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## **EU Equality Law after a Decade of Austerity: On the Social Pillar and its Transformative Potential**

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### **Abstract**

This article discusses the evolution of EU legislation and policymaking methods during the ten years since the onset of the financial and economic crisis in 2007/2008. In the EU, this period has been characterized by politics of stimulus, austerity and recovery. Against the backdrop of longer-term developments in the equality law field, we consider how this crisis context influenced this field's evolution. Through analysis of a range of legislative and policy proposals, we show that the progressive softening or hybridization of equality law over this period has gone hand in hand with the stronger articulation of equality objectives in terms of a 'business case'. While this approach appears to have enabled proliferation of policy and legal instruments and expanded the reach of equality law into areas where the EU has limited competence to legislate, it has also elevated instrumental economic goals for action at expense of human rights or social rationales. This longer-term tendency is also present in the recently adopted European Pillar of Social Rights, and the accompanying policy documentation, which have been hailed as carrying potential to infuse more coherence and to rebalance the social and economic rationales that the EU integration project has unevenly promoted over the years. Mindful that it is still too early for conclusive judgments, we suggest, however, that the transformative possibilities the Pillar carries are likely to be undermined by its soft and economically oriented thrust.

**Key words:** EU equality law; coherence; Social Pillar; soft-law; hybrid regulation; marketization

### **1. Introduction**

On launching the European Pillar of Social Rights ('the Pillar') (Commission 2017b) at the Social Summit for Fair Jobs and Growth in Gothenburg in November 2017, the European Commission President, Jean-Claude Juncker, remarked that the Pillar is not simply 'a poem' but rather 'a programme of principles first, a programme of action next' (Commission 2017f). The Pillar notably arrives as Europe recovers from one of the most acute financial and economic crises in decades, which have increased inequalities between member states (MS) and between citizens, left more Europeans at the risk of poverty and social exclusion (Commission 2016f), and contributed to rise of populism and Euroscepticism. As such, the Pillar's adoption appears to signal recognition that halting a

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race to the bottom in social standards and fulfilling the promise of a fairer, more equal Europe requires prompt action to rebalance the European Union's (EU) social and market dimensions.

In this paper, we consider whether the Pillar indeed carries such a potential. Given the Commission's assertion that the Pillar expands the application of equal treatment and non-discrimination principles beyond their current scope (Commission 2017b: 12, 15, 65), our focus is specifically on its contribution to the field of EU equality law.<sup>3</sup> In particular, we consider the potential of the Pillar to make this policymaking area more robust, coherent,<sup>4</sup> and transformative (see also Busby, in this issue).

Rather than considering the Pillar in isolation, we locate it in the context of longer-term regulatory trends in EU social and equality law and policy, with attention placed primarily on measures proposed over the last decade (2008 - 2018). This period saw the emergence of a 'new generation of equality law', which embraces softer legal modes resulting in hybrid regulation. Theoretically, such hybridity might open the scope of possibilities for expanding the reach of equality law beyond the current EU competences. As such, this new approach could contribute to build a more coherent legal framework, which better articulates equality law with other pertinent policy fields that are necessary for the achievement of equality in practice. However, the extent to which it is possible to promote substantive and transformative equality through such soft and hybrid measures, remains an important question, especially in a climate of austerity and following the post-2008 erosion of national social models. As we show in this paper, the economic and political fallout of the crisis itself and of the EU-led response, combined with the European Commission's promotion of the 'Better Regulation' approach<sup>5</sup>, have contributed not only to a progressive softening of equality law but also to a significant shift in the framing of recently proposed equality measures. Namely, a shift away from the discourse of fundamental human rights to that re-asserting the market-enhancing and business case for equality. Against this background, we consider whether the Pillar might be successful in re-centering the social and, in relation to equality law, in promoting a transformative conception of equality beyond market-making rationales.

The paper starts with a brief outline of the longer-term development of EU equality law and related policy, highlighting the expansion and transformation of the equal treatment principle from a market-focus to a more substantive and transformative conception, more

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<sup>3</sup> Our conception of equality law extends beyond equal treatment and non-discrimination, to encompass other policy fields that are supportive or necessary for the practical realization of equality objectives (for elaboration, see Benedi Lahuerta and Zbyszewska (2017)). This broader conception is not only consistent with a multi-dimensional notion of equality (see Fredman (2011)) but also finds reflection in the historical development of EU approach to equality.

<sup>4</sup> We contend that incoherence in EU equality law is located at three levels. Beyond the internal and external incoherence typically discussed in EU equality law debates, the inconsistencies and poor articulation between equality law and other policy fields of consequence to equality ends also leads to a form of incoherence we term 'systemic', see Benedi Lahuerta and Zbyszewska (2017).

<sup>5</sup> See section 2 for discussion and references.

explicitly framed in human rights terms (section 2). We observe a halting of this development, and a subsequent shift in direction post-2008, which we then explore in more detail in section 3. Through the analysis of a selection of EU instruments and initiatives section 3 reveals a progressive re-framing of these proposals in market and business-oriented terms, paralleled with their softening or hybridization, particularly after 2010. In light of this development, we continue in section 4 with a theoretical discussion on soft and hybrid modes of regulation, reflecting on their particular utility and limitations in a legal and policy field such as equality. We then move in section 5 to the analysis of the Pillar and related policy documents. We explore how the tendencies of softening and marketization have informed the way in which the Pillar itself is developed, and we reflect on the implications this framing has for the Pillar's transformative potential. Section six concludes.

## **2. Development of EU equality law**

The much-debated imbalance between social and market objectives and policies at the EU level is a legacy of the European integration project's historical origin as a common market. As is well known, the founding treaties attributed notable economic competences to EU institutions (e.g. market regulation and competition policy) but left most social powers to the MS, save for a narrow set of exceptions (e.g. equal pay) (Barnard 2012a; Council of Europe 1956; International Labour Organisation 1956). This 'embedded liberal' bargain could hold so long as national-level social models were able to offset the internal market's social consequences (Ashiagbor 2013). Subsequent bouts of widening and deepening integration led to gradual albeit uneven expansion of the EU's social dimension, in part because of differing national social standards and the alleged inability of governments to contain social effects of the common market domestically (e.g. unfair competition and regulatory race to the bottom) (Barnard 2012a).

The incorporation of the equal treatment principle into the European Economic Community (EEC) Treaty from the start gave equality a relatively privileged position compared to other social areas. However, due to its original 'market making' objective the scope of this principle was initially narrowly construed as pertaining only to sex (specifically, equal pay; Art. 119 EEC, now Art. 157 TFEU) and national origin (Art. 6 EEC, now Art. 18 TFEU) and was for long time largely driven by the logic of market integration. This Treaty foothold, nonetheless, led to a rapid expansion of equality law beginning in 1970s. To lend a 'human face' (Teague 1994) to the single market, the first Social Action Programme (Council 1974) supported a body of secondary legislation that effectively expanded Article 119 EEC beyond equal pay to a broader equal treatment principle (albeit only in relation to employment through Directive 76/207/EEC) (Bell 2011: 611, 615). Strategic litigation on sex equality of the Treaty provisions during the 1970s and 1980s resulted in recognition of the principles of equal pay for work of equal value, indirect discrimination, and their horizontal effect (Barnard 2012, Schiek 2007: 352-259, Bell 2014:144), thereby endowing equal treatment with a far more substantive and

transformative dimension than that originally conceived by the Treaty. The Court of Justice's interpretation of the equality legislation during this period also introduced a more expansive reading of equal treatment as inherently connected to the protection of human rights, as opposed to simply furthering the completion of the common market (Bell 2014). This decoupling of equality legislation from market integration was also gradually reflected in the evolving legislative framework, particularly following the Amsterdam Treaty amendments. For example, Article 3(2) EC (now Art. 8 TFEU) set an autonomous objective for the Union of eliminating inequalities and promoting equality between women and men, while Article 13 EC (now Art. 19 TFEU) enabled the Community to adopt non-discrimination legislation on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Bell 2014:150). Similarly, the 1989 (non-binding) Charter of the Fundamental Rights of Workers, elevated equal treatment to a fundamental right (Art. 16), which was then affirmed in secondary legislation, including Directive 97/80/EC on the burden of proof in sex discrimination cases (Benedi Lahuerta 2016: 351). Following the Amsterdam Treaty, the principle of equal (gender) treatment also started to be mainstreamed into other policy areas and integrated into European Employment Strategy (EES), which signaled the recognition of a need for more coherence and articulation across policy fields.

Post 2000, EU equality law was increasingly framed through reference to the human rights discourse, not simply that of market integration (Schiek 2002: 290).<sup>6</sup> The first decade of the new millennium saw adoption of several new non-discrimination directives, starting with the Race Equality Directive (2000/43/EC, O.J. L 180/22) and Framework Directive (2000/78/EC, O.J. L 303/16), both of which made clear references to human rights foundations of equality legislation and the fundamental character of equal treatment and non-discrimination principles (Bell 2014: 150).<sup>7</sup> The Lisbon Treaty and the coming into force of the Charter of Fundamental Rights of the EU (CFREU, [2000] OJ C364/1) in 2009 more explicitly constitutionalized (Bell 2014; Morris 2005: 33; O'Conneide 2015: 370) and confirmed the status of equal treatment (Arts. 21, 23 CFREU) as a fundamental EU right. While the reach of the non-discrimination and equal treatment principles remains uncertain due to the different protective scopes of the Equality Directives (Benedi Lahuerta 2016), the CJEU's expansive interpretation of the Charter provisions has also affirmed the fundamental status of these principles (Bell 2014; Xenidis 2017) .

A major change in this trajectory occurred from 2008 on, coinciding with the early stages of the economic and financial crisis. In 2008 the Commission proposed a Directive to extend the prohibition of discrimination on the grounds of religion or belief, disability, age or sexual orientation beyond employment, also known as the 'Horizontal Equality Directive' (Commission 2008b). While the proposal was in line with the 2000 Directives and the CFREU, and most MS recognised 'the importance of promoting equal treatment

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<sup>6</sup> See, however, criticism over prevalence of economic over legal analysis at this stage in time in Sciarra (1999: 169-170).

<sup>7</sup> Also: Directive 2004/113/EC (gender equality in access to services), Directive 2006/54/EC (recast), O.J. 2006, Directive 2010/41/EU (gender equality for the self-employed).

as a shared social value within the EU' (Council 2008b: 2), recurrent concerns about in relation to subsidiarity, interferences with market freedoms of individuals and businesses and the financial and social protection implications of the proposal (particularly for SMEs) (Council 2008b: 2, 3, 25), meant that the proposal stalled. This blockage can partly be interpreted as a national 'backlash' against the CJEU's expansion of equal treatment principle in prior years, in cases such as *Mangold*<sup>8</sup> and *Coleman*,<sup>9</sup> among others (Xenidis 2017), where its application interfered with MS redistributive policies, such as those using age as a social stratifier (Numhauser Henning 2015). Paradoxically, whereas the CJEU has been subject to spirited critique for its market-freedom elevating and constitutionalizing interpretations in the controversial *Viking*<sup>10</sup> and *Laval*<sup>11</sup> line of cases (Becker and Warnek 2011, Davies 2008: 126; Joerges and Rodl 2009: 18; Reich 2008; Rönmar 2007-08; de Schutter 2011: 346), which have sidelined national social policy and labour rights in problematic ways (Garben 2017; Rasnaca 2017; Schiek 2015),<sup>12</sup> its jurisprudence on equal treatment and non-discrimination appears to have articulated a more transformative conception of equality than the narrow internal market-based one originally conceived by the Treaties (Xenidis 2017).<sup>13</sup>

Indeed the conception of equality viewed as a human right, appears to have more consistently and clearly come through in CJEU's case law than it has in policy and legislative initiatives proposed by the European Commission, especially those put forth since 2008. The post-2008 period has seen a 'new wave of antidiscrimination law,' which, unlike the primarily legislative approach of previous years, prioritizes enforcement of existing law on the one hand, and utilizes more administrative and soft measures to complement existing law and expand into areas of limited competence on the other (De Búrca 2012; De Witte 2012). This new regulatory approach can be linked to the Commission Communication on 'Smart Regulation', which stressed that, to overcome the economic crisis, EU regulation should limit burdens on businesses (especially SMEs) to what is 'strictly necessary' to boost their competitiveness (Commission 2010b: 2). To achieve this, the Commission called for urgent review of 'incomplete, ineffective, and underperforming regulatory measures', and stressed the need to get 'legislation right' to 'deliver the ambitious objectives for smart, sustainable and inclusive growth' (Commission 2010b: 2). Among others, greater emphasis has been placed on the quantified cost-analysis in impact assessments (Commission 2010b: 7; Micklitz 2012: 398).

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<sup>8</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709.

<sup>9</sup> Case C-303/06 *Coleman v Attridge Law and Steve Law* EU:C:2008:415.

<sup>10</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* EU:C:2007:772.

<sup>11</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809.

<sup>12</sup> A similar tendency is evident in the Court's decisions on Article 16, wherein it elevated the 'freedom to conduct business' to a fundamental right: see, e.g. Prassl (2013: 434) and Schiek (2017).

<sup>13</sup> However, this approach has its own limitations, especially in relation to balancing recognition of disadvantage with social policy's redistributive function, and recognizing intersectional character of discrimination, see (Fudge and Zbyszewska 2015). Also, see Somek (2011) for a more general critique of EU non-discrimination law.

The possible relevance of this regulatory shift in the area of equality law is especially evident when we consider the changes in the wording of the 2003 and 2016 Inter-institutional Agreements on Better Law making. Whereas the former emphasized that alternative regulation methods would '*not* be applicable where *fundamental rights* or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States' (Parliament, Council and Commission 2003), the latter does not include a similar 'exception'. On the contrary, the 2016 Agreement shifts towards consideration of administrative burdens for businesses (particularly SMEs) and prioritizes a cost-benefit analysis and competitiveness (Parliament, Council and Commission 2016). This change could have been partly influenced by the struggles of the 2008 economic/sovereign debt crisis as well as the CFREU recognition of business rights (Art. 16). While EU social policy initiatives have always been accompanied by market justifications and have been tied to various strategic and growth objectives, after a period of more expansive framing of equality principles, the post-2008 period brought about a clear tendency to increasingly justify and subordinate proposed equality measures by reference to business concerns.

As we demonstrate in the following section, the crisis context, as well as the changing regulatory approach of the Better Regulation and the 'Smart Regulation' documents, have had a significant influence on the legislative and policy measures put forward during the post-crisis period.

### **3. EU Equality law & policy in the crisis and post-crisis: softer and increasingly marketized?**

In this section, we turn to a more detailed analysis of how the crisis affected the EU's regulatory paradigm, and how this translated into the softening and the marketization of equality instruments or initiatives. To show this emerging pattern, we review measures proposed and negotiated over the 2008-2018 period. Our analysis suggests that they fall into three broad categories defined by the manner in which they were framed and their timing. The first category constitutes 'hard' legislation proposed at the start of the period (2008), during the stimulus phase of the EU crisis-response (2a). After 2010, the second category includes a set of proposals for 'hard' law, albeit framed in a more business-friendly manner (2b), and finally, the last group encompasses a range of 'softer' and even more explicitly business-friendly measures (2c).

#### **a. The 2008 Directive Proposals face the crisis stumbling block**

The first category of instruments we identified in our review are 'hard' legislative measures based on the EU equal treatment and non-discrimination competences, which have a strong human rights framing. Several such instruments were proposed at the outset of the period under consideration, coinciding with what some had characterized the 'first phase' of the EU's crisis response (Clasen et al. 2012: 12). The 2008 proposal for

Horizontal Equality Directive (Commission 2008b) and the 2008 proposal for a new Maternity Leave Directive (Commission 2008a) are good illustrations. Both encountered significant opposition in the Council resulting in stalled negotiations. The latter proposal was abandoned by the Commission in 2015, and the former's adoption is still pending a decade on, despite recent efforts to reinvigorate the negotiations.

Our review of these proposals and discussions surrounding them suggests that they were doubly disadvantaged by this combination of timing and framing. The 2008 Horizontal Equality Directive proposal was rooted in the non-discrimination principle and the CFREU. It was also in line with the Lisbon Strategy for Growth and Jobs (Commission 2005) and was said to carry possible benefits for the internal market (Commission 2008b: 2-3; Council 2008a: 52) but its core aims were to lessen the alleged hierarchy of discrimination grounds (Commission 2005) and bring EU law in line with the UN Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>14</sup>. Primarily, therefore, the instrument was framed as a human rights tool that would overcome the 'hierarchy' of anti-discrimination grounds (Howard, in this issue) and thus would improve the coherence of equality law (Council 2008a: 5). Similarly, with its origins in the Commission's Roadmap for Equality Between Women and Men 2006-2010 (Commission 2006), the 2008 Maternity Leave Directive proposal was framed as facilitating the EU's gender equality commitments (Commission 2008a). Unlike the 1992 Pregnant Workers Directive (92/85/EEC, O.J. L 348/1), which was based on Article 118a EEC Treaty (health and safety), the 2008 proposal utilized Articles 137(b) (working conditions) and 141(3) EC Treaty (equal opportunities and equal treatment between women and men) as a combined legal basis. Accordingly, the proposal's provisions on the extension of the period of maternity leave from 14 to 18 weeks (Art. 8), and its introduction of job-protection clauses (Art. 10) and a right to return to the same or equivalent post (Art. 11), were justified as intrinsically linked to both health and safety and equal treatment. Ample references to the EU's commitments to promoting gender equality and work-family reconciliation, for their own sake and in relation to their economic and growth benefits were also present in the Commission's explanatory documents (Commission 2008a: 2-3).

The timing of both proposals was particularly ill-fated. Compared to the more favourable context in which the 2000 Equality Directives and the 1992 Pregnant Workers Directive were adopted, the Horizontal and Maternity Directive proposals were introduced at a time of the 'Great Recession' and when national priorities had consequently shifted. Concerns about the financial and cost implications of the proposals, and about potential negative impact on both social protection systems and businesses (particularly SMEs) were cited in Council discussions on each instrument. In the context of the Horizontal Equality Directive, Germany, questioned whether the proposal was timely and needed, given its cost implications, and Poland, the Netherlands, UK, Czech Republic and Hungary signaled similar concerns (Council 2008b, 2011; Hugendubel 2015). Similarly, a number of MS were concerned about the costs associated with the proposed Maternity Leave

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<sup>14</sup> 24 January 2007, UN Doc A/RES/61/106.



Directive, particularly in light of the Parliament's push for extending the leave period to 20 weeks, at full pay (Parliament 2010). In the Council, several MS deemed the extended pay provisions not to be 'an appropriate basis for negotiation' (Council 2010), particularly 'in the context of the financial and economic crisis and the pressure towards fiscal consolidation' (Council 2008c).

Thus, the combination of timing and framing translated into stalled negotiations and both proposals being blocked in the Council. As critics noted following the Commission's 2015 decision to withdraw the proposed Maternity Leave Directive, the Council's constant invocation of the budgetary reasons signaled erosion of the EU's commitment to gender equality (Van den Abeele 2015: 55-57). Indeed, beyond a shift in political priorities during the Great Recession and the allegedly high costs of these proposals, the overall change in the political climate may have been also decisive. According to Veld MEP 'governments [were] feeling pressured by populist and extremist parties and [were] too afraid to take a stand on equality' (Social Platform 2014). Framing instruments in a strong human rights language at the time when the legitimacy of the EU's actions and influence over national policy was being increasingly questioned at the national level proved ill-fated for the 2008 instruments.

#### **b. The first regulatory reaction to the crisis: 'hard' instruments proposed post-2010**

Following the regulatory intelligence accrued during the unsuccessful negotiations of the 2008 proposals for a Horizontal Equality Directive and the Maternity Leave Directive, from 2010 onwards the Commission changed its approach to make progress in its equality law agenda. Two key sets of instruments were launched in this period: a proposal for a Directive on Women on Company Boards (Commission 2012b) and, towards the end of the recession, a proposal for a Directive on accessibility requirements for products and services (Commission 2015c), also known as 'European Accessibility Act' (EAA). Both proposals sought to introduce binding measures that all MS would implement. Both could arguably enhance EU equality law, but, compared to the 2008 proposals, both evidenced a shift in the legal and discursive framing. Reflecting the post-2010 turn to austerity measures at EU and national level, both documents' narrative heavily relies on economic justifications and the benefits the proposed measures could bring for the internal market, growth and businesses, with a significant sidelining of the human rights discourse.

This trend can be readily observed in the Women on Boards Proposal. Despite initial references to equality between women and men as a human right and as a key founding value and aim of the EU in its own right,<sup>15</sup> the document is awash with references to its benefits for the internal market (including both employment and financial markets), for listed companies and for investors. Overall, the proposal leans heavily towards its ultimate instrumental objective, i.e. to 'exploit' the talent that would be brought in by

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<sup>15</sup> The Proposal refers to Articles 2 and 3(3) TEU, Article 8 TFEU, to the CFREU (Articles 15, 21, 23) and the principle of positive action, recognized in Article 157(4) TFEU, which is suggested as the legal basis.

new female board members to achieve the Europe 2020 objectives (Commission 2012b: 5; on instrumental use of policy see also Busby, in this issue). The document also points out how equality policies 'are vital to economic growth, prosperity and competitiveness' and underlines that imbalances in gender composition 'affect the overall performance of companies, their accountability, the ability of investors to assess and factor appropriately and timely all relevant information, and the efficiency of the EU financial markets' (Commission 2012b). Accordingly, whilst increasing women's participation on company boards is, primarily, a matter of justice and human rights (European Women's Lobby 2014: 4), the Proposal is predominantly based on and driven by concerns around potential benefits for business, economic growth and competitiveness (Benito Sánchez 2015; Elomaki 2015: 288-302).

A similar inclination can be traced in the Proposal for the EAA, which is part of the European Disability Strategy 2010-2020 (EDS) (Commission 2010c). The latter was designed to contribute to the Europe 2020 growth objectives ('market approach') as well as to meet the EU's obligations under the UNCRPD regarding accessibility ('human rights approach'). In this context, just as the 2008 Women on Company Boards Proposal, the proposed EAA is wrapped in a human rights language, but the case for facilitating accessibility is a strongly business-oriented one, with accessibility seen as an opportunity to 'achieve the EU's growth targets' (Commission 2010c: 2-3). Indeed, the proposed EAA constantly relies on a 'win-win' argument to justify the suggested measures. For instance, the Act clearly seeks to improve accessibility of goods and services for disabled individuals, whilst simultaneously underscoring how greater accessibility would improve competition between economic operators, efficiency and free movement of goods and services (Commission 2015c: 2-3). Similarly, the Act is designed to support MS in achieving their accessibility commitments and obligations under the UNCRPD, but the proposal's focus on inclusion is also substantiated on economic grounds, i.e. how greater inclusion and accessibility falls in line with the Europe 2020 Strategy's objective of promoting 'smart, sustainable and inclusive growth' (Commission 2014a: 9).

In both above-mentioned instruments, this blending of market access, competition and efficiency arguments, on the one hand, and social, equality and human rights objectives, on the other hand, appears to present a 'win-win' outcome. Compared to the first category of instruments, these post-2010 hard law proposals put stronger emphasis on their benefits for the economy through contributing higher employment rates and consumption, free movement and growth. This greater accent on the business-case and the advantages for the internal market seems to be aimed at making these proposals more appealing for MS. Yet, this approach carries some undesirable risks, which suggest these proposals may not in fact lead to properly balanced 'win-win' outcomes. First, a shift towards a more market-based approach paralleled by a significant sidelining of the rights discourse is normatively highly problematic. Secondly, the substantive measures proposed in these two instruments are themselves either less robust, more limited in scope or introduce significant restrictions in order to make the proposals appealing. This

is evident in either the proposal as put forth by the Commission or in its subsequent discussion or position on it adopted by the co-legislators.

### **c. The second regulatory reaction to the crisis: softer and more business-oriented instruments**

In this last category we include soft law measures proposed during the latter part of the crisis (i.e. post-2010) or since its 'end' (i.e. post-2014). As noted above, the Commission (2010b) has emphasized the importance of designing regulatory measures in a way that does not overburden businesses and stifle competitiveness. Several equality instruments launched from 2010 onwards illustrate this approach. For instance, EU Framework for National Roma Integration Strategy (Commission 2011), and the overall gender equality approach, exemplified in various instruments, such as the Women's Charter (Commission 2010a), the Pay Transparency Recommendation (Commission 2014c), or the Strategy for equality between women and men 2010-15 (Commission 2010d). In all these documents, the 'win-win' discourse already present in the instruments just discussed (3b) remains, but the measures have an even stronger business rationale and/or integrate a greater cost-benefit analysis. Indeed, it appears that the latter may even take priority over the human rights and equality rationales. Additionally, the measures themselves tend to be 'softer' and more flexible, leaving MS more margin for maneuver, and leading, potentially, to larger substantive and implementation differences across the EU.

Through Women's Charter the Commission undertook to infuse a gender perspective into all EU policies and to promote gender equality. The Charter focuses on five areas of action: equality in the labour market, reducing the gender pay gap, equality in decision-making, gender-based violence and gender equality in external relations. Although the Charter initially presents gender equality as a common EU value and a fundamental right, it also immediately emphasizes that '[e]conomic and social cohesion, sustainable growth and competitiveness [...] depend on real equality between women and men'. Indeed, the Gender Pay Gap (GPG) is mainly seen as 'a cost that Europe cannot afford (Commission 2010a: 4). The potential of gender equality progress for economic growth is further developed throughout the document (see e.g. Commission 2010a: section 3). Although the Charter states that it will be implemented through 'both legislative and non-legislative' instruments, the balance strongly leans towards soft-law measures, often linked to economic governance. For instance, the document suggests that women's greater economic independence in the labour market will mainly be encouraged through quantified targets in line with the Europe 2020 strategy (Commission 2010a: 3), presumably embedded in the European Semester.

More specifically, as regards the GPG, the priorities set by the Women's Charter have materialized in the Pay Transparency Recommendation, which has been equally justified in economic terms and is also being promoted through the European Semester (Commission 2017d: 2, 10). While a welcome initiative, as a soft-law instrument it leaves MS plenty of flexibility to 'cherry pick' measures, which may vary widely in terms of

effectiveness and enforceability. The Recommendation encourages MS 'to implement the most appropriate measures for their specific circumstances and to implement at least one of the four core measures enhancing pay transparency' (Commission 2014c: Recital 10, 2017c). Yet, the potential of the core actions (i.e. entitlement to request pay information, company reporting, pay audits, equal pay collective bargaining) to achieve real change could differ significantly. In fact, recognizing employees' right to request information on pay levels by gender and job category is simply a right to request,<sup>16</sup> which employers could deny without consequence. In contrast, an outright negation of such information is less likely if a legislative obligation to report gender pay information or to conduct equal pay audits is established.<sup>17</sup> Allowing MS to choose which measures to implement can translate into very different rights and obligations at the national level, which can impede the overall coherence of EU (equality) law.

Indeed, MS may lawfully choose not to implement any core measure, given that the recommendation is non-binding. In this regard, the 2017 Commission Progress Report recognizes that '[d]espite the adoption of the Recommendation, only eleven MS have currently legislation on pay transparency in place' and only six have adopted new measures or improved existing ones. Consequently, one in three MS have taken no action (Commission 2017d: 3, 10).

This 'win-win' discourse, wherein social and economic objectives are deemed to be simultaneously pursued and capable of being achieved, is also evident in EU action against Roma discrimination. Here, EU regulation is based on two key soft-law instruments: the 2011 Framework for National Roma Integration Strategies (FNRIS) (Commission 2011) and the 2013 Council Recommendation on effective Roma integration measures (Council 2013). An analysis of the official discourse that accompanied, supported and followed these measures suggests that they have a dual rationale, based both on human rights and economic/market arguments. The 2010 Communication highlights not only the prohibition of ethnic discrimination as an EU right and value, but also that Roma *inclusion* is necessary to achieve the EU 2020 growth priorities and the 'full integration of Roma will have important economic benefits for our societies' (Commission 2010f: 2-3). Similarly, the 2012 Communication seems to assign equal importance to both rationales by stating that better integration of the Roma is 'both a moral and an economic imperative' (Commission 2012a: 2). In some documents, however, the economic/market rationale is even portrayed as being the primary aim, taking priority over the human rights one. The FNRIS is exemplary, as the Commission presents Roma integration as bringing predominantly economic benefits (in terms of productivity, social assistance payments

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<sup>16</sup> Similar to the right to request changes to working hours and/or patterns under Directive 2010/18/EU, Clause 6(1). For a critique of a right to request in the proposed Work-life Balance Directive, see Benedi Lahuerta and Zbyszewska (2018: 13-14) and Zbyszewska (2016).

<sup>17</sup> Furthermore, company reporting is encouraged for companies with 50+ employees, whereas pay audits for companies with 250+ employees, which seems a large difference and would leave SMEs, employing most EU workers, out of the pay audit obligations (Recommendations 4 and 5).

and revenues from income taxes) that 'will *also* contribute to social cohesion and improve respect for fundamental rights' (Commission 2011: 2-3).

The FRNIS also states that 'MS' national strategies should [...] contribute to *social integration* of Roma in mainstream society' and 'should *fit into* and contribute to the broader framework of the Europe 2020 strategy and [...] be *consistent with* national reform programmes' (Commission 2011: 8-9). This suggests that if the measures required to achieve Roma integration do not 'fit' into or 'contribute' to the economic rationale of the national reform programmes, they are inconsistent with Europe 2020, even if they could be valuable from a non-discrimination/human rights perspective.

The earlier excerpts also evidence that prioritizing the socio-economic objectives creates a discourse saturated with positive terms, like 'inclusion', 'integration' and 'diversity promotion', which tends to minimize the extent and seriousness of structural discrimination, segregation and hatred the Roma experience. This trend is problematic because eradicating endemic discrimination against the Roma community is primarily a moral and justice imperative, based on human dignity, which is the source of the right to equality, a human right the EU is bound to protect. While economic benefits are important, they should not be presented as the primary rationale for action, especially at a time when anti-Gypsism is on the rise (see e.g. ECRI 2001: 4; Mirga-Kruszelnicka 2017: 12).

The fact that the EU Roma Framework is mainly, though not solely, based on soft-law instruments with a positive discourse framed in terms of 'inclusion' and 'integration', might limit its effectiveness. On the one hand, the RED is a hard-law measure that already prohibits ethnic origin discrimination, so soft-law Roma measures may in principle complement it. On the other hand, however, soft-law measures are insufficient on their own to improve the effectiveness of RED as regards the Roma or to guarantee the related measures are implemented. In fact, the non-binding character of the two main Roma instruments might be the main weakness of the EU policy in this field. This leaves MS large flexibility to pick measures to implement and may lead to 'a plethora of diverse approaches and policy solutions' (Mirga-Kruszelnicka 2017: 19), which may not always be consistent and guarantee equal rights throughout the EU. Some national governments may also effectively avoid adopting any measures (Mirga-Kruszelnicka 2017: 19). This is evidenced by the fact that only 21% of the measures recommended by the Council in 2013 have been adopted by more than half of the MS (Commission 2016a). Furthermore, the EU Roma Strategy has not led to major changes in the areas of employment, healthcare, housing and discrimination (Commission 2017h). Indeed, in a recent consultation, 28% and 38% of the respondents considered that, since 2011, the Roma situation has worsened in the fields of discrimination and housing, respectively (Commission 2017h; see also Commission 2012a, 10, 12).<sup>18</sup>

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<sup>18</sup> Independent reports suggest the situation of Roma has worsened in France, Cyprus, Hungary, Ireland, Romania and the UK (Chopin et al. 2017: 10).

#### 4. Hard, Soft and Hybrid Regulation

The analysis in the previous section demonstrates a clear shift in the EU regulatory approach to equality law from a system largely based on hard law until 2008 to a new 'tactic', from 2010 onwards, that prioritizes soft-law as a means to achieve progress in an increasingly adverse economic and political climate. In the now extensive literature on new modes of governance, there is a strong case that soft law can be effective at coordinating national policies, and that, indeed, it can take on a hard edge even if it is not legally binding (Ashiagbor 2005; Korkea-Aho 2009: 271). This section considers, from a theoretical perspective, the advantages and limitations of the stronger emphasis on soft law in the specific context of equality law.

The expression 'new governance' refers to replacing top down (command and control) government with governance based on interactive (reflexive) bottom-up and top-down processes and interaction of state governments with socio-economic actors (Trubek and Trubek 2005: 343-364). As such, this mode of governance typically utilizes soft law. In the EU context, soft law has been primarily used in areas where the EU lacks competence or where national diversity of practice requires a more flexible approach. By deploying tools such as guidelines and bench marking, peer review and sharing of best practice, and monitoring, the Open Method of Coordination (OMC) introduced in the European Employment Strategy (EES) post Amsterdam, for example, has been shown to produce normative effects and some policy convergence (Ashiagbor 2005). It has done so through, among others, 'foster[ing] a cognitive consensus around common challenges, objectives and policy approaches' (Jacobsson 2003: 355-370). This potential of soft law to produce normative change is important not only where there is no competence to regulate, but also in light of the fact that classical regulatory techniques based on command and control (i.e. 'hard' law) are not necessarily always effective. The latter point has been well demonstrated by research on the disjuncture between the practical operation of law as opposed to its formal letter,<sup>19</sup> or as the problem of ineffective enforcement makes apparent (Trubek & Trubek 2005: 361, citing Kilpatrick; Trubek and Cotterell 2005).

The primary objections to soft law, however, have been that in a context where there is an inherent asymmetry between social and market objectives, as is the case of the EU, soft law is not itself sufficient to rebalance the two domains, or offset the deleterious consequences of market/economic policy and the possible race to the bottom in social standards (Trubek and Cotterell 2005).<sup>20</sup> The question of whether soft responses are appropriate for an area like equality law is particularly crucial. On the one hand, hard law

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<sup>19</sup> There is a rich literature in legal realism, new legal realism, and socio-legal studies that explores the disjuncture between legal norms as enacted and the way in which law operates in practice, see e.g. Halperin (2011).

<sup>20</sup> Interestingly, new macroeconomic governance – which is an inherently hybrid mode of regulation – shows that soft law has been used in ways that undermine the ability of national welfare states/social models to withstand this 'race to the bottom' because it has effectively eroded those social models away; see, e.g. Barnard (2012), Ashiagbor (2013) and Schiek (2017).

can be a fairly 'blunt instrument' for bringing about social change (Barnard 2012), which is necessary for achieving substantive equality goals in practice. Thus, softer modes of regulation that promote best practices, mutual learning, and emphasize awareness raising and attitudinal change – whether in national policies or among the population – may, in fact, be more appropriate. On the other hand, presence of hard legal guarantees tends to send a strong, symbolic message about the importance of equality and non-discrimination as essential values (but see Howard 2004; Zeegers 2005). Moreover, there is a risk that in absence of binding means, the many soft commitments and strategic statements on equality that have been articulated over the years remain unachieved and simply aspirational, and that in areas such as equality law, the law loses its precision (Milewski and Senac 2014: 189).

In light of these shortcomings, *hybrid* approaches that combine hard and soft regulatory modes may be most appropriate (Trubek and Trubek 2005), and such an approach has been indeed emerging in the context of EU equality law (De Búrca 2012; De Witte 2012). However, hybridity carries its own problems including the possibility that soft and hard law might interact with each other in 'antagonistic' ways: they can 'obfuscate and undermine' each other (Shaffer and Pollack 2010: 706, 709). As Shaffer and Pollack have shown in relation to international law (2010: 746-747; 709), fragmented regulatory systems, where distributive conflicts exist and multiple regulatory regimes overlap, can be particularly prone to antagonistic relationships, and to strategic bargaining leading to hardening of soft law regimes and to the softening of hard law regimes, reducing the purported advantages of soft law (e.g. flexibility) and those of hard law (e.g. legal certainty and predictability). While these arguments have been developed in the context of international law, they tend to resonate with what we observe in EU law, namely, the increasing vagueness of (equality) Directives' provisions (Mason 2010), which have softened their effects, and have reduced legal certainty.

Moreover, the success of the hybrid approaches depends on other environmental conditions, and the post-2008 climate has not proven particularly friendly to ensuring such approaches can thrive, especially in policy fields that necessitate expenditure and administrative capacities to operate effectively. As has by now been noted by numerous commentators, both, the macroeconomic governance introduced post 2008, and the crisis response promoted at the EU level (especially its second, post-2010 phase, have stymied most MS' scope to maneuver on social policy (Giubboni 2014: 935-963). Building on previous OMC experience, the EU's new economic governance, which itself utilizes a hybrid regulatory approach, aims to achieve stricter coordination and convergence of national fiscal and economic policies. It relies on technocratic style, and is based on surveillance of MS performance to certain targets in relation to budget stability, containing imbalances in the Eurozone, and coordination of socio-economic policy (Armstrong 2013: 601-617; Schiek 2015). One of its key effects has been to shift fiscal decision-making to the EU level and, within particular MS, to finance ministries, with the consequence of subordinating spending in areas of social policy to meeting

macroeconomic guidelines (or memorandums of understanding for those MS subject to Troika bail outs).

As critics have pointed out, this approach has eroded national social models and has exacerbated further the already existing imbalance between the EU's social and the market dimensions (Ashiagbor 2013; Schiek 2015; Garben 2017). While these effects have been especially visible in the context of labour law (Barnard 2012; Clauwaert and Schömann 2012; Moreau 2011), social security and other policies that directly or indirectly affect the state's delivery of social programs have been also affected. In relation to equality field, the implications of this new economic governance and the EU's crisis response – for both, EU-level and national policies – have been explored in feminist social policy literature (Annesley and Scheele 2011: 335–347; Karamessini and Rubery 2013; Lombardo and Kantola 2017; Walby 2009; Zbyszewska 2017). At the EU level itself, the strategy of gender mainstreaming, for example, was significantly undermined in the context of the EU's crisis response (Villa and Smith 2014). Combined, these developments have led some scholars to conclude that the project of expanding EU's social dimension, and the original 'embedded liberal' bargain, have been reoriented or refocused on a neo-liberal consensus (Ashiagbor 2013; Höpner and Schäfer 2010: 344-368; Joerges and Rödl 2009; Scharpf 2010).<sup>21</sup> As Schiek (2014: 4) summarizes, this 'suggests that the EU now strives actively for a dismantling of national social policies and pursues a new neo-liberal constitutional settlement.' At the same time, since 2010 on we have also seen a proliferation of various initiatives, both hard and soft, that seek the coordination of national policies in relation to a wider range of equality issues. As we have observed, however, these initiatives appear to be primarily driven by economic rationales, rather than human rights objectives. Whether or not this is a strategic choice on the part of the Commission (given the post 2008 difficulties to adopt new equality legislation) this approach is highly normatively problematic, and may be limiting in terms of the substantive changes it can bring about. Indeed, it could lead to the erosion of social and equality standards in those MS, where these standards are more robust (Christodoulidis and Dukes 2008).

Against this background, in the next section, we consider whether the recently launched European Pillar of Social Rights may contribute to re-center the EU equality discourse around social rights – rather than businesses and the market. We will also analyze the regulatory and governance approach the Pillar adopts, and its potential to promote greater coherence and effectiveness in the field of EU equality law.

## **5. Moving forward: the European Pillar of Social Rights**

In April 2017, the European Commission released its final proposal for the European Pillar of Social Rights (Commission 2017b), following a wide public consultation in 2016. The

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<sup>21</sup> Somek (2011) had already made this argument in relation to the EES's mainstreaming of equal treatment and non-discrimination principles.



Pillar was subsequently proclaimed in November 2017 during the Gothenburg Social Summit for Fair Jobs and Growth. Designed 'as a compass for a renewed process of convergence towards better working and living conditions' (Commission 2017b), the Pillar is conceived primarily for the Euro area, although it remains open to all MS. It aims to deliver 'new and more effective rights for citizens' in areas of equal opportunities and access to labour market, fair working conditions, and social protection and inclusion, with the view to support the Treaty promise of highly competitive social market economy.

The Pillar is formed by twenty principles, with five relating to equality law (see Table I).<sup>22</sup> EU institutions have noted, however, that the Pillar's implementation is a 'joint responsibility' of EU institutions, MS, social partners and other stakeholders. In this regard, EU policymakers have emphasized that their role is 'set[ing] the framework and giv[ing] direction on the way forward for implementation of the Pillar' (Commission 2016d). Indeed, the Pillar documentation describes its role as 'a reference framework to screen employment and social performance' (Commission 2016e: Annex 1) and a tool to 'steer greater convergence within the euro area' (Commission 2016c: 8). To some extent, hard-law instruments appear to have a role in this coordinating task. Indeed, the Pillar has partly 'absorbed' relevant existing legislative proposals, such as the EAA, and it has also been accompanied by a new proposal for a Directive on work-life balance (Commission 2016c), to replace the failed Maternity Leave Directive (see also Busby, in this issue). However, at EU level, the two key tools that will apparently be used to steer MS' social policies are soft-law tools: a) the European Semester, to which the 'Social Scoreboard' (discussed below) was recently incorporated, and b) European Structural and Investment Funds (Commission 2017c: 3). As we show below, this hybrid (mostly soft) regulatory approach and the tendency to invoke business and economic rationales to justify social action places the Pillar more or less on trajectory with the post-crisis regulatory evolution.

### **a. On the scope and the regulatory approach**

The way in which the Pillar has been presented gives the impression that it seeks to boost the social dimension of the EU rather generally. Indeed, according to preliminary documents, the Pillar is about putting 'citizens first' (Commission 2017b: 9) and its starting point are 'the social objectives and rights inscribed in EU primary law' (Commission 2016c: 2). More recently, the Commission has stated that '[b]uilding a fairer Europe and strengthening its social dimension is a key priority' (Commission 2017a) and that the Pillar 'provides an opportunity to take a holistic view at the "acquis"' (Commission 2016c: 8). However, the adopted Pillar has a narrow focus that does not cover either all EU social objectives or the entire EU territory. Indeed, the Pillar is only supposed to bolster the

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<sup>22</sup> These are: Principle 2, Gender equality; Principle 3, Equal opportunities; Principle 9, Work-life balance; and Principle 17, Inclusion of people with disabilities.

social dimension of the Euro area and is primarily aimed at fostering 'fair' and equal *labour markets*, especially in light of increased unemployment post crisis.<sup>23</sup>

The Pillar is deemed to achieve a 'social triple A' (Commission 2016c: 5) and the Commission asserts that it expands the existing *acquis* (Commission 2016e, Annex 1: 12, 15, 65), but in reality the Pillar addresses the field of equality rather narrowly. EU law generally recognizes the principle of equal treatment and the right to non-discrimination,<sup>24</sup> and at least in certain areas, hard-law formally extends this recognition beyond employment to encompass social protection, education, and access to goods and services (see also Busby, in this issue). The Pillar, however, emphasizes these rights primarily in relation to the access, opportunities, and inclusion in the labour market<sup>25</sup>. Indeed, the labour market emphasis has been clear from the outset, with the Commission's early documents referring to equal opportunities as an 'economic imperative' (Commission 2016e: 6, 8). This perennial labour market and employment link was critiqued during the public consultation by some organizations, which wanted to see these principles more broadly mainstreamed (Commission 2017k: 10-11).

Despite the limited number of areas covered by the Pillar, in what follows we consider whether two of its features could make a difference in practice, namely, its wording and the expansion of the protective scope of some rights. Interestingly, the wording of the principles is quite commanding for a soft-law instrument, e.g. Principle 2 on gender equality requires that equal treatment be 'ensured and fostered in all areas' and Principle 3, covering all protected grounds, states that '[e]qual opportunities of under-represented groups shall be fostered'.<sup>26</sup> This language emulates the style of hard-law and appears to compel MS to take action to implement these principles. However, the Pillar principles and rights 'are not directly enforceable and [...] require a translation into dedicated action and/or separate pieces of legislation' (Commission 2017c: 3). In the field of equality law, the Pillar has been accompanied by *one* legislative proposal for a new directive on work-life balance, linked to Principles 2 and 9.<sup>27</sup> In fact, the Pillar documents acknowledge that it will be implemented 'through legislation *where needed*' (Commission 2017e), which suggests other types of governance tools might be prioritized. Whilst the European Council has expressed the Union should develop its social dimension as a 'shared commitment' of EU institutions and MS (according to their competences) (Commission 2017j; European Council 2017), the more technical Pillar documentation appears to indicate that national governments, social partners and civil society organizations are expected to take most of the implementing measures.<sup>28</sup> Considering the post-2010

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<sup>23</sup> See also Commission 2017b (Preamble (recitals 9-14) and the title of Chapter 1).

<sup>24</sup> Articles 20, 21, 23 CFREU.

<sup>25</sup> See Principle 6, equal opportunities, in general, and Principles 5 and 17 on gender equality and disability, respectively.

<sup>26</sup> See further Table I.

<sup>27</sup> See further Table I.

<sup>28</sup> Either through the adoption of national regulation, via collective bargaining or by collecting and exchanging best practices, see Commission (2017c: 4, and for each principle, the section 'What MS and social partners can do' ).

reluctance of many MS to take action in this field, it is doubtful that this hybrid approach will be effective.

Still, some soft action is being taken transnationally, particularly through the European Semester, and more specifically through the Social Scoreboard. This instrument tracks and compares performance and progress of MS through twelve policy areas, broken down in fourteen headline indicators relating to three main dimensions or 'chapters'. Chapter 1 concerns equal opportunities and access to the labour market, Chapter 2 deals with dynamic labour markets and fair working conditions, and Chapter 3 relates to public support, social protection and inclusion (Commission 2016h). The data gathered through these chapters is analyzed and used to prepare the Country Reports for the European Semester and it also feeds into the annual Joint Employment Report (Commission 2018).

In principle, the Social Scoreboard can be a valid soft tool to identify areas where national action is needed, to monitor evolution and to engage in ongoing and constructive dialogue with MS on how best to achieve progress in their specific circumstances. However, a careful scrutiny of the Scoreboard reveals that only one area ('Gender equality in the labour market') and one headline indicator ('Gender employment Gap') are directly relevant to equality law, specifically, to gender discrimination (Commission 2016h). While the gender dimension is also present in many indicators because the data are often broken down by gender, the only other discrimination ground indirectly considered in the Social Scoreboard is age, which relates to the area 'Youth' and the headline indicator 'Young people neither in employment nor in education and training'.<sup>29</sup> This evidences the very narrow focus of the Social Scoreboard compared to the much broader scope of EU equality law, which prohibits discrimination on many other grounds, and covers discrimination beyond employment for gender and race/ethnic discrimination (and potentially for new grounds too if 2008 proposal is adopted). Indeed, during the public consultation, several stakeholders expressed concerns about the lack of emphasis on, inter alia, ethnic discrimination, the rights of undocumented migrants, the rights of EU mobile citizens, and more generally, rights outside the labour market (Commission 2017k).

Secondly, the Pillar refers to pre-existing primary and secondary law but goes beyond the scope of protection of the legal framework that predates it.<sup>30</sup> For instance, Principle 3 extends the right to equal treatment beyond employment to areas like social protection, education and healthcare for all the protected grounds; Principle 15 recognizes a *right to* a pension and to sufficient resources to live with dignity in old age.<sup>31</sup> However, considering MS averseness (or indeed, increasingly limited ability) to take action in this field post-2010, it is doubtful that citizens will fully benefit from this extended protection given the lack of hard-law measures that *require* such action. Even more worryingly, some

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<sup>29</sup>Some headline indicators are also broken down by age categories, e.g. 'Employment rate' and 'Unemployment rate' (Commission 2016h).

<sup>30</sup> See further Table I.

<sup>31</sup> See further Table I.

MS may choose to extend the scope of their legislation, while others not, which would negatively affect the uniform application of EU equality law and would create inequalities between individuals, depending on the MS where they reside.

In conclusion: the Pillar continues with the post-2010 tendency of softened or hybrid regulation, which prioritizes policy coordination over hard regulation. Arguably, then, its very broad and seemingly far-reaching principles are likely to be drastically reduced to a very core minimum in its implementation through soft-law; a minimum that does not even scrutinize progress on the basic rights EU protects. For this reasons, it is questionable that the Pillar, as such, will add anything to the legal framework, apart from elevating visibility for certain rights and principles (Commission 2017c: 3).

### **b. On the market-oriented approach**

Also in line with the post-2010 developments, the Pillar draws heavily on economic rationales of growth and competitiveness, with the importance of social policy and expenditure reasserted in its early drafts (Commission 2016e: 7). As already observed, despite its promise to bolster the Euro area's social dimension, and its apparent role in 'encourag[ing] a race to the top' (Commission 2017i) in social standards, both EU and national actors see the Pillar as a tool to improve macroeconomic performance, and, particularly, the labour market performance. In this regard, the Pillar's Preamble consistently refers to competitiveness and unemployment, and its potential to foster 'efficient employment and social outcomes', 'fair and well-functioning labour markets', and improve 'employment and social performance'.<sup>32</sup> Similarly, the Communication launching the Pillar conceives social policy 'as a productive factor' (Commission 2016c: 2). According to President Juncker, the EU will work to gain a 'social triple A', to which the Pillar will contribute, but the Commission has stressed that this is 'not just a political or social imperative [it is] also an economic necessity' (Commission 2016c: 5).

The preeminence of the economic approach is also evident from MS statements. For instance, a recent Trio Presidency declaration presents the Pillar as setting out '*an agenda for better performing economies and more equitable and resilient societies*', which 'enshrines gender equality as one the EU's key principles and rights' (Presidency 2017).

In so far as its equality aims, the Pillar seeks primarily to foster equal opportunities and access to the labour markets for women and men and other disadvantaged groups (Commission 2017j). This objective is especially crucial given the post-crisis increase in long-term unemployment, to which the growth of inequality, poverty and exclusion is ultimately attributed (Commission 2016g: 21-22).<sup>33</sup> However, attaining the Pillar's equality principles seems often subordinated to economic interests. For instance, in line

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<sup>32</sup> Social Pillar Preamble, Recitals 12-14.

<sup>33</sup> See also Social Pillar, Recitals 9-14 related to labour markets; made clear also by the title of Chapter 1: Equal opportunities and access to the labour market.

with the 2016 Inter-Institutional Agreement on better regulation,<sup>34</sup> the Commission has noted that potential Directives adopted to implement Principles 2 (gender equality) and 9 (work-life balance) should 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.<sup>35</sup>

Although labour market, growth and competitiveness objectives have been present in Pillar proposals from the start, it appears that their strong preeminence in its final configuration is a response to the concerns voiced by MS and businesses during the 2016 consultation that preceded its adoption. MS feared that imposition of social standards that are 'too high' would pose a threat to competitiveness and fiscal sustainability, instead suggesting that 'the focus of the Pillar *should not be on social rights as such*, but on increased productivity and job creation' (Commission 2017k: 9). Likewise, employer organizations critiqued the early Pillar proposals as 'not sufficiently focus[ed] on areas that can generate growth and improve competitiveness', or the role of 'free enterprise as a driver of inclusive growth' (Commission 2017k: 11). The latter also emphasized the need for a softer regulatory approach, more clearly entwined with economic policy. Indeed, the Pillar's primary mode of delivery is through the Social Scoreboard and it has been integrated into the European Semester. While such entwining means that equal treatment and non-discrimination, as well as the other Pillar social principles, have now been mainstreamed into economic and fiscal policy, the question remains whether these rights and social values will inform the latter or will be ultimately subordinated to them yet again.

## 6. Conclusion

Following a turbulent decade since the onset of the crisis in 2007-2008, the introduction of the Pillar has been welcomed (Garben, Kilpatrick and Muir 2017; Hendrickx 2017: 191-192; Schiek 2017), as it appears to represent the EU's reassertion of its commitment to the social dimension. The Pillar has been regarded as a response to the concerns about the EU's democratic deficit, which have increased due to the character of new economic governance, its technocratic form and the surge of soft instruments adopted without need for oversight. This democratic deficit, paired with the decline of national social policies and the resulting breakdown of the 'embedded liberal bargain', has exacerbated the asymmetry between the market and social dimensions of the EU.

Although one single instrument may not reasonably be expected to solve both the EU's democratic deficit and the cracks in MS systems of social protection, the Pillar is pertinent, especially if, with Schiek, we accept that the solution to the imbalance that has long plagued the European project should be found at EU level (Schiek 2015, 2017). As Schiek

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<sup>34</sup> Supra note **Error! Bookmark not defined.**

<sup>35</sup> This constraint applies to directives adopted in the basis of Article 153 TFEU, see Commission (2017c: 10, 37).

has pointed out, an internal transnational market can only be 'embedded' through transnational social policy (or in combination with the national level) (Schiek 2015, 2017).

However, as we have shown in section 4, the Pillar's social ambitions are subordinated to its economic rationales. Even if, '[e]conomic and social progress are intertwined' (European Council 2017: at 11), it is questionable a Pillar of Social Rights mainly driven by economic objectives will deliver its social promises since any conflict of interest between the economic and the social is likely to be resolved in favour of the former.

As we have shown here in relation to equality law and related policy, despite its apparent aspiration to expand the equal treatment and non-discrimination principles beyond their existing scope, the Pillar falls very short of the promise. Save for a couple of concrete measures, such as the proposed Directive on work-life balance, or the Pillar's absorption of the pre-existing plans for the EAA, the Pillar has not been (at least yet) accompanied by sufficiently robust measures to suggest that its 'programme of principles' is indeed going to become a 'programme of action'. Instead, the Pillar continues along the trajectory of softening (or hybridity) and marketization evident in social policy, including in equality law and policy, over the last decade.

Consequently, despite the aspirational discourse that the EU so often espouses, it appears that the Pillar is unlikely, as it currently is, to rebalance the economic and social dimensions, and to help EU equality law to escape its market-making origins and its current incoherence and disarticulation from other relevant policy fields. There are certain social goals that, while costly and apparently unfriendly to business, are necessary to achieve a fairer and better European society. The European Pillar of Social Rights may 'be part of wider efforts to build a more inclusive and sustainable growth model' (European Council 2017: at 11) in Europe, but it is doubtful that it will achieve its aims if improving Europe's competitiveness and achieving economic growth continues to be its primary driving force.

**Table I. The EU Pillar of Social Rights: Equality Law Principles, Scope and New and Existing measures**

Principle	Primary law & existing secondary law	Has the Pillar added anything?	Is the Pillar proposing any soft or hard-law measure?	
			Soft-law	Hard-law
<b>2. Gender equality</b>	<p>Arts. 23, 33 CFREU Arts. 19, 157 TFEU</p> <ul style="list-style-type: none"> <li>-Directives 79/7/EEC (equal treatment in social security), 92/85/EEC (pregnancy/maternity), 2004/113/EC (goods &amp; services) 2006/54/EC (employment), 2010/18/EU (parental leave), 2010/41/EU (self-employed)</li> <li>-Recommendation 2014/124/EU (pay transparency)</li> <li>-Proposal for a Directive on Women on Company boards (COM(2012) 614 final)</li> <li>-Strategic Engagement for Gender Equality 2016-2019 (SWD(2015) 278 final)</li> </ul>	<ul style="list-style-type: none"> <li>-Requires that equality is 'ensured', not just pursued</li> <li>-Extends the scope of protection to all areas, beyond existing acquis (e.g. to the media and to the field of education)</li> </ul>	<ul style="list-style-type: none"> <li>-New start to support Work-Life Balance for parents and carers (COM(2017) 252 final), includes legislative actions – see column to the right)</li> <li>-Follow-up reports on the Pay Transparency Recommendation</li> </ul>	<ul style="list-style-type: none"> <li>-Proposal for a work-life balance Directive (COM(2017) 253 final)</li> <li>-Accession to Istanbul Convention</li> </ul>
<b>3. Equal opportunities</b>	<p>Art. 21 CFEU Arts. 18, 19 TFEU</p> <ul style="list-style-type: none"> <li>-Directives 2000/43/EC (race/ethnic origin), 2000/78/EC (religion/belief, disability, age, sexual orientation in employment)</li> <li>-'Solo' provisions on third country nationals in specific Directives (e.g. Blue Card, Students, Family Reunification)</li> <li>-Proposal for a Horizontal Equality Directive (COM(2008) 426 final)</li> </ul>	<ul style="list-style-type: none"> <li>-Requires that equal opportunities are 'fostered', which may entail that positive action is mandated, not just allowed.</li> <li>-Extends protection against discrimination on the grounds of religion/belief, disability, age and sexual orientation beyond employment (to social protection, education, and access to goods and services).</li> </ul>	---	<ul style="list-style-type: none"> <li>-Continue supporting and making progress in negotiations on the Horizontal Equality Directive Proposal (COM(2008) 426 final)</li> </ul>

Principle	Primary law & existing secondary law	Has the Pillar added anything?	Is the Pillar proposing any soft or hard-law measure?	
			Soft-law	Hard-law
<b>9. Work-life balance</b>	<p>-Recommendation 2013/C 378/01 (Roma)</p> <p>Arts. 23, 33 CFREU Arts. 153(2), 157(3) TFEU Directive 92/85/EEC (pregnancy/maternity), 2010/41/EU (maternity leave for the self-employed), 2010/18/EU (parental leave), 97/81/EC (part-time workers)</p>	<p>-The principle applies to anyone who is in employment and has caring responsibilities (not only parents)</p> <p>-It recognizes a right to flexible working arrangements to anyone with caring responsibilities, not just to parents returning from parental leave.</p> <p>-Requires that women and men have equal access to leaves for caring purposes and that they are 'encouraged to use them in a balanced way'.</p>	-New start to support Work-Life Balance for parents and carers initiative (see above)	-Proposal for a work-life balance Directive (see above)
<b>15. Old age income and pensions</b>	<p>Arts. 23, 25, 34 CFREU Arts. 19, 151, 153, 156, 157(3) TFEU</p> <p>-Directives 79/7/EEC (equal treatment in social security), 2006/54/EC (gender equality in employment); 2004/113/EC (gender equality in access to goods &amp; services)</p> <p>-Regulation 883/2004 (coordination of social security systems)</p> <p>-Recommendation 92/442/EEC (convergence in social protection)</p>	<p>-The principle requires that men and women have equal opportunities in acquiring pension rights, which may entail, inter alia, 'adequate crediting of pension rights for care periods'.</p> <p>-The principle recognizes the right to a pension and to enough resources to live with dignity in old age.</p>	-Social partners consultation on 'Access to Social Protection' (C(2017) 2610, includes occupational right and pension rights' transferability and transparency)	---



Principle	Primary law & existing secondary law	Has the Pillar added anything?	Is the Pillar proposing any soft or hard-law measure?	
			Soft-law	Hard-law
<b>17. Inclusion of people with disabilities</b>	<p>EU as party of the UN Convention on the Rights of Persons with Disabilities  Arts. 21, 26, 34 CFREU  Arts. 19, 153 TFEU  -Directive 2000/78/EC (disability discrimination in employment)  -'Solo' provisions on sectoral legislation (e.g. transport, consumer protection, telecommunication, state aid, public procurement, health and safety).-Proposal for a Horizontal Directive on, inter alia, disability, (see above)  -European Disability Strategy 2010-2020 (COM(2010) 636 final)</p>	<p>The principle recognizes three mutually reinforcing rights:  1. Right to income support to live in dignity  2. Right to services facilitating labour market participation  3. Right to an adapted working environment</p>	<p>-Continue to mainstream disability matters into relevant policy areas</p>	<p>-Continue supporting and making progress in negotiations on:  1. The Horizontal Directive Proposal (see above)  2. The European Disability Act (COM 2015 615 final)</p>

Source: Own elaboration on the basis of Commission (2017b, 2017c).

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