obligation to reply); the right to training; the right to a reasonable notice period in case of dismissal/early termination of contract; the right to adequate redress in case of unfair dismissal or unlawful termination of contract and, finally, the right to access effective and impartial dispute resolution in cases of dismissal and unfair treatment.[67]

It would be very useful if the Directive would somehow address the specific precariousness connected to certain casual, on-call contracts, where the employer is free to reduce or increase the number of working hours at will within a very short timeframe. This allows the employer to *de facto* dismiss a worker through a sudden, drastic reduction or complete elimination of their assigned working hours, without an official termination of the contract. The effectiveness of all the rights accorded to workers on such contracts depends on the impossibility for the employer to use the threat of a *de facto* dismissal as a disincentive for the worker to assert their rights and entitlements. It would furthermore be useful if the Directive would clarify the application of the other EU labour law directives to these atypical forms of employment. Currently, this is decided by the European Court of Justice on a case-by-case basis, and while there is some convergence in the case law towards an autonomous scope of application based on the general definition of 'worker' applicable in the context of Article 45 TFEU, it would benefit legal certainty and coherence if this were to be clearly provided in a legislative instrument at EU level.[68]

While it remains to be seen how these three initiatives will turn out, all three have the potential to address pressing issues of social justice and protection facing

[66] This corresponds to the protection provided by the Dutch courts in the case of 'nul-uren contracten' (zero-hours contracts), developed in the national case law.

[67] The Parliament is likely to support such a measure. In its Resolution on the Pillar, the Parliament has called for a framework directive on decent working conditions to include relevant minimum standards to be ensured in more precarious forms of employment, in particular fair working conditions for internships, traineeships and apprenticeships, a clear distinction between genuine self-employment and those in an employment relationship and limits regarding on-demand work. European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights, para. 5.

[68] For extensive discussion *see* S. Garben et al., 'Towards a European Pillar of Social Rights: upgrading the EU social *acquis?*', 1 *College of Europe Policy Brief* (2017).

European workers and labour markets today. As such, it can be concluded that if it manages to deliver on these three key initiatives, the Pillar will resuscitate both the Social Policy Title and Social Europe, significantly improving the social situation of many EU citizens, and the social output of the EU overall. That means that one dimension of social displacement would be effectively redressed.

The displacement of democratic social decision-making to the judiciary and the executive in the internal market and economic governance

In a previous contribution to this journal, I highlighted the existence of a constitutional imbalance between 'the market' and 'the social' in the EU.[69] The piece explored three areas of EU law, focusing on how 'the market' and 'the social' are being balanced and by whom, whether there is an imbalance in the overall outcome, and to what extent that outcome can be legitimised. It concluded that the specific constitutional configuration of the area of social policy, the legislative process through the Community Method and the Social Method[70] ensures balance and, moreover, legitimacy. In contrast, in the internal market and economic governance, the balance between 'the market' and 'the social' has been decisively struck in favour of the former, to such an extent that it affects the overall balance of these values in the EU polity, and this outcome is not the result of democratically legitimate procedures but instead of judicial and executive decision-making respectively. In the internal market, the European Court of Justice decides on highly sensitive political, socio-economic questions in its application of the prohibitions on restriction to free movement (often interpreted as pure economic freedoms), displacing the national legislative process but to a certain extent also the European one – in that a range of political and legal factors make upwards social re-regulation by the EU exceedingly difficult in an area 'liberalised' by the Court's case law.[71] In economic governance, national regulatory autonomy is severely constrained[72] through substantive decisions

[69] Garben, *supra* n. 3, p. 23.

[70] Legislation on the basis of Social Partner Agreements.

[71] Scharpf (2010), *supra* n. 60, p. 211; Scharpf (2001), *supra* n. 60, p. 645.

[72] As was pointed out further above, the constraining impact of the European Semester's Country Specific Recommendations has been questioned in light of their allegedly low (immediate and direct) take-up on the national level. This argument is in essence empirical and would need some further research to be reconfirmed. Furthermore, in the past years, the framework has become more coercive, with EU-level funding being increasingly conditioned on the Country Specific Recommendations. Perhaps most importantly, the Country Specific Recommendations may not be directly binding, but they provide national governments with leverage over other domestic actors, who may be less informed about the legal nature of Semester 'obligations', allowing governments to cherry-pick the recommendations they like and to side-step national democratic scrutiny for implementing them.

taken by executives at the EU level, but outside the systems of checks and balances of the Community Method. It was argued that to address this, we should structurally re-empower the legislator vis-à-vis both the executive and the judiciary, at the European and the national level.

How does the European Pillar of Social Rights fit into the picture? Can it help to redress these two forms of displacement? Unfortunately, while the Pillar, as discussed above, can certainly improve the social output of the EU in substantive terms, its main effect would be to reinforce the EU's action under the Social Policy Title. It does not redress the displacement of the national and European legislator in the two areas where it arguably counts most: European economic governance and the internal market.

The Pillar is not aimed at fixing any problems with the internal market. While, as stated above, 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', this measure is not conceptualised as part of the Pillar, nor does the Pillar address the displacement of democratic social decision-making to the judiciary in the internal market in another way. In any event, it would seem that only a fundamental change in the case law[73] (either initiated on the European Court of Justice's own motion or through Treaty amendment[74]) would be sufficient. It could be argued that in the specific area of posted workers, the Court has already adjusted its stance on national wage standards to a more moderate approach in the *Elektrobudowa* and *Regiopost* cases,[75] allowing more leeway for host member states to impose minimum pay conditions. Also the *AKT* judgment on the Temporary Agency Work Directive,[76] and arguably the Court's recent judgments in the area of access to welfare entitlements of non-economic EU citizens, could be mentioned in this regard.[77]

However, the Court carries on its expansive approach in other areas, as can be seen in the *Commission v Spain* judgment on port labour,[78] and recently in *AGET*

[73] Such as proposed by C. Barnard in 'Restricting Restrictions: Lessons for the EU from the US?', 68 *Cambridge Law Journal* (2009) p. 575.

[74] For an argument to de-constitutionalise the internal market provisions: F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', 21(3) *ELJ* (2015) p. 401.

[75] ECJ 12 February 2015, ECLI:EU:C:2015:86, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spółka Akcyjna*; ECJ 17 November 2015, ECLI:EU:C:2015:760, *RegioPost GmbH & Co KG* v *Stadt Landau*.

[76] ECJ 17 March 2015, ECLI:EU:C:2015:173, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry* v *Öljytuote ry and Shell Aviation Finland Oy*, where the Court rejected an interpretation of a provision in the Directive that would allow companies to contest 'restrictions' on the use of such atypical employment in national courts.

[77] For overall discussion of the case law in this context, *see* Garben, *supra* n. 3, p. 23.

[78] ECJ 11 December 2014, ECLI:EU:C:2014:2430. The Court held that the Spanish dock work system, which required all companies wishing to perform cargo handling services to register with the

concerning Greece's legislation on collective redundancies.[79] While the Court's tone in *AGET* is more conciliatory than in some previous cases,[80] the fact remains that once again precedence is given to the freedom of establishment of companies (or rather, their 'economic freedom' more generally) at the cost of a system protecting workers from collective redundancies. This can be considered politically controversial considering: (i) Greece's overall crisis context;[81] and (ii) the fact that these rules applied without distinction to domestic and EU companies. With or without the Pillar, therefore, at present the European Court of Justice's interpretation of the internal market provisions continues to cause a structural imbalance between 'the market' and 'the social', with all the legitimacy deficits that this entails. While it is of course possible that the European Court of Justice will use the Pillar as a source of inspiration in its case law, the Pillar as such does not entail a significant recalibration of social and economic values in the EU legal order – instead it is a reaffirmation of social values that already have primary law status in the EU Charter. And it could be argued that in the European Court of Justice's interpretation of the Charter, it has at times attached more weight to economic rights such as the freedom of enterprise, than to social rights.[82] Nothing in the Pillar as such suggests that this will change.

Regarding economic governance, one may think that the Pillar has more of a potential to address the structural problems. After all, we have seen that part of the Pillar's implementation is through the European Semester, and precisely aimed at improving the social dimension of Economic and Monetary Union. This is, in fact, presented as the official rationale for primarily orienting the Pillar's application to the Euro area. But while this could further the substantive 'socialisation' of the European Semester through the inclusion of a range of social benchmarks and objectives in the yearly recommendations cycle and their follow-up (along the lines of the trend started a few years ago to include social

dock workers' company and to hire, with priority, workers from that company, amongst whom a certain number on permanent contract, constituted an unjustified restriction of the freedom of establishment. Various legislative attempts at EU level to open cargo handling to the market had been unsuccessful. This judgment, rendered without an AG Opinion and available only in Spanish and French, does just that, showcasing the surreptitious power of negative integration, achieving outcomes that would be more difficult to procure in a democratic arena.

[79] ECJ 21 December 2016, ECLI:EU:C:2016:972, *AGET Iraklis*.

[80] Markakis argues that *AGET* 'was not a *Viking/Laval* moment for the Court, as it very carefully examined the merits and demerits of the opposing arguments and handed down a very measured judgment', *see* M. Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis', 13 *EuConst* (2017) p. 743.

[81] Which the Court recognised in the judgment, but nevertheless did not accept as an overall justification.

[82] E.g. in ECJ 18 July 2013, ECLI:EU:C:2013:521, *Alemo-Herron* v *Parkwood Leisure Ltd*. For more extensive discussion of this point, *see* Garben et al., *supra* n. 68.

considerations concerning poverty, minimum wages and income in the Semester),[83] the overall framework is likely to remain oriented towards financial sustainability. It thus will remain to be seen what approach will be taken in the 'hard cases', where a certain social objective cannot easily be defended from an economic viewpoint and instead implies a trade-off. And in any event, the Pillar does not change anything about the legitimacy problems inherent in the current decision-making process of European economic governance, which remains executive-dominated and excludes genuine parliamentary participation. The highly sensitive, political nature of the issues being dealt with necessitates a more robust democratic approach than a signing-off by the Council, and this is not something the Pillar can resolve.

Conclusion

Although it is too soon for those in favour of a more social EU to celebrate the commencement of a new, more socially-oriented era of European integration, the launch of the European Pillar of Social Rights should be seen as a promising development. It has the capacity, if implemented through the planned legislative measures, to significantly improve the social situation of millions of Europeans, and as such would do good to the EU's social image and potentially address one dimension of the 'social displacement' that is discussed in this special issue. It does not, however, resolve the displacement of the national and European legislative process in the two areas where the most important social decisions have been made in the EU during the past decade: the internal market and European economic governance. For that, the EU will have to engage in a more difficult, and more self-critical exercise, in which the internal market, budgetary balance and social justice are not presented as non-controversial, apolitical issues that benefit citizens, workers and businesses alike, but instead are being recognised for the sensitive, political issues that they are, and that they are, at least partially, inherently at odds with each other – implying that normative decisions will have to be taken concerning the trade-offs that are involved in the pursuit of these various objectives, for which the EU Treaties all give a self-standing constitutional mandate. Without such frank politicisation of socio-economic questions in European integration, it is unlikely that the social and economic unrest that has bedevilled the EU now for more than a decade will fully subside.

[83] J. Zeitlin and B. Vanhercke, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *SIEPS* (2014).