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A New Wave of Solidarity in a Sea of Economic Interests: Can the Pillar Sail in the Asymmetric Tides Between the Internal Market and the Social Dimension of the EU?

1. Introduction

Echoed by the impact of the financial crisis and the consequently imposed austerity measures, the asymmetries inherent to the EU have put an additional burden on the European social dimension, which, in turn, has resulted in an increased Euroscepticism on the added value offered by the EU. These asymmetries emanate from two parallel streams. On the one hand, there are the imbalances that emerge between the monetary and economic governance of the EU and its social objectives.¹ This imbalance was substantially deteriorated by the sovereign debt crisis and the austerity measures imposed by the Member States—many as a consequence of the implementation of the memoranda of understanding—which lead in turn to the deregulation of the domestic social protection systems. On the other hand, there is an apparent asymmetry that stems from

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¹ Scharpf, *The asymmetry of European integration, or why the EU cannot be a “social” market economy* (2010), p. 211; Garben, *The Constitutional (Im)balance between “the Market” and “the Social” in the European Union* (2017), p. 23; Vandenbroucke, *The Idea of a European Social Union: A Normative Introduction* (2017), p. 3; Barnard, *Regulating Competitive Federalism in the European Union? The Case of EU Social Policy* (2000), p. 49; FitzGibbon (et al.), *EUROSCEPTICISM AS A TRANSNATIONAL AND PAN-EUROPEAN PHENOMENON: THE EMERGENCE OF A NEW SPHERE OF OPPOSITION* (2017).

the fact that the Union's internal market's supremacy has derogated national social protection schemes to a subordinated position. This imbalance is simultaneously worsened due to the arguably limited competence of the EU to act on social matters as opposed to its broad competence concerning the internal market, which results in a weak EU social dimension that is unable to address the challenges imposed by the internal market on matters of social protection.² In a more recent turn of events, the European Pillar of Social Rights (EPSR) has set the goal of tackling these imbalances and provide an adequate floor of social protection in the EU. Over the last couple of years, the Commission has had its hands full with first negotiating and launching the EPSR and later continuing efforts to deliver on its content and monitor its progress. Now, amidst what is quickly unveiling as the next great economic recession, the decisions taken by the EU institutions become more determinant than ever for the future of the EU.

This article focuses on the latter asymmetry between the internal market and the social objectives of the EU and studies it from the perspective of the policy objective to fight poverty and social exclusion.³ It first addresses the impasse that arose from *Viking*, *Laval*, and the cases that followed as well as from the failed Commission's attempt to cover the deficient patches that this line of jurisprudence created in safeguarding national social protection systems from the impacts of the internal market. It follows an analysis on what the renewed hope for social Europe has to offer in tackling such deficiencies to address later whether the expectations put by many on the EPSR are somewhat realistic in the dream of reviving the social sphere of Europe and embarking upon a trip towards an actual social market economy.

2. The Comber of the Internal Market: *Viking*, *Laval* and the Monti II Regulation Fiasco

When initially conceived, the European project did not contain any legal competence on social matters as the founding fathers relied on the rationale that economic policies would gracefully reconcile with its social counterparts. At most, this idea of automatic reconciliation was unsustainable. In early 1970, the heads of states realised that an inter-

² Vandenbroucke, *The Idea of a European Social Union: A Normative Introduction* (2017), p. 15; Vanhercke (et al.), *THE SOCIAL POLICY STATE OF PLAY 2017* (2017); Commission, *Reflection paper on the Social Dimension of Europe* (2017); Leczykiewicz, *Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval* (2014); Vanderbroucke, Vanhercke, *A European Social Union: 10 nuts to crack* (2014); Ferrera, *Modest Beginnings, Timid Progresses: What's Next for Social Europe?* (2012).

³ For an analysis on the potential of the EPSR in tackling the asymmetries regarding economic and monetary objectives see: Aranguiz, *Social Mainstreaming through the European Pillar of Social Rights: Shielding "the social" from "the economic" in EU policymaking* (2018), p. 341.

nal market that lacked a minimum social floor was not feasible, which led to a burst of EU social legislation on matters of gender equality, workers' protection, and health and safety at work.⁴ Since the Treaty of Rome did not offer the legal basis to adopt such legislation, these instruments were adopted under the premises of the general competence of the Treaty, or the so-called "residual basis", which might be used only in the absence of specific basis but never as a way to circumvent an express prohibition under the Treaties.⁵

Nowadays, while highly fragmented, there is a vast collection of EU instruments aimed at tackling social issues in a diverse range of subjects such as gender equality, anti-discrimination law, or health and safety at work. Most of these measures, however, relate to strict employment law as opposed to broader social inclusion measures.⁶ Moreover, the Treaties also include a social policy title, which contains, *inter alia*, the specific competence, yet limited, to adopt secondary law instruments under Article 153 TFEU. Still, this provision has mostly been ignored, and most of the legal instruments have been adopted under a different legal basis. In addition, while there are quite some pieces of legislation on social protection in the EU, there are still significant gaps in the social protection system of the EU (perhaps most clearly against dismissal), and the Member States retain most of the competence to legislate on this domain. This is where the cases of *Viking* and *Laval*, and the case-law that followed became problematic.

2.1. *The Drowning of National Social Protection Systems in European-Wide Waters*

Viking and *Laval* displayed the apparent prevalence of the internal market's interest over national welfare systems when the European Court of Justice (ECJ) made the field expressly excluded from EU competence, namely the right to association, subject to the freedom of establishment.⁷

Viking concerned a Finnish company that wanted to reflag its vessel—the *Rosella*—under an Estonian flag so that it could hire an Estonian, cheaper, crew. The International Transport Workers Federation (ITF) encouraged its affiliates to boycott the vessel, which resulted in *Viking* seeking injunction before the English High Court against ITF and the Finnish Seaman's Union who threatened to strike. *Laval*, differently, involved a Latvian construction company who acquired a contract in Sweden to refurbish a school and used its own Latvian workers for the job who were paid 40 per cent less than the Swedish

⁴ Vandenbroucke, *Europe: The Social Challenge. Defining the Union's Social Objective Is a Necessity rather than a Luxury* (2012), p. 7.

⁵ C-376/98 *Germany v. Parliament and Council*, para. 79.

⁶ Barnard, *European Employment Law* (2012), pp. 15ff.

⁷ C-438/05 *The International Transport Workers' Federation y The Finnish Seamen's Union (Viking)* and C-341/05 *Laval un Partneri (Laval)*.

counterpart was. Consequently, the Swedish Construction Union tried to convince the Latvian company to comply with the Swedish collective agreement, which was refused by Laval and led to a picket at the construction site as well as to a worker's blockade. While these actions were lawful under Swedish law, Laval took the Union to court arguing that they had breached their freedom to provide services under Article 56 TFEU as well as the Posting of Workers Directive.

These cases came to the surprise of many for several reasons.⁸ On a positive note, the ECJ explicitly recognised the right to strike as a right subject to EU law even though it is an explicitly excluded domain under Article 153(5) TFEU. Moreover, the Court used these judgements to claim the fundamental status of the right to collective action under Article 28 of the Charter.⁹ The ECJ, however, also argued that the right to collective action might be limited under both domestic and EU law when looking into the justification for taking actions and considering the principle of proportionality. In the case of *Viking*, the Court decided that the actions taken by the trade unions represented an obstacle on the freedom of establishment, but left some room (yet rather limited considering the strict proportionality test imposed in the case) for the referring court to decide whether such obstacle was justiciable.¹⁰ In *Laval*, similarly, the Court agreed that the threat of “social dumping” could very well be a reason to entail collective action, but the fact that the trade union used this action to push Laval to sign an arguably unclear collective agreement on sensitive issues such as pay, went beyond what it was necessary and, therefore, claimed it was unjustified.¹¹ Additionally, the Court agreed with Laval in that the trade union had breached the Posting of Workers Directive.^{12, 13}

These decisions, and the ones that followed,¹⁴ became a game-changer for European social policy for at least two reasons. Firstly, because the ECJ ignored, for the very first

⁸ Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ* (2008), p. 126; Joerges, Rodl, *Informal Politics, Formalised Law and the “Social Deficit” of European integration: Reflections after the Judgments of the ECJ in Viking and Laval* (2009), p. 18; de Schutter, *Transborder provision of Services and “Social dumping”: Rights-Based Mutual Trust in the Establishment of the Internal Market* (2011), p. 346; Bücken, Warnek, *Reconciling Fundamental Social Rights and Economic freedoms after Viking, Laval and Rüffert* (2011).

⁹ *Viking*, para. 44; and *Laval*, para. 91.

¹⁰ *Viking*, paras. 69–71.

¹¹ *Laval*, paras. 101ff.

¹² Barnard, De Baere, *Towards a European Social Union; Achievements and Possibilities under the Current EU Constitutional Framework* (2014), pp. 11–12.

¹³ For an extensive overview of the cases see: Freedland, Prassl, *VIKING LAVAL AND BEYOND* (2014).

¹⁴ See C-346/06 *Rüffert* and C-576/13 *Commission v Spain*. As Garben puts clearly, *Viking* and *Laval* were followed by *Rüffert* and cannot be considered “lapses” of the ECJ as they were followed by similar more low-key judgements that broaden the scope of what can fall under the scope of “obstacle” for the freedom of services and establishment. See: Garben, *The Constitutional (Im)balance between “the Market” and “the Social” in the European Union* (2017), p. 35.

time, the original settlement that established that social policy was a matter of national legislation by explicitly acknowledging that collective action fell within the scope of EU law.¹⁵ The Court had previously been confronted with decisions involving collective agreements and the internal market, most notably in competition and posting cases, but what differed in *Viking* and *Laval* is that the ECJ explicitly recognised the EU social objectives—in this case, workers’ protection—as relevant for the implementation of internal market law, and regrettably subordinated these objectives to economic interests. This decision embodied the loss of “the social” before “the market”.¹⁶ Even though the Court recognised the right to strike for the first time, its strict approach to justification and proportionality made it quite difficult to defend the social interests of the Union. Secondly, because when the ECJ decided to apply EU law in an area expressly outside the competence of the EU, it generated a legal vacuum in the EU legal system that could not be filled by the legislator precisely because of its lack of competence.¹⁷

2.2. *An Attempt to Come Afloat: The Monti II Regulation*

Not only did these cases represent possibly the most extreme form of conflict between the economic interests of the EU freedoms and the domestic social protection systems, but also proved to be effective in alienating workers’ movement against the internal market.¹⁸ In an attempt of reconciling the economic interest of the EU and its social objectives and provide a more political and target-oriented strategy to fill the vacuum generated by the ECJ, the Commission presented the so-called Monti II Regulation, also known as “baby Monti”.¹⁹ However, the Commission had its hands pretty much tied due to the lack of EU competence in the domain of collective rights, which meant that the Commission had to use the general legal basis to tackle these issues.²⁰

¹⁵ See, for example, C-67/96 *Albany* in which the Court ring-fenced domestic legislation striking to improve working conditions from competition rules or C-190/98 *Graf* in which the Court found that the effect of national measures on the right to free movement was too remote. See: Barnard, De Baere, *Towards a European Social Union: Achievements and Possibilities under the Current EU Constitutional Framework* (2014), pp. 11–12.

¹⁶ See extensively on the imbalance between the two in: Garben, *The Constitutional (Im)balance between “the Market” and “the Social” in the European Union* (2017), pp. 23–61.

¹⁷ Barnard, de Baere, *Towards a European Social Union: Achievements and Possibilities under the Current EU Constitutional Framework* (2014), pp. 11–12.

¹⁸ Monti, *A new Strategy for the Single Market* (2010). See *Viking*, para. 87; and *Laval*, para. 110.

¹⁹ European Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services* (2012).

²⁰ For a deeper analysis on the procedure and the role of the national parliaments see European Commission, *Annual Report 2012 on Subsidiarity and Proportionality* (2013); Cooper, *A Yellow Card for the Striker: National Parliaments Defeat of EU legislation on the right to strike* (2015)

The Commission, thus, faced the main challenge of regulating the right to strike without, on the one hand, reversing the case-law of the ECJ and, on the other, going beyond the competences of the EU and complying with the principle of conferral.²¹ The Monti II Regulation, therefore, recognised that while there was no primacy of the freedom to provide services or establishment over the right to strike when colliding, fundamental freedoms and rights, must reconcile following the principle of proportionality. Bearing this in mind, the Commission proposed alert mechanisms that would provide both Member States and the Commission “timely and transparent” information on cases affecting the effective exercise of the freedoms as well as proposing several dispute-resolution mechanisms.²²

Because the right to strike is explicitly excluded from the social policy title, the Commission had no other option than to propose this measure under Article 352 TFEU. The proposal, however, turned out to be the first victim of the so-called “yellow card procedure” that aims at ensuring that the principle of subsidiarity is well taken into account when proposing a new legislative measure by allowing the Member States to present a reasoned opinion against such a measure. While the Commission is not bound to follow these opinions, given the little support received among the Member States and the requirement of unanimity to adopt measures under Article 352 TFEU, the Commission accepted that it would not have gathered the necessary support for its adoption and decided to kill the proposal.²³ The subsidiarity concerns by the Member States were far beyond unreasoned since the proposal was targeted at addressing a problem that the ECJ had generated in the first place, and as such, it is difficult to imagine how these issues could have been better addressed at the national level. In any case, triggering the yellow card procedure by 12 Member States sent a clear message about its opposition.²⁴

In the context of poverty of social exclusion, the weakening the national social protection floors followed by the failure of the Commission to put remedy at the European level symbolised a great loss. While the EU has, for many years now, put in place a pol-

pp. 1406–1425; Fabbrini, Granat, “Yellow card, but no foul”: the Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for EU Regulation on the Right to Strike (2013), pp. 115–144; and Goldoni, *The Early Warning System and the Monti II Regulation: the Case for Political Interpretation* (2014), pp. 90–108.

²¹ European Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services* (2012), explanatory memorandum 10.

²² *Ibid.* Articles 4 and 5. For a deeper study in the Proposal see: Rocca, *The Proposal for A (So-Called) “Monti II” Regulation on The Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services: Changing without Reversing, Regulating without Affecting* (2014), pp. 19–34.

²³ *The Adoptive Parents, The Life of Death Foretold: The Proposal for a Monti II* (2014), p. 96.

²⁴ *Ibid.*, pp. 99–102.

icy framework to tackle poverty and social exclusion in the EU, perhaps most saliently setting it as a headline target for the Europe 2020 Strategy to reduce poverty with 20 million,²⁵ these policy instruments have proven to be insufficiently effective in achieving these EU social objectives also when buffering the effects of the economic crisis. When it comes to legally binding instruments to tackle poverty and social exclusion, mostly by ensuring access to social benefits or adequate wages, these are mainly left to the competence of the Member States. The reasoning used in *Laval* and *Viking* is dangerous in the sense that it may justify the subordination of what domestic legislation has put in place to guarantee adequate social protection to the economic interest of the internal market, which has often been the case in the context of the European Semester.²⁶ The Monti II Regulation fiasco, in turn, exposed the ineptitude of the EU to provide for an effective alternative at the European level.

3. The Pillar's Thrust: *Ex-post* Remorse or an Actual Lifeguard?

The relative weakness of the EU social dimension, which appears insufficient to counterbalance the hollowing out of the national social systems brought by the jurisprudence of the ECJ, proved the necessity of bringing the social to the core of the EU. Perhaps to compensate the reality exposed by these cases and the inability of the Commission to uphold a solution, once the waters of the economic crisis were more calmed and the outcomes of the austerity measures appeared afloat, the Juncker Commission started a two-staged consultation that lead to the adoption of the EPSR.

The EPSR was first presented on 26 April 2017 in the form of a recommendation²⁷ and together with a proposal for an interinstitutional proclamation²⁸—which was later signed by the EU institutions in November 2017—along with a vast number of explanatory and accompanying documents, also known as the Pillar Package.²⁹ Later, in March

²⁵ European Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth (2010).

²⁶ Bekker, The European Semester Process: Adaptability and Latitude in Support of the European Social Model (2017), pp. 238–250. See specifically the position papers of EAPN on the impact of the European Semester on poverty and social exclusion. Available at: <https://www.eapn.eu/news-and-publications/publications/eapn-position-papers-and-reports/> (last accessed 15 July 2020).

²⁷ European Commission: Commission Recommendation of 26. 4. 2017 on the European Pillar of Social Rights (2017).

²⁸ European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights (2017).

²⁹ Other documents included in the “Pillar Package” comprise of a set of explanatory documents, *inter alia*, a Communication of the Commission on the Pillar, three different staff working documents, a summary of the public consultation launched in March 2011, an explanatory document of each of the principles of the Pillar and the Social Scoreboard; see: European Commission, Reflection paper

2018, the Commission presented the Social Fairness Package,³⁰ which included a staff working document on the monitoring of the EPSR, a proposal for access to social protection for all the workers and the self-employed, and a proposal for the establishment of the European Labour Authority.³¹ More recently, the von der Leyen Commission has committed to deliver on an instrument on fair wages as well as initiating discussion on a possible European Unemployment Reinsurance Scheme.³² Precisely due to the dynamism that the EPSR has generated, some conceive it as more of a movement than a single instrument leading to discrepancies among scholars with regard to its impact. While the black letter legal scholars have criticised the weak legal nature of the instruments—seeing that both main documents, the recommendation and the inter-institutional proclamation, are non-binding instruments—, the more optimistic³³ take this salient political tool as an umbrella movement or a momentum in social Europe and argue that while the recommendation and the interinstitutional are weak from a legal perspective, the package may also be conceived as a wave pushing forward a vast number

on the Social Dimension of Europe (2017); European Commission: Establishing the European Pillar of Social Rights (2017); European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed (2018).

- ³⁰ European Commission, Commission adopts proposals for a European Labour Authority and for access to social protection, URL: http://europa.eu/rapid/press-release_IP-18-1624_en.htm.
- ³¹ European Commission, Monitoring the implementation of the European Pillar of Social Rights (2018); European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed (2018); European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (2018). In the meantime, these have been adopted in the form of a recommendation and a Regulation respectively: Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01) (2019) OJ C 387; Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland) [2019] OJ L 186.
- ³² European Commission, second phase consultation of Social Partners under Article 154 TFEU on a possible action addressing challenges to fair minimum wages (2020). See also mission letter of president von der Leyen to Nicolas Schmit. URL: https://ec.europa.eu/commission/commissioners/2019-2024/schmit_en.
- ³³ Hendrickx, The European Social Pillar: A first evaluation (2018), pp. 6–3; Garben, the European Pillar of Social Rights: Effectively addressing displacement? (2018), pp. 210–230; Garben (et al.), Towards a European Pillar of Social Rights: updating the existing social *aquis* (2017), pp. 6–7.

of initiatives in the social field,³⁴ including some that have become legally binding.³⁵ The most provoking have even dubbed the EPSR “the last chance for social Europe”.³⁶ This article also conceives the EPSR as a wave, rather than as two static instruments. It will first focus on the material scope of the EPSR, in particular with regard to its relevant content for the fight against poverty and social exclusion, while the following section will provide a look into whether it is realistic, or even possible—and if so, how—, for these provisions to have an actual impact in reversing, or at least challenging, the issues that arose with *Viking* and *Laval*.

3.1. *Drifting the Union’s Objective to Fight Poverty and Social Exclusion in the Pillar*

Taking a broad approach to poverty and social exclusion, all the 20 principles and rights in the EPSR relate to these policy objectives. But in this section, only those areas where poverty and social exclusion—or inclusion when narrated *a contrario*—are explicitly addressed are discussed.

A quick search in the booklet of the EPSR reveals that the word poverty materialises four times, social exclusion three, and social inclusion only once.³⁷ Poverty is mentioned twice in the Preamble, once in combination with the concept of social exclusion in relation to the commitment of both the Union and the leaders of the 27 Member States to fight unemployment, discrimination and poverty and social exclusion; and a second time

³⁴ Among the accompanying documents, which are associated with the EPSR but may as well act independently, there is a reflection paper on the social dimension of Europe, a first-phase consultation on the Written Statement Directive and on the consultation for possible action on access to social protection, a proposal for a Work-life Balance Directive for parents and carers, two texts assessing the impact of two prior recommendations, one on active inclusion and the other on children investment. Moreover, this was accompanied by the Commission’s white paper on the future of Europe, COM(2017) 206, C(2017) 261 final, C(2017) 2610 final, COM(2017) 252 final, SWD(2017) 257 final, SWD(2017) 258 final, COM(2018) 130 final, COM(2018) 132 final and COM(2018) 131 final.

³⁵ Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [2019] OJ L 288; Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [2019] OJ L 288.

³⁶ Brooks, the “last chance for social Europe”: The European Pillar of Social Rights can only work if integrated into the EU’s existing policies, URL: <https://blogs.lse.ac.uk/europpblog/2017/05/22/last-chance-for-social-europe-european-pillar-social-rights/>; Visentini, the Last Chance for Social Europe?, URL: <https://www.friendsofeurope.org/publication/last-chance-social-europe/>; EAPN, Last Chance for Social Europe? EAPN Position Paper on the European Pillar of Social Rights (2016).

³⁷ The European Parliament, the Council and the Commission, European Pillar of Social Rights, URL: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

in Paragraph 10 of the Preamble when listing the severe consequences of the economic crisis that have emphasised the need for a social response at the European level. Moreover, poverty is mainly related to Principles 6 and 11, on fair wages and childcare. With regard to fair wages, the principle envisions a right to wages that are adequate enough to tackle in-work poverty, whereas Principle 11 puts a particular weight on combating child poverty. Mentions to social exclusion, differently, focus on the Union's objective to fight social exclusion, an objective that in one way or another has been translated into the initiative that is the EPSR. Both Paragraphs 1 and 2 of the Preamble, which explicitly refer to combating social exclusion, derive from the Treaties, the first from the general aims of the Union under Article 3 TEU and the second on the mandate of the Union to horizontally mainstream the social objectives across its policies and activities under Article 9 TFEU. Social inclusion, in turn, is referred to only in Principle 19, with regard to housing and assistance for the homeless.

Beyond the recommendation, the explanatory document indicates how the objective to fight poverty and social exclusion, also explicitly, is translated into several other principles such as equal opportunities, access to social protection, minimum income, old-age pensions, the inclusion of people with disabilities, long term care and access to essential services.³⁸ All in all, more than half of the principles enshrined in the EPSR are, either directly or indirectly—by mention only in the explanatory document—unequivocally connected to the Union's policy objective to fight poverty and social exclusion. With all certainly, the fight against poverty and social exclusion appears high in the agenda of the Commission what translates into the abundant presence of this policy objective across the EPSR, both in the form of general aims of the EPSR and throughout into the different provisions. But as it has been the case with other policy instruments that promised to tackle poverty and social exclusion, the key question remains on how the Union plans to deliver on this policy objective.

3.2. Diving into Turbulent Waters: Implementing the Pillar

In Paragraph 17 of the Preamble, the EPSR is clear in that delivering on the EPSR is a shared commitment and responsibility and that it will be implemented both at the Union and national levels within their respective competences. However, the implementation of the EPSR is primarily the responsibility of national governments, public authorities, and social partners.³⁹ While this rationale makes perfect sense from the perspective of subsidiarity and conferral, the sole implementation of the EPSR at the

³⁸ European Commission: Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (2012). See footnote n. 29.

³⁹ Commission, Establishing a European Pillar of Social Rights (2017), p. 7.

domestic level would not solve the asymmetry at the European level between the internal market and the insufficient social dimension, which is also among the aims of the EPSR.

At the European level, the Commission proposes to implement the EPSR through seven parallel streams: EU law, the endorsement of the EPSR by the EU institutions—which occurred few months after the Pillar Package was published in the Social Summit for Fair and Sustainable Growth in Gothenburg on November 2017—, through the promotion of the effective implementation of existing EU legislation, by supporting social dialogue in the EU, through the European Semester, by drawing conclusions for the completion of Europe’s Economic and Monetary Union and through EU Funds.⁴⁰

While the implementation of the EPSR through policy instruments is essential for establishing a conversation-like fora between the EU and the Member States, and as much as the process of the European Semester might be engaging in a “socialisation” process,⁴¹ at the end of the day, social issues are rendered to the monetary and economic interests which are built in a much stricter system.⁴² For a long time, policy instruments have proven insufficient to tackle poverty and social exclusion effectively; yet, they have generated a substantial amount of data and are relatively effective in creating a floor for discussion and good practices. The EPSR offers the added value of the Social Scoreboard that provides a system for a *vis-à-vis* monitoring of the Member States performances when delivering on the EPSR.⁴³ Yet, this also supposes an additional drawback. While there is a clear overlap between the indicators on the Social Scoreboard, those of Europe 2020,⁴⁴ and the Social OMC⁴⁵ (added to an overlap between the principles in the EPSR,

⁴⁰ Ibid., pp. 7–10.

⁴¹ Zeitlin, Vanhercke, *Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond* (2017).

⁴² Sabato, Corti, *The times they are a-changin’? The European pillar of social rights from debates to reality check* (2018), pp. 51ff.

⁴³ Commission, *Social scoreboard supporting the European Pillar of Social Rights*, URL: <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/> (20. 5. 2019).

⁴⁴ Only once does the Staff Working Document on monitoring the EPSR refer to Europe 2020 in reference to the headline target on limiting early school leave to less than 10 per cent by 2020. There is, however, no further reference to how the EPSR and the Europe 2020 Strategy will interact. See European Commission: *Monitoring the implementation of the European Pillar of Social Rights* (2018), p. 7. For more information on the Europe 2020 Strategy see, *inter alia*, European Commission: *EUROPE 2020. A strategy for smart, sustainable and inclusive growth* (2010); Schoukens (et al.), *Fighting Social Exclusion under EU Horizon 2020. Which legal nature for social inclusion recommendations?* (2015) pp. 11–23; Vanhercke, *Under the radar? EU social policy in times of austerity* (2015) and Peña-Casas, *Europe 2020 and the fight against poverty and social exclusion: fooled into marriage* (2012).

⁴⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social*

the headline target to lift poverty in 20 million and the Employment Guideline 8 to fight poverty and social exclusion),⁴⁶ none of the documents on the EPSR, or the European Semester for that matter, provide clear guidelines on how to implement all these policy instruments altogether. A clear roadmap is needed.⁴⁷

In the case of the allocation of funds for the implementation of the EPSR, while absolutely necessary, funds will not tackle distributional issues in a structural way but rather serve as an alleviator. In any case, because this article focuses mainly on the constitutional asymmetries and such imbalances will not be effectively tackled through soft law, this part will focus on what EU law, by means of updating existing legislation or by adopting new one, may do for the sake of the social policy objective of fighting poverty and social exclusion.

Thus far, the Commission has presented four legislative proposals: on work-life balance (related to Principle 9),⁴⁸ on transparent and predictable working conditions (Principles 5 and 7),⁴⁹ on access to social protection for workers and the self-employed (Principle 12)⁵⁰ and on the establishment of a European Labour Authority (ELA)⁵¹ – all successfully adopted. More recently, the Commission has initiated a two-stage consultation process on a possible instrument addressing fair minimum wages and has put a European Unemployment Benefit Reinsurance Scheme as a deliverable in its mission letter. Moreover, the Commission has linked the updating of other instruments also to the context of the EPSR, *inter alia*, on the coordination of social security systems, the posting of workers, the revision of the EU framework on occupational health and safety

Inclusion, COM(2008) 418 final; Vanhercke, Inside the Social Open Method of Coordination: The Hard Politics of ‘Soft’ Governance (2016); Greer, Vanhercke, Governing Health Care through EU Soft Law (2016); Zeitlin, The Open Method Co-ordination and the Governance of the Lisbon Strategy (2014), pp. 436–450; Barcevicus (et al.), ASSESSING THE OPEN METHOD OF COORDINATION: INSTITUTIONAL DESIGN AND NATIONAL INFLUENCE OF EU SOCIAL POLICY COORDINATION (2014).

⁴⁶ Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015, OJ L 268/28; European Anti-Poverty Network, Proposals on New Commission Integrated Guidelines: Economic and Employment, URL: <https://www.eapn.eu/eapn-proposals-on-new-commission-integrated-guidelines-economic-and-employment>.

⁴⁷ Sabato, Corti, The times they are a-changin’? The European pillar of social rights from debates to reality check (2018), p. 65.

⁴⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2017).

⁴⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union.

⁵⁰ European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, (2018).

⁵¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (2018).

at work and the European Accessibility.⁵² In the context of the Covid-19, the Council has also referred to the need to address the challenge of minimum income schemes.⁵³

At first glance, there is a clear connection between the objective to fight poverty and social exclusion and the recommendation to access social protection. This recommendation is to be welcomed in that at the very least it recognises that current social protection systems are insufficient to face the challenges brought by new forms of labour and that changes need to be incorporated within the current systems for future-proving welfare states.⁵⁴ However, this remains a non-binding instrument. While it aims at prompting change at a national level, it seems insufficient, by itself, to achieve a coordinated approach towards outdated social security systems.⁵⁵

As for the other legal initiatives presented in the EPSR, they were conceived in the form of a Directive or a Regulation, but their link to the objective of fighting poverty and social exclusion is far more elusive, yet still existent. In the agreed proposal for Directive on work-life balance, the Commission listed among the reasons for adopting such a proposal the higher risk of females (particularly older women) to find themselves in a situation of poverty and social exclusion as a consequence of the pay-gap. Furthermore, this Directive is seen as part of the necessary EU action to tackle gender inequality by balancing the design of leaves between genders. As such, even if it is only for a segment of society when implemented, this Directive is likely to have a positive impact on the standard of living of working mothers.⁵⁶

Similarly, the Directive on transparent and predictable working conditions introduces a mandatory requirement of information for workers in every employment relationship, which aims at addressing, yet again, the challenges brought by the hand of digitalisation and the increased market of non-standard forms of employment. While this recognition and mandatory requirement are to be welcomed, Bednarowicz argues,⁵⁷

⁵² European Commission, *Establishing the European Pillar of Social Rights* (2017).

⁵³ Council of the EU, *Council Conclusions on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond* (2020).

⁵⁴ European Commission, *Proposal for a Council Recommendation on access to social protection for workers and the self-employed* (2018), recital 7.

⁵⁵ See more in: Schoukens (et al.), *The EU social pillar: An answer to the challenge of the social protection of platform workers?* (2018), pp. 219–241; Polesi, *Social protection for all workers – Signs of progress on the Social Pillar* (2018); Aranguiz, Bednarowicz, *Adapt or Perish: Recent developments on social protection in the EU under a gig deal of pressure* (2018), pp. 329–345.

⁵⁶ According to the last numbers by Eurostat, the share of women at risk of poverty and social exclusion was 1.9 per cent higher than the corresponding share of men. Eurostat, *Europe 2020 indicators – poverty and social exclusion*, URL: https://ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_poverty_and_social_exclusion (20 May 2019).

⁵⁷ Bednarowicz, *Delivering on the European Pillar of Social Rights: the new directive on transparent and predictable working conditions* (2019).

and rightly so, that mere information rights are unlikely to combat the precarious employment situation that are present in a great part of the digital economy. To protect the interest of those working under precarious situations in the digital economy, it is worth noting that while the Council decided not to include a fully codified definition of the concept of a worker in the text, at the very least, the Directive enshrines a broader concept of worker by reference to the ECJ case-law.⁵⁸ Beyond the clarity that information can bring for people at risk of poverty, the Directive also introduces several minimum requirements such as a maximum probationary period (six months), the right to redress, a certain degree of protection of dismissal—which notably puts the burden of proof on the employer—as well penalties, which might be effective in avoiding unfair dismissals, and ultimately entitles the worker to seek compensation. At least for the sake of those working, these provisions are likely to play a positive role in fulfilling the social objective of fighting poverty and social exclusion.

While not directly emanating but certainly associated with the EPSR, the new Posting of Workers Directive adopted on 28 June 2018 and that was supposed to be transposed into national law by 30 June 2020, includes a provision on “remuneration”. The Directive replaces its former reference to “minimum rates pay” for the concept of “remuneration” and it now imposes an obligation on the Member States to publish information on the constituent elements of remuneration. Moreover, the Directive implies that the rules on remuneration (that are to be defined by the Member States) and are applicable to local workers—whether they stem from the law or from collective agreements that are universally applicable under Article 3.8 of the Directive—are also applicable to posted workers. The concept of remuneration, further, needs to be applied in a non-discriminatory manner to undertakings posting workers to its territory provided that they do not disproportionately restrict freedom of services.⁵⁹ These changes mean that not only would the statutory minimum wage apply to posted workers (as it was the case before) but also all remuneration regulations and generally binding collective agreements—that need to be clearly published by the Member States—would also apply. When it becomes applicable, this will most certainly improve the economic circumstances of posted workers and in all likelihood result in a decrease on the number of posted workers currently living at risk of poverty and social exclusion. These changes are particularly remarkable when viewed together with the decision taken in *Laval*, where the (narrow) disproportionality approach taken by the ECJ was partly based on the lack of clarity of the Swedish collective agreement at that time.

⁵⁸ Bednarowicz, Workers’ rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost? URL: <http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html>.

⁵⁹ Commission, Directive of the European Parliament and the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

Also on the topic of cross-border mobility, is the ELA that, when up and running, will undoubtedly bring better prospects for EU mobile citizens whether in terms of facilitating individuals and employer's information on their rights or in the form of cooperation between the Member States in the enforcement of existing EU law (such as inspections) or as an authority to mediate in case of conflict. In the context of poverty, the ELA could prove to be useful in granting information on the entitlement of mobile citizens to social benefits, particularly in the case of frontier workers or hyper mobile citizens.

Regarding the consultation on fair minimum wages, the Commission sees this as an opportunity to tackle in-work poverty and effectively implement Principle 6 of the EPSR. As noble as these intentions might be, research has shown that minimum wages, by themselves, are unlikely to have a determinant impact on in-work poverty, mostly, because wages are sufficient to lift "only" one person out of poverty, and as such, they are not necessarily sufficient to improve significantly the situation of poor households.⁶⁰ Minimum wages are, however, key to improve the situation of low-wage earners with low bargaining power and wage inequalities both between and within the Member States. This, in turn, would limit social dumping by preventing a race to the bottom between the Member States. They might, moreover, have a spill-over effect in increasing just above minimum wages and even social benefits.⁶¹ While the impact of a potential instrument on minimum wages on in-work poverty is disputable, such an instrument would undoubtedly improve the situation of low-wage earners, therefore, contributing to the fight against poverty and social exclusion at least indirectly.

As for the European Unemployment Reinsurance Scheme, if the discussion continues, it is likely to have a relatively significant impact on poverty insofar as it may absorb part of the effects of a future crisis and, therefore, reduce the income losses of European societies in the future.⁶² In the absence of an existing Reinsurance Scheme, the Commission was "forced" to propose a loan-based alternative, SURE,⁶³ which might as well emphasise the need for such a macroeconomic stabiliser in the EU and facilitate the discussions on the European Unemployment Reinsurance scheme in the upcoming years.

It is too soon to say whether the recent Council conclusions will eventually lead to some sort of action on minimum income. However, initiatives on minimum income, when not limited to mere rhetoric and reduced marginally used recommendation, such

⁶⁰ Marx, Nolan and Olivera, *The Welfare State and Anti-Poverty Policy in Rich Countries* (2014).

⁶¹ Cantillon, Parolin and Callado, *A glass ceiling on poverty reduction? An empirical investigation into the structural constraints on minimum income schemes* (2019).

⁶² See extensively: Beblavy and Lenaerts, *Feasibility and added value of a European Unemployment Benefit Scheme* (2017).

⁶³ European Commission, *Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak* (2020).

as the 1992 one on sufficient resource (also known as the minimum income recommendation),⁶⁴ are likely to have a substantial impact in implementing the policy objective to fight poverty and social exclusion.

4. Calm After the Storm: Can the Pillar Surf in Shallow (Social) Waters?

From the section above, it follows that the ambitious content of the EPSR is translated into fragmented (yet prevailing) actions at least from the perspective of attaining the policy objective to fight poverty and social exclusion. Yet, even if it is in small bits and pieces, it appears that the EU has regained consciousness of the need to guarantee some minimum social standards also at the EU level, and slowly but surely, it seems to be delivering through a set of legislative measures that expand the social dimension of the EU. The question remains whether or not this is sufficient in addressing the imbalances between the internal market and social protection systems, after all, the EPSR is not an all-fixer.⁶⁵ From the standpoint of poverty and social exclusion, at least for now, the answer would have to be in the negative. Decades of anti-poverty policies have shown that policy instruments alone are unlikely to attain the objectives of fighting poverty and social exclusion. Given strong system to protect and foster the internal market, and the decision to subordinate national social protection systems to the economic interest of the EU, it appears that efforts to bring “the social”⁶⁶ to the core of the EU should be more straightforward. This is not to say that the EPSR is useless, far from it. The EPSR, besides confirming the existing social *acquis*, also acknowledges the fact that the current social dimension is insufficient and provides a start towards the solution. From a legal perspective, more importantly, it has quickly ignited a conversation to expand the EU social dimension, quite successfully so far. If seen as a wave, the EPSR should be considered a success. That is, of course, if the Covid-19 consequences do not force a strong wind of change in European politics, which fortunately does not seem to be the case. For the sake of attaining the objective to combat social exclusion, many, including myself, argue in favour of the adoption of a redistributive instrument at the European level, such as a Framework Directive on Minimum Income, which is possible within the current Treaty Framework.⁶⁷ There is an imminent need to activate the possibilities under Article 153

⁶⁴ Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection schemes [1992] OJ L 245.

⁶⁵ Garben, *The European Pillar of Social Rights: Effectively Addressing Displacement?* (2018), p 212.

⁶⁶ Garben, *The Constitutional (Im)balance between “the Market” and “the Social” in the European Union* (2017), p. 23.

⁶⁷ The EU has competence to adopt a directive on the basis of Article 153(1)(h) TFEU with due regard to a number of limitations. I discuss this in a forthcoming contribution for the latest issue of

TFEU with proposals that respect the limits under the social title while embracing the opportunities to expand the social protection fora at the EU.

This is as far as the role of the legislator, and the Commission is concerned. But the EPSR could also prove to play a role with the judiciary. Many have commented on the language used by the EPSR, which is in the narrative of entitlement by using a rights-based approach.⁶⁸ This is a language courts are used to using, and it would not be without precedent that the ECJ would use a non-binding instrument to inspire its future case law,⁶⁹ perhaps to offer a more social-friendly approach in the next balancing exercise between the internal market and national social protection systems putting weigh on the latter under the principles enshrined in the EPSR. Moreover, the EPSR recognises independent rights from more general rights, such as the right to minimum income separate from the right to social assistance and the right to an adequate fair minimum wage separate from a more general right to fair working conditions. This could assist the ECJ in interpreting a number of provisions in the Charter of Fundamental Rights with a more specific purpose. It makes, in addition, interesting links between EU law and other instruments of international human rights, therefore, creating bridges for a proactive judicial dialogue, which could favour social rights when interpreted in light of a more mature and progressive case-law, most notably in the case of the European Social Charter, and avoid future problems of the international rule of law order.⁷⁰

5. Conclusions: The Need to Stem the Tide

If we refer to constitutional asymmetries, there is little that a soft-law instrument can do to redress the effect of those judgements and the general imbalance between the internal market and the insufficient social dimension of the EU. However, the different provisions discussed in this article support that the EPSR is to be seen more as a new wave of social policy than as a sole instrument. As such, the added value of the EPSR, including from a legal standpoint, should not be underestimated.

Overall, the success of the EPSR in effectively tackling the current deficiencies of the EU and to move towards an actual social market economy largely depends on whether or not this activism will continue. So far, there is no reason to believe it will stop as since its adoption the Commission has delivered new proposals every year. However, if the EPSR

the 2020 European Journal of Social Security: Aranguiz, Securing decent incomes at a crossroads: A Framework Directive on Minimum Income (2020) [Forthcoming].

⁶⁸ De Schutter, Dermine, *The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union* (2016), pp. 27ff.

⁶⁹ See, for example, F-1/05 *Landgren v ETF* and F-40/05 *Andreassen v Commission*.

⁷⁰ Garben, *The problematic interaction between EU and international law in the area of social rights* (2018), p. 98.

were to become an anecdotal undertaking, it would risk becoming as effective as the Europe 2020 Strategy has been in delivering its headline target to reduce poverty in 20 million.⁷¹ The failure of the strategy, naturally, was a direct result of the economic crisis and possibly the strategy would have proven more effective under different circumstances. Yet, this emphasised the lack of sufficient stabilisers in place to confront a financial crisis and its impact on individuals. Here is precisely where the EPSR should strike a difference, in promoting a structural change towards a more socially inclusive Union that offers sufficient social safeguards as to improve the well-being of its citizens but is also able to confront, or at the very least mitigate, the adverse effects of a crisis. The fact that the Commission remains attached to its initial social plan in times of a new economic recession, and that social standards seem *a priori* to have taken an important seat in the recovery plan,⁷² appears to show a steady steering towards a more social EU. It remains to be seen whether this will prevail in case of utter conflict between internal market interests and social objectives in the future. In sum, if the EPSR wants to live up to its expectations and effectively tackle the imbalances between “the social” and “the market”, it cannot remain a single drop in the ocean, and it will have to stock enough provisions as to survive more than plain sailing weather by effectively placing due (EU-wide) social safeguards that will protect individuals also in times of economic hardship.

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⁷¹ According to the latest numbers provided by Eurostat, 118 million people, 23.5 per cent of the EU population, live at risk of poverty and social exclusion, URL: https://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion#Number_of_people_at_risk_of_poverty_or_social_exclusion (20 May 2019).

⁷² European Commission, *Europe’s moment: Repair and Prepare for the Next Generation* (2020).

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ZBORNIK ZNANSTVENIH RAZPRAV
PERSPEKTIVE EVROPSKEGA STEBRA SOCIALNIH PRAVIC
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Ane Aranguiz

Novi val solidarnosti v morju ekonomskih interesov: ali je plovba Evropskega stebra socialnih pravic med notranjim trgov in socialno dimenzijo EU lahko uspešna?

Desetletje po prelomnih odločitvah v zadevah *Viking* in *Laval*, v katerih je Sodišče EU odločilo v korist pravice do ustanavljanja in svobode opravljanja storitev pred pravico do kolektivnih ukrepov, je Evropska komisija predstavila Evropski steber socialnih pravic, ki bi bil lahko ključno orodje za odpravo negativnih učinkov navedenih odločb na področju socialne zaščite v EU. Odločitvi v zadevah *Viking* in *Laval* simbolizirata neravnotežja med, pretežno, nacionalnimi sistemi socialne zaščite in notranjim trgov EU. Odločitvi sta skupaj s poznejšimi odločbami Sodišča ključno pripomogli k slabitvi socialne dimenzije EU, ki jo mnogi štejejo kot neprimerno protiutež izvotlitvi nacionalnih socialnih ureditev, in odkazali na potrebo po vzpostavitvi »socialnega« v samem jedru pravne ureditve EU. Le tako lahko namreč Unija zasleduje cilj socialnega tržnega gospodarstva, ki je zapisan v 3. členu PEU. Resnično socialno tržno gospodarstvo zahteva naslovitev vprašanja Uniji lastnih asimetričnih razmerij ter (vsaj) potrebe po koordiniranem pristopu držav članic k vprašanju socialne zaščite. S tega vidika Evropski steber socialnih pravic izkazuje novo soglasje, doseženo na ravni EU. Z njim je socialnega napredka postavljena v samo jedro Evropskega projekta.

Prispevek obravnava možne načine, ki jih Evropski steber socialnih pravic kot ključni izziv primatu notranjega trga EU ponuja v razmerju do odprave neravnotežij med zahtevami trga in socialno ter drugo politiko EU. Vlogo Evropskega stebra socialnih pravic obravnava predvsem z vidika boja proti revščini in socialni izključenosti.

Ključne besede: Evropski steber socialnih pravic, *Viking*, *Laval*, socialno tržno gospodarstvo, notranji trg EU, revščina in socialna izključenost.

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ZBORNIK ZNANSTVENIH RAZPRAV
PERSPECTIVES ON THE EUROPEAN PILLAR OF SOCIAL RIGHTS
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Ane Aranguiz

A New Wave of Solidarity in a Sea of Economic Interests: Can the Pillar Sail in the Asymmetric Tides Between the Internal Market and the Social Dimension of the EU?

A decade after the game-changing cases of *Viking* and *Laval* where the European Court of Justice (ECJ) decided in favour of the freedom to provide services and establishment over the right to collective action, the Commission launched the European Pillar of Social Rights (EPSR), which could be key in reversing the damages that these cases caused to social protection in the EU. *Viking* and *Laval* symbolised the imbalances between the (mostly) national social systems and the EU-wide internal market. These cases and the following jurisprudence added to the relative weakness of the EU's social dimension—which is seen as insufficient to counterbalance the hollowing out of the national social systems—proved the necessity of bringing 'the social' to the core of the EU, giving sense to the objective set in Article 3 TEU of the EU being a social market economy. A true social market economy is compelled to address the issue of asymmetry between the 'social' and the 'market' that is so inherent to the EU, which requires, at the very least, to put in place a coordinated approach to social protection between the Member States. The EPSR represents a renewed consensus that social progress is central to the European project. This article discusses the possibilities that the EPSR offers to redress the imbalances in EU law by challenging the primacy given to the internal market over other EU policies. The role of the EPSR is discussed from the perspective of the latent impact of this instrument in contributing to the policy objective of fighting poverty and social exclusion.

Keywords: European Pillar of Social Rights, *Viking*, *Laval*, social market economy, internal market, poverty and social exclusion.