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Previous contributions to this EuVisions debate on the ‘European Social Union’ and the role of the European Pillar of Social Rights therein ([Ferrera 2018](#)), have already set out the Pillar’s main features, proposed ‘interpretations’ ([Vandenbroucke 2019](#)) and ‘perspectives’ ([Knijn 2019](#)), have argued for specific focus and prioritization ([Cantillon 2019](#)) and have suggested strategies for the Pillar’s effective implementation ([de la Porte 2019](#)).

As many contributors have already emphasized, the Pillar is more than the list of 20 non-binding rights and principles. Fortunately, for otherwise it would inevitably succumb to the risk of disappointment and frustration that Vandenbroucke pointed out. The proof of the Pillar will be in its implementation, and it is already showing to be an important agenda-setter, turning into a social action plan for the EU akin to the 1989 Community Charter on the Fundamental Social Rights of Workers with its accompanying Action Programme.

Hoping to add something new to this already very rich discussion, and building on my previous publications on the constitutional imbalance between ‘the market’ and ‘the social’ and the European Pillar of Social Rights (Garben 2017, 2018, 2019), in this piece I will argue that **even if the Pillar cannot address all the EU’s social failings, it has put a surprising social spin on the Better Regulation Agenda that was threatening to erode the social *acquis* and it helps to rebalance the EU’s output by reviving the use of the Treaty’s Social Title.**

The Pillar and the EU Better Regulation Agenda

The overall Pillar initiative contains a sometimes confusing ‘blend of old and new elements’ (Plomien 2018): it subsumes pre-existing legislative initiatives such as the three proposals on non-discrimination, proposes to replace existing measures (Work-Life Balance Directive to replace Directive 92/85/EEC on maternity protection and the 2010 Parental Leave Directive; Directive on Predictable and Transparent Working Conditions to replace the Written Statement Directive), and introduces genuinely novel actions (European Labour Authority). It furthermore deploys a range of governance tools in the Pillar’s implementation, from hard

and soft law measures to policy coordination in the European Semester. In order to understand this mixed working method, it is particularly insightful to see the Pillar in relation to the EU Better Regulation Agenda.

The Pillar needs to be seen against the background of increasing criticism about the EU's social deficit. The austerity measures taken in the Euro-crisis, as well as the internal market case law of the Court of Justice of the EU in the context of national social standards of the past decade, have been considered responsible for a degree of 'social displacement' in the EU, that had been widely recognized and deplored.

While the Better Regulation Agenda has been around in EU policy-making in various incarnations for several decades, it was arguably under the previous administration that is becoming particularly powerful, impacting EU social policy to an important extent. The Agenda is based on a number of, partially contradictory, rationales: (i) improving the quality of EU legislation, (ii) reducing the quantity of EU legislation, (iii) increasing public participation in the legislative process, (iv) promoting science-based governance, and (v) enforcing the subsidiarity and proportionality principles. While it would be ill-informed to paint a picture of EU Better Regulation as an unequivocal drive towards de-regulation in the interests of businesses, many scholars have argued that certain elements of the Agenda carry a risk of systematic bias against regulatory standards, particularly to pursue non-economic interests such as social policy (Garben and Govaere 2018, Dawson 2016). One of the main methodologies used in the obligatory Impact Assessment of new EU initiatives and wide-spread Evaluations of existing legislation is a cost-benefit analysis, which poses problems in terms of its reliance on certain assumptions and the quantification of non-quantifiable benefits. It was out of concern for the expected negative consequences of the Agenda in this sense, that in 2015 more than fifty civil society groups set up of a 'Better Regulation watchdog' concerned that the Agenda would erode important existing rights and policies and hamper the development of new initiatives.

The Pillar has drastically changed this picture, at least from a social perspective.

The Pillar turns the EU Better Regulation Agenda squarely on its head, deploying its very methodology to upgrade the EU social *acquis*. In some ways, the entire Pillar process can be seen as a Better Regulation exercise, whereby the European floor of social rights comprising the EU and international social *acquis* is considered for its ‘fitness for purpose’. The Pillar’s set of 20 rights and principles sets out what is this floor, and the Pillar’s broader implementation package identifies the holes in the floor (in the sense of missing or inadequate social protection, due to a lack of standards, implementation and/or enforcement thereof), and proposes concrete measures to plug them (making use of the entire EU regulatory and governance arsenal). This explains why the Pillar is an amalgam of ‘the old’ and ‘the new’.

More concretely, precisely the evaluations of the social *acquis* that worried social stakeholders and kept Commission services’ hands full over the past years, are now seized to support the new initiatives taken in the implementation of the Pillar.

The initiative to revise and strengthen the Written Statement Directive builds on the findings of an earlier REFIT evaluation, the proposal to include new exposure limit values for five chemicals in the Carcinogens and Mutagens Directive follows the evaluation of the EU’s occupational health and safety *acquis*, and the proposed Work-Life Balance Directive follows the withdrawal of the Commission’s 2008 proposal to revise the Maternity Leave Directive, which was part of the Better Regulation Agenda. The fact that the Pillar’s Staff Working Document mentions specifically that ‘in 2018, the Commission expects to complete a REFIT evaluation of the Directives which give effect to the Social Partner Framework Agreements on fixed-term and part-time work’ suggests that further Pillar-related initiatives could be based on the outcomes thereof.

All this may lend some credence to the argument that Better Regulation’s core methodologies of evidence-based policy-making and analytical underpinning of regulation are in fact neutral as to the amount and level of rules and regulation they prescribe: if a problem is identified, the analysis may very well suggest that new EU action is needed to address it. While it could still be argued that the administrative burden of impact assessment and the cost-benefit methodology inherently imply a certain bias against regulation, the Pillar experience shows that this bias can be overcome by political choices. In any event, from a social perspective, there is something particularly pleasing about the fact that one of the main obstacles to Social Europe has been turned into an important force supporting its revival and development.

The Pillar and the Constitutional Imbalance between ‘the Market’ and ‘the Social’

The Pillar needs to be seen against the background of increasing criticism about the EU’s social deficit. The austerity measures taken in the Euro-crisis (see [Costamagna 2019](#)), as well as the internal market case law of the Court of Justice of the EU in the context of national social standards of the past decade, have been considered responsible for a degree of ‘social displacement’ (Kilpatrick 2018) in the EU, that had been widely recognized and deplored (Barnard 2014). 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’, Commission President Juncker has presented the initiative as part of his efforts to ensure a ‘Social Triple-A Rating’ for Europe, and the Pillar has to be seen alongside the proposal to revise the Posting of Workers Directive to ensure the principle of ‘equal pay for equal work’, and with the initiative of the European Labour Authority the issue of the balance between the economic freedoms in the internal market and social rights is increasingly drawn into the Pillar process.

Even if the Pillar cannot by itself address the EU’s most fundamental social-democratic problems, the Pillar does help rebalance the EU’s output by reviving the use of the Treaty’s Social Title provided that the envisaged implementing measures are indeed successfully adopted

In previous work (Garben 2017) I have highlighted the existence of a constitutional imbalance between ‘the market’ and ‘the social’ in the EU. I 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. I found that in the area of EU social law, the constitutional configuration of the Treaty’s Social Title -within particular the central use of legislative process through the Community Method and the Social Method - 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 CJEU 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 ‘liberalized’ by the Court’s case law (Scharpf 2010). In economic governance, national regulatory autonomy is severely constrained through substantive decisions 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? As I have argued elsewhere (Garben 2018), the Pillar does not (and cannot) in itself resolve this problem. The most important social decisions continue to be taken not in the context of the Treaty’s Social Title, but in the internal market and economic governance, and these decisions prioritize the market over the social and remain democratically deficient.

While, as stated above, the Pillar has to be seen alongside the revision of the Posting of Workers Directive to ensure the principle of ‘equal pay for equal work’, as well as the proposal for a European Labour Authority, the Pillar cannot fundamentally address the displacement of democratic social decision-making to the judiciary in the internal market. It would seem that only a fundamental change in the case law (either initiated on the CJEU’s own motion or through Treaty amendment), would be sufficient (Barnard 2009, Scharpf 2015). To some promise, in the specific area of posted workers, the Court has adjusted its stance on national wage standards to a more moderate approach in the *Elektrobudowa* and *Regiopost* cases, allowing more leeway for host Member States to impose minimum pay conditions. In other areas, however, the internal market freedoms continue to receive precedence over labour protections, such as the *Commission v Spain* judgment on port labour, and recently in *AGET* concerning Greece’s legislation on collective redundancies. As for the EU Legislator, while it managed to amend the Posting of Workers Directive to allow more space for the application of social standards, proposals in other areas, such as on the services e-card, undermine such attempts to ‘socialize’ the internal market.

Regarding economic governance, one may think that the Pillar has more of a

potential to address the structural problems. After all, part of the Pillar's implementation is through the European Semester and precisely aimed at improving the social dimension of the EMU. This is, in fact, presented as the official rationale for the initial focus of the Pillar's application to the Euro area. But while this could further the substantive 'socialisation' of the European Semester (Zeitlin and Vanhercke 2014) 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 considerations concerning poverty, minimum wages and income in the Semester), I agree with [Costamagna 2019](#) that the overall framework remains 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. Indeed, stakeholders such as the [European Anti Poverty Network have noted](#) that while the implementation of the Pillar through the Semester should, in general, be welcomed, the process overall still needs to 'shift the narrative from austerity to social investment in social rights and standards, and finance adequate and sustainable welfare states through tax justice and progressive taxation'. Furthermore, the most important social damage has been done in the context of the Euro-crisis measures, and the national reforms effected under Troika auspices remain in force. And 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 necessitate a more robust democratic approach than a signing-off by the Council, and this is not something the Pillar can resolve.

Nevertheless, even if the Pillar cannot by itself address the EU's most fundamental social-democratic problems, the Pillar does help rebalance the EU's output by reviving the use of the Treaty's Social Title provided that the envisaged implementing measures are indeed successfully adopted. Especially the legislative proposals, both the re-packaged pre-existing ones and the new initiatives, would significantly improve the level of social protection of 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. Over the past decade, output had been meagre, especially in terms of legislation. Since the adoption of the Temporary Agency Work Directive in 2008, itself the result of two decades of arduous debates and

negotiations, there has been little EU legislative action undertaken on the basis of the Social Policy Title. Various well-known factors of both a political and constitutional nature have contributed to this sense of social displacement: EU enlargement has made EU decision-making more complicated particularly in this area by increasing the number of countries leaning towards a 'Liberal Market Economy', whose bargaining position has been further strengthened by the CJEU's judgments on national social standards in the context of the internal market as discussed above, national parliaments have proven an additional hurdle since the Lisbon Treaty's introduction of the Early Warning System, and the financial crisis made the economic and political case for maintaining (let alone raising) social standards more difficult on both the national and European level. The Pillar itself can be seen as testimony to the change in some of these underlying factors, particularly the different ideological orientation 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.

As one commentator has noted, the Pillar 'entails some meaningful developments for social [...] progress. However, its current form and content represent an adjustment to, rather than a transformation of, the unequal European economy and society' (Plomien 2018). But what it does do, should also be recognized, namely significantly boosting the EU's social credentials in a time where the EU needs a positive post-crisis narrative (Barnard and de Baere 2017) going into the European elections. If effectively 'implemented', which depends not only on the current political powers but also the ones to take over, the Pillar will significantly improve the level of social protection of many European citizens, which is something to celebrate.

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