EUROPE OF RIGHTS & LIBERTIES

The European Pillar of Social Rights and the European Social Charter

Sacha Garben

ABSTRACT
The European Pillar of Social Rights (EPSR) is a political reaffirmation of twenty social rights and principles. Some may question the need for another social rights document, alongside the Charter of Fundamental Rights of the European Union and the European Social Charter of the Council of Europe. Should we be worried that the EPSR is 'crowding out', and perhaps even diluting, the social rights already contained in EU and international law ? To the contrary, this article argues that one important aspect of the EPSR is that it represents a renewed engagement of the European Union (EU) with international social actors, such as the Council of Europe, and their legal instruments, such as the European Social Charter (ESC). Furthermore, while the EPSR is not as such legally binding, the legal value of this new social action plan for Europe lies elsewhere : in its programmatic nature, leading to the adoption of new important legal measures.

RESUME
L'article se penche sur le rôle à attribuer au juge national lorsqu'il est désigné juge rapporteur, qu'il rédige une opinion séparée dans une affaire dirigée contre son pays d'origine ou qu'il est amené à prononcer des mesures provisoires. La contribution aborde, ensuite, quelques expériences professionnelles de la première auteure.

KEYWORDS: EU social policy - European Pillar of Social Rights - political commitment of the EU institutions - legal enforceability of the Pillar of the EU - Directive 2010/18/EU on Work-Life Balance - Directive 2019/1152 on Predictable and Transparent Working Conditions – clash between international law and EU law in the area of social rights - synergy between the standard-setting systems

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The European Pillar of Social Rights and the European Social Charter

Sacha Garben*

1. INTRODUCTION

Gothenburg, 17 November 2017. After several trying years of social depression in the European Union (EU) and the Western world more generally, the Presidents of the European Commission, European Parliament, and European Council sign a 'solemn' Inter-Institutional Proclamation on the European Pillar of Social Rights.[1] As stated by one commentator, it 'represents the most encompassing attempt to raise the profile of social policy in two decades, since the inclusion of the employment chapter in the Amsterdam Treaty and the formulation of the European Employment Strategy'.[2] This high-profile political reaffirmation of a broad set of social rights and principles could, in line with the Rome Declaration,[3] be taken as an indication that in the future post-Brexit EU27, there may be a stronger commitment to EU social policy. The times, it seems, they are-a-changing…

Yet, no matter how 'solemnly' proclaimed, the Pillar is not legally binding. This means that individuals cannot directly rely on it in court proceedings should they consider that the 'rights' contained in the EPSR have not been respected, nor can the European Commission initiate infringement proceedings against Member States where they fail to live up to the Pillar's standards. This is a slightly uncomfortable reality, which some could consider a disappointment especially in light of the prominent reference to social rights : the Pillar spites its own name. As further explained in Section II below, it would, however, be misguided to focus only on the lack of direct legal enforceability of the EPSR, as it would fail to appreciate its real legal and political importance, which is more subtle and indirect. The EPSR's significance lies in its programmatic nature, and it will only show its true worth in its implementation. The precedent of the 1989 Community Charter on the Fundamental Social Rights of Workers with its accompanying Action Programme should

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1 [2017] OJ C428/10.

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

3 The Rome Declaration of 25 March 2017 outlined the importance of a strong social Europe based on sustainable growth, which promotes economic and social progress as well as cohesion and convergence, for the EU27 going forward.

be recalled in this context : an important part of the EU social *acquis* was progressively adopted on that basis. In the context of the Pillar, a range of important measures has been proposed as part of this new social action plan for Europe, some of which have already been successfully adopted.

From the perspective of other prominent instruments containing social rights, such as the EU Charter and the ESC, the EPSR may at face value appear, at best, a rather meaningless replication and, at worst, a harmful dilution and a 'crowding out'. However, as explained in Section III below in further detail, such a hostile stance would be myopic, in that it does not appreciate that the EPSR actually acts as a catalyst for (the rights contained in) these other instruments. In a certain sense, the EPSR's legal value is vicarious : it operates indirectly through other social rights instruments and encourages their actual implementation and expression. The EU Charter does not apply to the Member States unless they act in the scope of EU law. This means that the social rights contained in the Charter are dependent on being given further expression in legislation, and this is precisely what the Pillar's 'implementation process' is contributing to. The ESC, in turn, has not been fully ratified in both its incarnations by all the EU Member States, and furthermore does not benefit from the same enforcement mechanisms that rights contained in EU law do. The European Commission's monitoring of the implementation of the Pillar is encouraging the Member States to ratify where they have not done so, and to apply where they have, the ESC, and it is contributing to making the rights contained in the ESC a reality through the adoption of (enhanced) social protection in the EU Member States. It is the Pillar's indirect nature of an action programme rather than a rights' charter, that makes it instrumental for the EU Charter and ESC rather than a dangerous duplication, which it could have been in case it had been legally binding *in se*.

2. WHAT(EVER) IS THE PILLAR AND ITS PURPOSE?

A. A Pillar of (Non-)Rights?

In a narrow sense, the Pillar is a set of twenty social rights and principles, categorized in three chapters. Chapter I entitled 'Equal Opportunities and Access to the Labour Market' comprises the right to education, training and life-long learning, equal treatment between men and women, non-discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and 'active support to employment'. Chapter II is called 'Fair Working Conditions' and features the rights to 'secure and adaptable employment', fair wages, information about employment conditions and protection in case of dismissals, social dialogue and involvement of workers, work-life balance, and healthy, safe and well-adapted work environment and data protection. Chapter III entitled 'Social Protection and Inclusion' contains the rights and principles concerning childcare and support for children, social protection, unemployment benefits, minimum income, old-age income and pensions, health care, inclusion of people with disabilities, long-term care, housing and

assistance for the homeless, and access to essential services.[4]

The Proclamation states that the aim of the Pillar 'is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people's essential needs, and towards ensuring better enactment and implementation of social rights'.[5] It 'should be implemented at both Union level and Member State level within their respective competences',[6] and 'does not entail an extension of the Union's powers and tasks as conferred by the Treaties'.[7] As stated above, the Pillar takes the legal form of a proclamation and as such is not legally binding.[8] This means that the rights and principles it features are not, by virtue of the Pillar, enforceable against either the EU Institutions or the Member States.

Nor should they be. Virtually all of the rights and principles it contains, are already legally binding on the EU and/or the Member States by virtue of the EU Charter of Fundamental Rights, the ESC as well as the various Conventions of the International Labour Organization (ILO). It would have been a harmful duplication to create another binding social rights instrument at EU level with overlapping content. The Commission's explanations indicate that the Pillar 'draws on' these pre-existing instruments and that nothing in it shall be interpreted as restricting or adversely affecting them.[9] The Pillar reaffirms the rights already present in the EU and in the international legal acquis and complements them to take account of new realities. As such, the Pillar does not affect principles and rights already contained in binding provisions of Union law : by putting

4 While the Pillar includes a relatively wide range of social rights and principles and gives them a generous reading, a conspicuous absence is the right to a maximum weekly working time, adequate rest periods, and paid annual leave, as laid down in Article 31(2) of the EU Charter and in the Working Time Directive 2003/88/EC and further sector-specific legislation. The CJEU has held these to constitute social rights of fundamental importance (see, for example,. *Schultz-Hoff and Stringer and Others*, C-350/06 and C-520/06, EU:C:2009:18). Puzzlingly, the Pillar does not mention these fundamental social rights to maximum working time and minimum rest period and annual paid leave, nor does it reference workers' dignity (while it does mention dignity in reference to old age (Principle 15), disability (Principle 17), and minimum income (Principle 14)). While the Pillar cannot affect the rights laid down in the Charter in a direct way, this does raise the question whether the right to healthy and safe working conditions is politically being redefined to exclude the issue of working time. The fact that the Commission conceives its interpretative communication on working time as part of the Pillar package, however, provides an argument to quell that concern: Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time [2017] OJ C165/1.

5 Recommendation 12.

6 Recommendation 17.

7 Recommendation 18.

8 The Pillar was first launched by means of a Commission Recommendation (Article 292 TFEU –AUTHOR: can you please give the full treaty name and the official citation for the first reference?) and subsequently endorsed by the Inter-Institutional Proclamation of 17 November 2017. In both manifestations, it is non-binding, meaning that its legal value is limited to a source of interpretation of EU law, which the Court of Justice of the European Union may use in its case law. For recommendations, their non-binding nature follows from Article 288 TFEU. Proclamations are not mentioned in the Treaties and their legal status is therefore somewhat more 'obscure'. See Rasnaca, 'Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-level Policymaking', 5 *ETUI Working Paper* (2017) at 14.

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

together rights and principles which were set at different times, in different ways and in different forms, it seeks to render them more visible, more understandable and more explicit for citizens and for actors at all levels. In so doing, the Pillar establishes a framework for guiding future action by the participating Member States.[10]

The Pillar thus reaffirms the political commitment of the EU institutions, including the Member States in the Council, to deliver on these social rights and principles as contained in different pre-existing social instruments and reiterated in the EPSR.

While in a legal sense, the Pillar cannot directly affect the meaning of these rights and principles as featured elsewhere, it does provide an indication of how the political institutions at present understand these rights and principles and how they thus may give effect to them in the context of their current policies. Since especially fundamental social rights depend to an important extent on the legislator and policymaker to give them full effect, the Pillar could be taken as an indication on the content and direction of the 'implementation' of the rights and principles it contains. Moreover, the Court of Justice of the European Union (CJEU), as well as national courts, may use the Pillar as a source of interpretation of the rights and principles as laid down in other instruments, especially where a new act, at EU or national level, refers to the Pillar in the preamble or in the preparatory works.[11]

B. The Pillar's Implementation Process: Making Social Rights a Reality

The 'implementation' of the Pillar through new legislative and other acts should be considered the most important part of the Pillar initiative. The overall 'Pillar package' features a range of legislative and non-legislative proposals, some pre-dating the Pillar and some amending existing law and/or policy, and some new. As such, while the precedent of a 'proclamation' was set by the EU Charter of Fundamental Rights, the format of the overall Pillar initiative is more akin to 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.[12] The Community Charter is declaratory, but it is a source of inspiration for the CJEU, especially in the interpretation

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

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

[12] The comparison with the 1989 Community Charter carries a little further, in the sense that like the Pillar it initially also had a 'differentiated' scope of application, excluding the UK. Although both the Commission's original Pillar Recommendation and the subsequent Inter-Institutional Proclamation indicate that the Pillar is 'primarily conceived' for the Euro area, the former considered that the Pillar would be 'applicable to all Member States that wish to be a part of it', while the latter instead states that 'it is addressed to all Member States'. It could therefore be argued that since the adoption of the Proclamation, the Pillar no longer should have a differentiated scope. Moreover, none of the proposed legal implementation measures have been proposed as enhanced cooperation and instead are conceived to apply to all Member States.

of the rights featured in the EU Charter of Fundamental Rights that are based on rights first set out in the Community Charter.[13] Most importantly, many rights listed in the Community Charter were implemented in secondary law through the Social Charter Action Programme,[14] such as on occupational health and safety, written statement, posted workers, working time, pregnant workers, and younger workers. The broader Pillar initiative could be likened to such an action plan.

The 2018 Commission Staff Working Document 'Monitoring the Implementation of the European Pillar of Social Rights' provides the general overview of what can be considered part of the broader Pillar initiative.[15] The document lists per right/principle the most relevant existing measures at EU level, the ongoing and new initiatives, as well as national measures that are relevant 'in the spirit of the Pillar'. It does not identify specifically which instruments are considered to be an implementation of the Pillar, but it would seem to include most of the measures that are featured in the category entitled 'recent and ongoing initiatives at EU level'. This comprises a few dozens of EU actions, ranging from : country-specific recommendations on minimum wages, to a proposed Regulation on a pan-European Pension Product ;[16] and from a proposal for a Recommendation on promoting common values, inclusive education, and the European dimension of teaching,[17] to a proposal for a Regulation to strengthen EU cooperation on health technology assessment.[18]

Of course, not all of these measures are equally integral to the Pillar. The proposal on a recast of the Electricity Directive,[19] which is mentioned in relation to Principle 20 on 'Access to Essential Services', is arguably not as central to the Pillar project as the Directive on Predictable and Transparent Working Conditions. And a number of measures that are thematically closely connected to the Pillar, such as the equality directives,[20] are

13For example, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* C-438/05, EU:C:2007:772, at paras 43–44; Opinion of Advocate General Trstenjak of 24 January 2008 in *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* C-350/06, EU:C:2008:37, at para 38.

14 COM [1989] 568.

15 SWD [2018] 67 final.

16 COM [2017] 343.

17 OJ [2018] C195/1, adopted by the Council on 22 May 2018.

18 COM [2018] 51 final.

19 COM [2016] 864 final.

20 The Pillar package subsumes three existing legislative proposals in the field of non- discrimination, some of which had been stalled in the Council for some time. The hope is that the Pillar itself, as well as the changed political climate of which the Pillar is part, may lead to a breakthrough in the arduous negotiations on these measures. Whether or not thanks to the Pillar, one of these initiatives, the Proposal for a for a European Accessibility Act, has now been successfully adopted: Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, OJ L 151, 7 June 2019, at 70–115. The most contentious is the Proposal for a Council Directive on implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, that has been blocked in the Council for almost a decade: COM [2008] 426. Another stalled instrument that the Pillar hopes to recover is the proposed Gender Balance on Boards Directive, submitted by the Commission in November 2012: COM [2012] 614. The Directive is aimed at improving gender balance in corporate boards of large listed companies, setting the aim of a minimum of 40 percent of non-executive members of the underrepresented sex on company boards, to be achieved by 2020 in the private sector and by 2018 in public-sector companies.

stalled legislative proposals that (long) pre-date the Pillar. Can these therefore really be said to be an 'implementation'? The mere fact that the Pillar post-dates these proposals should arguably not prevent them as being conceptualized as part, or even an implementation, of it. In the case of the Charter of Fundamental Rights, some of the social directives that pre-dated it have been considered to give expression to a Charter right and have been interpreted in light of it.[21] Moreover, if these pending proposals are successfully adopted now, post-Pillar, it arguably proves the usefulness of the latter in unlocking the blockages. One of the Pillar's main values could indeed be to facilitate the advancement of the social *acquis* by providing political leverage : it increases the cost of opposing or down-levelling social initiatives for all institutions that have 'solemnly' proclaimed their attachment to these values, which includes the Member States in the Council.

It is also true that many of the central Pillar implementation initiatives are 'repackaging' exercises. The two main achievements to date, to wit the Work-Life Balance Directive and Predictable and Transparent Working Conditions Directive discussed below, as well as the Social Scoreboard, are not entirely new but replace the existing Maternity Leave and Written Statement Directives and the Scoreboard of Key Employment and Social Indicators respectively. Is the Pillar therefore merely putting old wine in new bottles ? The extent to which these initiatives develop new rights and policies should not be underestimated. The mere fact that they would replace existing measures does not detract from their value either in a self-standing sense or as part of the Pillar project. It could be argued that for every measure -whether old or new, whether closely or loosely connected to the Pillar's themes - the fact that it is mentioned in the Pillar's context is relevant, because the association to it may have political consequences for negotiation, adoption and, subsequently, interpretation. Furthermore, the Pillar package does also introduce a number of novelties, such as the proposal for a European Labour Authority[22] and the initiative on Access to Social Protection for Workers and the Self-Employed.[23]

C. The Pillar's Main Achievement (To Date): Two New Social Directives

Two major milestones in the on-going Pillar process have already been achieved. The EU has adopted a new Work-Life Balance Directive 2010/18/EU, to replace Directive 92/85/EEC on maternity protection and the 2010 Parental Leave Directive, as well as Directive 2019/1152 on Predictable and Transparent Working Conditions, replacing the Written Statement Directive 91/533/EEC. Considering the time-consuming nature of the EU legislative process generally, and the specific difficulties in the adoption of social

[21] As Advocate General Bobek states in his Opinion of 5 September 2018 in *Torsten Hein v Albert Holzkamm GmbH & Co.* Case C-385/17, EU:C:2018:666, at para 38, in relation to the Working Time Directive: 'Pursuant to Article 31(2) of the Charter, every worker has the right to an annual period of paid leave: no further details are provided on that right. Article 7(1) of Directive 2003/88, which the Court has ruled has direct effect, gives specific expression to that right'.
[22] COM [2018] 131 final.
[23] COM [2018] 132 final.

legislation over the past years,[24] the swift adoption of these two measures in the wake of the EPSR cannot but be considered remarkable.

The Work-Life Balance Directive takes a broad approach to the issue of gender equality and caring duties, and introduces 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(1) and (6)) and a payment thereof, to be determined by the Member States/Social Partners (Article 8(3));
(ii) allowing the four-months entitlement to be taken up until the child reaches the age of twelve (instead of eight) and making 2 months thereof non-transferable between parents (Article 5(1) and (2));
(iii) an entitlement to ten working days of paternity leave when a child is born, paid at sick pay level (Article 4 and 8(3)); and
(iv) an entitlement to five days of leave per year per worker to take care of seriously ill or dependent relatives (Article 6).

It seems fair to say that this Directive, even if it has watered-down some of the crucial pay entitlements initially proposed by the Commission in its initiative, improves 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.

Directive 2019/1152 on Predictable and Transparent Working Conditions reinforces the rights already contained in the Written Statement 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. It determines its scope of application by reference to national employment law but also taking into account the case law of the CJEU,[25] making it likely that the CJEU will confirm that it applies to all who meet the uniform EU law definition of 'worker': i.e. anyone who performs services under the direction of someone else for remuneration.[26] While the CJEU has traditionally excluded 'marginal and ancillary' work from this definition, the Directive makes it clear that in the case of zero-hours or other on-call contracts, no *de minimis* applies.[27] This is likely to bring

[24] See Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199.
[25] Article 1(2) determines that the Directive applies to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.
[26] Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* ECLI:EU:C:1986:284.
[27] Article 1(3) states that Member States may decide not to apply the obligations in this Directive to workers who have an employment relationship in which their predetermined and actual working time is equal to or less than an average of three hours per week in a reference period of four consecutive weeks. Article 1(4) in turn stipulates that Paragraph 3 shall not apply to an employment relationship where no guaranteed amount of paid work is predetermined before the employment starts.

precisely those workers that find themselves in a particularly vulnerable contractual situation into the protective scope of the Directive.

In addition to the more procedural rights on receiving information in writing, the Directive introduces more important substantive elements of protection, defining core labour standards for all workers, particularly for the protection of atypical, casual forms of employment such as on-call work and zero-hours contracts. The Directive lays down a maximum duration for probation of six months (where a probation period is foreseen) in Article 8, the right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time (Article 10), the prohibition of exclusivity clauses (Article 9), the right to request a new form of employment (and employer's obligation to reply) in Article 12, the right to training (Article 13), and strong enforcement mechanisms in relation to the rights provided, including a reversal of the burden of proof in cases of dismissal where the worker has exercised the rights provided for in the Directive (Article 18).

3. THE PILLAR AND THE EUROPEAN SOCIAL CHARTER

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

The Pillar needs to be seen in the context of some tensions between the EU and international social law, including the ESC. As set out in more detail in other contributions to this volume, over the past ten years, before the launch of the Pillar, a number of important tensions emerged in the context of the austerity policy pursued in the economic crisis and in the context of the right to strike.[28]

The EU's austerity policy, or, more particularly, the national reforms that had to be executed in countries in return for receiving financial assistance in accordance with Memorandums of Understanding signed by the Commission and the national government, have met the scrutiny of the European Committee of Social Rights.[29] On several occasions, the Committee has held that the national implementing measures infringed the European Social Charter. It upheld the complaint of Greek trade unions against the introduction of special 'apprenticeship contracts' for young workers, which provided for a minimum wage lower than the poverty line, did not provide three weeks' paid annual leave and did not mandate any type of training, as being contrary to Articles 4(1), 7(7), 10(2) and 12(3) of

[28] Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Recent Tensions with the International Protection of Social Rights' (2017) 7 *European Labour Law Journal* 55. See also, for a more extensive discussion of the issues raised in this section: Garben, 'The Problematic Interaction between EU and International Law in the Area of Social Rights' (2018) 7(1) *Cambridge International Law Journal* 77.

[29] The legal status of these instruments under EU law is unclear but even if they were to be considered EU norms, they would not subject to the direct scrutiny of the European Committee of Social Rights, as the EU is not a signatory to these instruments. As such, it is only the compliance of the national measures implementing the Memoranda that can be brought under review. On the legal status of the Memoranda, see: Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, at 406.

the Charter.[30] It also upheld the complaint against compensation-free dismissal during a one-year trial period as in breach of Article 4(4)[31] and against pension reforms.[32] With regard to the argument of the Greek government that it had no choice as it was due to comply with the Memorandum, the Committee noted that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter'.[33]

It should be noted that not all the measures that were taken by the Greek government in the context of the Eurozone crisis and that were condemned by the European Committee of Social Rights were the direct 'implementation' of stipulations by the Troika in the Memorandums of Understanding. For instance, the first Memorandum of Understanding provided 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, as such.[34] 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. This means that at least to a certain extent the fault lies with the Member States' interpretation of the various norms. Nevertheless, in some cases, it would seem that the 'creditors' did not realistically leave much room for manoeuvre for the Greek government to comply with its conditionalities and still comply with international social norms. While these conditionalities do not constitute 'EU law' *stricto sensu*, a slightly thicker and less formalistic notion of political responsibility would include the EU's (and particularly the European Commission's) role in the formulation of these requirements. They may have lacked binding force, but the impending threat of bankruptcy would seem a more effective enforcement mechanism than any formal judicial proceedings could be. As such, this situation could be considered a *de facto* outright incompatibility between the EU legal/political order and the international one.

The more recent decision of the European Committee of Social Rights in *Greek General Confederation of Labour (GSEE) v Greece*[35] would seem to confirm this approach. It is noteworthy that the European Commission itself, in its observations presented in the case, seemed to accept a direct link between the Eurozone crisis measures and the disputed Greek

30 *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* (Complaint) European Committee of Social Rights No 66/2011.
31 Ibid.
32 Ibid.
33 *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece* (Complaint) European Committee of Social Rights No 78/2012, p 10.
34 Directorate-General for Economic and Financial Affairs, European Commission, *The Economic Adjustment Programme for Greece: Occasional Papers 61 May 2010* (European Union 2010) 80.
35 *Greek General Confederation of Labour (GSEE) v Greece* (Complaint) European Committee of Social Rights No 111/2014, 23 March 2017.

legislation. The decision notes that the European Commission did not dispute that the legislation adopted between 2010 and 2014 in response to the economic and financial crisis has affected the rights guaranteed by the 1961 Charter and that the 'legislation reflects the conditions laid down by the "Troika"'.[36] The European Committee of Social Rights considered that 'the pressure of the creditor institutions was considerable by prescribing in such detail measures which affected notably the right to work, the minimum wage and working time for both adult and young workers, dismissal protection, information and consultation in the workplace and collective bargaining' and that these measures 'resulted in a dismantling of important parts of labour law and the employment system in Greece'.[37] This, more than in previous decisions, implicates the responsibility of the Troika.

A second problematic case of conflict has arisen in relation to the well-known and controversial judgments of the CJEU in *Viking* and *Laval*.[38] In those cases, the CJEU considered collective action undertaken by workers to protect their interests to be *a prima facie* restriction on companies' free movement rights enshrined in the EU Treaties. While in *Viking*, the CJEU left it open to the national court to consider whether the restriction could be justified, in *Laval* it held that it could not. The CJEU did refer to the fundamental nature of the right to take collective action as recognized by the ESC but did not refer to the case law developed by the Committee of Social Rights. In response to the judgment, the Swedish government adopted the so-called *Lex Laval*, a package of measures to bring Swedish law into compliance with EU law. In response to the ensuing complaint, the European Committee of Social Rights stated that the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States— which constitute important and valuable economic freedoms within the framework of EU law—cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers.[39]

B. The Pillar as an Olive Branch and Catalyst

The Pillar does not specifically address or resolve either of these two conflicts, as it does not directly and specifically pertain to Euro-crisis governance or the qualification of collective action as a restriction of the internal market freedoms. It nevertheless deserves to be noticed that the Social Scoreboard does apply to the general framework of economic governance

[36] Ibid. at para 80.
[37] Ibid. at para 86.
[38] *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* C-438/05, EU:C:2007:772; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* C-341/05, EU:C:2007:809.
[39] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden* (Complaint) European Committee of Social Rights No 85/2012, 3 July 2013, at para 122.

(the European Semester), helping to further 'socialize' it,[40] and that the EU has revised the controversial Posting of Workers Directive which was at issue in the *Laval* case. There has been some ambiguity as to whether the revision of the Directive, to ensure the principle of 'equal pay for equal work', is considered part of the Pillar. The proposal was presented by the Commission in its 'Mobility Package' on the same day as the Pillar in its 'Social Package', but it did not seem to be conceptualized as a part of it. Of course, in overall terms, both the launch of the Pillar and the revised Posting Directive were part of former Commission President Juncker's commitment to social values and to deliver on election promises made to ensure a 'Social Triple A Rating' for Europe. Accordingly, several stakeholders and politicians explicitly linked the Pillar and the revision of the Posting Directive,[41] and this link is also underlined by the fact that the Council reached agreement on the Directive on the same day as it approved the Inter-Institutional Proclamation on the Pillar.[42] The revised Directive has now been successfully adopted,[43] which takes away some of the social 'sting' of the *Laval* doctrine, by allowing more space for the imposition of national wage standards in the context of the temporary provision of labour across borders in the internal market. It does not however reconsider the balance between the right to strike and collective bargaining on the one hand and the EU economic freedoms, as maligned by the Committee.

Still, the Pillar should be seen as an attempt by the EU to quell the concerns that have arisen in relation to these conflicts and constitutes an important olive branch that the EU has extended to the Council of Europe (as well as the ILO). The Council of Europe's Secretary-General published an Opinion on the Commission's initiative to establish the Pillar, addressing it to the President of the European Commission, on 2 December 2016.[44] In his letter, after mentioning the increasing conflicts, the Secretary-General welcomed the Pillar to 'help consolidate the synergy between the standard-setting systems that protect these fundamental rights across the continent to ensure that they are effectively implemented by the states concerned'. He also emphasized that legal certainty and coherence between European standard-setting systems protecting fundamental social rights needed to be promoted, ensuring that the European Social Charter, 'the Social Constitution of Europe', is central to the Pillar. Concretely, he recommended that 'the provisions of the [Revised ESC] should

40 Zeitlin and Vanhercke, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020' (2014) *SIEPS Report*.

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

42 See European Council, 'Posting of Workers: Council Reaches Agreement', 24 October 2017, European Council, 'Employment, Social Policy, Health and Consumer Affairs Council: Posting of Workers', 23 October 2017 [last accessed 24 September 2019].

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

44 Opinion of the Secretary General of the council of Europe on the European Union Initiative to Establish a European Pillar of Human Rights, 2 December 2016, available at: rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dd0bc [last accessed 17 January 2020].

be formally incorporated in the [Pillar] as a common benchmark for states in guaranteeing these rights' and 'the collective complaints procedure, based on the Additional Protocol to the [ESC], should be acknowledged by the [Pillar] for the contribution that it makes to the effective realization of the rights established in the Charter and to the strengthening of inclusive and participatory social democracies'.

His requests have not (yet) been met entirely. Still, the Pillar extensively engages with the international social *acquis* and the ESC specifically. The 2016 Staff Working Document on the EU social *acquis* accompanying the Commission's initial consultation on a European Pillar of Social Rights devoted a subsection to 'social rights and principles as laid down in international law',[45] the 2017 Commission Communication establishing a Pillar of Social Rights stresses that 'the Pillar takes direct inspiration from the existing wealth of good practices across Europe, and builds on the strong body of law which exists at EU and international level' mentioning particularly the ESC (and the ILO),[46] and the preamble of the Inter-Institutional Proclamation references the ESC.[47] More concretely, in the 2018 Staff Working Document 'Monitoring the Implementation of the European Pillar of Social Rights', the specific Pillar principles are connected to relevant international law, and the Pillar is used as a catalyst for Member States' engagement with these international measures. Most importantly, in relation to Principle 12 on Social Security, the Commission suggests that Members ratify/apply 'the Revised European Social Charter, and may review the reservations made for some Articles of the revised European Social Charter'.[48] This approach, especially if extended in the future of the EPSR follow up process, may contribute to the full ratification of the ESC by all the EU Member States and could thereby significantly raise its profile and impact.

Indeed, it is argued here that making a contribution towards the full ratification of all provisions of both incarnations of the ESC by all EU Member States is, at this stage, the most important contribution that the EPSR could make to impact and stature of the ESC. Arguably, such full ratification constitutes the only really effective doorway to some of the other proposals that have been made to further raise the profile of the ESC in the European Union, such as using the EPSR follow-up to reference the interpretations given to the ESC by the European Committee of Social Rights, aligning the status of the ESC with that of other international human rights instruments in the case law of the CJEU, and using the ESC as an element in the EU's impact assessments for new legislative initiatives.[49] The Member States' uneven acceptance of the various ESC provisions and the collective complaint's procedure greatly undermines the ESC's claim for its rights - and the

[45] SWD [2016] 50 final.
[46] COM(2017) 250 final, at 6.
[47] Recitals 3 and 16.
[48] SWD [2018] 67 final, at 50.
[49] A recent study at the request of the Secretariat of the European Social Charter and the CoE-FRA-ENNHRI-Equinet Platform on Economic and Social Rights puts forward a number of concrete recommendations to strengthen the role of the ESC in the context of the EPSR. See de Schutter, 'The European Pillar of Social Rights and the Role of the European Social Charter in the European Union Legal Order' (Council of Europe, 2019).

Committee's interpretation thereof - to be accepted as general principles of EU law and to accord it a(n even) more prominent role. Of course, the EU legal framework already explicitly accommodates, and thus to a certain extent internalizes, international social instruments such as the ESC. The ESC is referenced in the preamble of the Treaty on European Union and Article 151 TFEU, and further mentioned in the preamble of the EU Charter of Fundamental Rights, which 'reaffirms' 'the rights as they result, … from the Social Charters adopted by the … Council of Europe'. Although the non-regression clause of Article 53 of the Charter only explicitly mentions the European Convention on Human Rights and not the ESC, the CJEU does refer to the ESC as well as the case law of the Committee of Social Rights as a source of inspiration for the interpretation of EU law.[50] This seems especially warranted where secondary EU law makes explicit reference to the ESC.[51] For the EU legal order generally, and the CJEU specifically, to go further than this current accommodation, it would seem that an increased, if not full, uptake by the EU Member States would be crucial.

4. CONCLUDING REMARKS

The year 2020 brings a new Commission, which will have its own take on the importance and meaning of the European Pillar of Social Rights. While past achievements, such as the adoption of new social directives and the renewed prominence attached to the ESC, deserve to be recognized, there is still much untapped potential in the Pillar project. Apart from the important pending equality directives, the EPSR brings both scope and hope for the adoption of additional EU social measures, addressing the rise in atypical employment and precariousness, as well as for a stepped-up enforcement of the existing social *acquis*. Furthermore, it is to be hoped that the yearly monitoring of the implementation of the Pillar by the European Commission is continued, and that it will increasingly integrate the ESC, like other international instruments such as the ILO Conventions, into the assessment – encouraging the EU Member States to fully ratify both incarnations of the ESC. After the unfortunate divergence over the past decade, it can be hoped that the Pillar marks a return to the previous more respectful and fruitful interaction between these overlapping legal orders, which both have much to lose from conflict and to gain from collaboration.

All this is desirable from the perspective of a more social Europe, of course. But it also seems important from a democratic perspective. A robust and well-functioning democracy

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

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

needs, as a pre-condition, a certain level of social protection and equality. Without that, neither the process nor the outcome of majoritarian decision-making can be called either democratic or legitimate. That, arguably, is the primary function of constitutionalized social rights that condition the legislative process at national and European level. At the same time, it is arguably the *only* extent to which they should be constitutionalized ; the crucial but limited purpose for which they should be removed from the ordinary process of democratic decision-making. For it should be emphasized that socio-economic issues are the bread and butter of politics, are highly salient and that therefore sufficient space should be left for the people to determine concretely, in a particular place and time, what they consider to be the place of the market and the economy in society.[52] This is part of the genius of the EPSR : it (re-)establishes the legislative process as the main instrument through which social rights – whether protected by virtue of EU, ESC or international law - are given concrete shape and reality. Above all, the Pillar has the potential, already partially realized, to empower the European legislator and to revive the use of the Social Policy Title in the TFEU and thereby the Community Method for social decision-making. That is a victory on both the social and the democratic front.

[52] For a more extensive elaboration of this argument, see Garben, 'The Principle of Legality and the EU's Legitimacy as a Constitutional Democracy: A Research Agenda' in Garben, Govaere and Nemitz, *Critical Reflections on Constitutional Democracy in the European Union* (2019). For these reasons, we should be equally, if not more, careful not to 'over-constitutionalise' economic freedoms, something which the EU arguably has done, not in the least with the *Laval* and *Viking* doctrine.