
Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking

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europaen trade union institute

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Abstract

On 26 April 2017 the Commission presented its proposals for the much-awaited European Pillar of Social Rights (EPSR), an initiative that has been called ‘the last chance for social Europe’.¹ While in the past there have been numerous initiatives that might have brought major change in the social policy area (for example, the youth guarantee, social investment), they have all fallen short and ended up having a rather limited impact. The EPSR, at least as it has been advertised by the European Commission, represents an attempt to break this cycle with its broad reach and ambitious scope.

Nevertheless, the usual doubts remain. Will the EPSR effectively change anything in the making of EU social policy? Is this the long-awaited shift or merely another soft law initiative that will fall short?

This paper explores whether or not the EPSR will succeed in filling in the gaps when it comes to making social policy at the EU level. More specifically, it assesses the EPSR’s potential impact on the policy-making process at the EU level. I argue that, while so far there has been very little detectable impact, the EPSR does offer some hope that certain things could change, especially after the adoption of the proclamation in November 2017. However, any change will depend on how well and actively the EPSR will be picked up and instrumentalised by the EU institutions and other stakeholders. For now, a big part of the EPSR’s potential remains untapped and the Commission has not (yet) done a great job in envisioning the instrumentalisation of this brand-new instrument.

1. Brooks E. (2017).

1. Introduction²

The European Pillar of Social Rights (EPSR) represents a recent and rare initiative in the otherwise bleak landscape of EU social policy that is aimed at supporting, rather than deregulating,³ labour markets and welfare systems. The crucial question, however, is whether the EPSR will suffice for triggering an EU-level shift towards better social protection and higher labour standards.

In a way, the Pillar could be seen as one of numerous attempts over the years to build or revive social Europe. Since realising that social questions needed to be addressed, at least to a certain extent, at the EU level, the Member States and the Commission have, every once in a while, come up with various new initiatives.

First, in 1973 the Commission drew up a Social Action Programme⁴ that triggered remarkable legislative activity, although largely confined to certain areas of employment law.⁵ Second, in 1986 the Single European Act brought about the all-important Articles 118a and 118b.⁶ This was followed, thirdly, in 1989 by the Community Social Charter and another Social Action Programme.⁷ Similarly to the EPSR, this Charter was ‘solemnly proclaimed’ rather than adopted by EU legislature or incorporated in the Treaties by the Member States.⁸ The Action Programme proposed that 47 new policy instruments be adopted; however, of those, only 17 were directives, and of those, 10 dealt with the narrow field of health and safety matters.⁹ Fourth, in the early 1990s the Member States led the extension of social policy objectives and competences with the adoption, alongside the Treaty of Maastricht, of the Social Policy Protocol and Agreement.¹⁰ These changes were incorporated directly into the Treaty of Amsterdam.¹¹

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2. The author is very grateful for the help and comments of Stijn Croes, Maria Jepsen, Philippe Pochet and Stefan Clauwaert.
 3. See, for example, Schömann I. (2014:7).
 4. European Commission (1974), COM(73) 1600 final.
 5. Barnard C. (2012: 9).
 6. Single European Act, OJ L 169 of 29.6.1987.
 7. European Commission (1989), COM(89) 568 final.
 8. Barnard C. (2012: 12).
 9. Ibid at 13.
 10. Treaty on European Union (Consolidated Version), Treaty of Maastricht, OJ C 325/5, 7 February 1992.
 11. Treaty of Amsterdam, OJ C 340/1, 10 November 1997.

Since then, there has been a rather noticeable absence of meaningful socially oriented constitutional or legislative changes. While the adoption of the EU Charter brought with it a legally binding set of social rights, its promise has not been fulfilled.¹² The Lisbon Treaty expanded on the social objectives, and introduced the horizontal social clause (Article 9 TFEU), but this change also failed to trigger a shift in the EU policy discourse. Overall, the EU social dimension has been neglected, while in other areas of EU law there has been significant legislative change.¹³

This recent impasse becomes even more problematic when considered in the light of the widespread belief that a concerted attack on Social Europe has taken place over the last decade or so. There are two main arguments about this ‘attack’, invoked by stakeholders and academics alike.

The first and relatively older point in this discussion concerns the imbalance between the (national) social dimension and the (pan-European) internal market that has been seen as damaging for national social and labour law systems.¹⁴ Among the key reasons for this damage is the constitutionalisation of economic freedoms that, due to the direct effect and supremacy of EU law, has placed national social systems in an inherently inferior position.¹⁵ The two examples traditionally invoked to support this argument are the (in)famous judgments, *Viking* and *Laval*, where the CJEU balanced the right to collective action against the freedom to provide services and freedom of establishment and ruled in favour of the latter two.¹⁶

Contributing further to this state of ‘imbalance’ is the relative weakness of the EU-level social dimension, which is seen as insufficient to offer a serious and meaningful counterbalance to the hollowing out of the national social and labour law systems.¹⁷ At an early stage of the Community’s creation a decision was made to transfer as little as possible of the social policy competence to the supranational level, in stark contrast to the competences concerning the internal market.¹⁸ The founding fathers of the Communities hoped that market integration would gradually lead to social integration; however, they had underestimated the social differences between the Member States that since then, with the expansion of the EU, have only increased.

12. Jacobs A. (2011: 131–133).

13. The greatest activity has been within the EMU (clear examples being the ‘six-pack’ and ‘two-pack’).

14. See the arguments made by, for example, Joerges C. (2005), Offe C. (2003) and Scharpf F. (2009).

15. See, for example, Hinarejos A. (2016: 241).

16. Judgment of 18 December 2007, *Laval un Partneri* (C-341/05, ECR 2007 p. I-11767) ECLI:EU:C:2007:809; Judgment of 11 December 2007, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* (C-438/05, ECR 2007 p. I-10779) ECLI:EU:C:2007:772. See also the argument made by Malmberg J. and Sigeman T. (2008), Deakin S. (2008).

17. Schellinger A. (2015: 4–5).

18. Spaak Report (High Authority of the European Community for Coal and Steel (1956)) and Ohlin Report (International Labour Organisation (1956))

The second and comparatively more recent argument concerns the imbalance between the monetary and economic governance and the ‘EU social dimension’.¹⁹ Due to the sovereign debt crisis, numerous Member States required financial assistance in the form of bail-outs. To receive assistance the Member States had to carry out austerity-oriented national reforms.²⁰ Overall, the bail-outs resulted in a well-documented deregulation of national labour law and social protection systems.²¹ In response to the crisis, the decision-making concerning fiscal and economic governance was progressively moved to the EU level, and increasingly took on a hard law edge. Together with what Nora Martínez-Yáñez has called ‘[the] overreach in the use of the competence for coordinating economic policies’²² this then resulted in a new dimension of imbalance.

In this context, Stefano Giubboni has argued that the European economic governance mechanisms have further deepened the already existing asymmetries between the supranational economic and national welfare systems.²³ Among the problems specific to this area have been the lack of control over EU institutions (for example, the Commission, but also the ECB) when they act outside the strict confines of EU law and within the inter-governmental sphere,²⁴ and also the threat of economic coordination which has turned out to be at least as efficient in deregulating labour law and lowering levels of social security benefits as EU-level legislation.²⁵

Furthermore, any attempt by the EU to act in the social field has received criticism about intrusion in the national welfare systems from at least some of the Member States. An argument often made has been the need to preserve the national labour law and social models and even to ‘re-nationalise’ social policy.²⁶ This somewhat paradoxical pulling in two directions, with an admitted need for some EU-level social policy on one side, but protective tendencies concerning national systems on the other, has resulted in a fragmented and rather incomplete legal framework that, as argued by many, is in part subordinated to the market.²⁷

Nevertheless, more recently, and to a great extent because of the deepening of the Economic and Monetary Union (EMU) triggered by the sovereign debt crisis, the requests for the EU to act have been growing. As early as 2014,

19. I use the term ‘EU social dimension’ to refer to the areas covered by the EU social policy *acquis*, as identified by the Commission in European Commission (2016a), SWD/2016/050 final.

20. See, for example, Rasnača Z. (2014: 99–109).

21. See, for example, the arguments made in Kilpatrick C. (2014) and in Schömann I. (2014).

22. Martínez-Yáñez N. (2016: 523).

23. Giubboni S. (2015). See also Hinarejos A. (2016).

24. See the argument made by Claire Kilpatrick that the bailout measures should not be immune to the EU social challenge in Kilpatrick C. (2014).

25. Schiek D. (2013: 186).

26. Lamping W. (2010: 46).

27. Giubboni S. (2006: 25) and the sources cited.

Jean-Claude Juncker announced that what he wanted for Europe was a social ‘triple-A’ rating.²⁸ This then began the EU-level process towards delivering on this objective which, amid continuous pleas from stakeholders for a rebalancing of the social and the economic, led to the proposal of the EPSR on 26 April 2017. At least initially, the Pillar was presented as a mechanism to rebalance the EMU and infuse it with strong social standards.²⁹

This paper assesses the EPSR initiative to find out whether the promise holds true. Is the EPSR a light at the end of the tunnel, a sign of a paradigm shift and the beginning of a more serious development of the EU social dimension, or is it merely an ineffectual distraction?

To somewhat limit the scope of assessment, this paper does not look at all the possible implications of the EPSR initiative but instead evaluates its potential for changing the EU-level legal landscape, with an emphasis on its capability to shift, rebalance or change the existing practices in the policy-making process at the supranational level. It also contains some proposals for how the EPSR could be more efficiently enforced and instrumentalised, in ways that have so far not been promoted by the Commission and the Member States. The main focus will not be so much the content of the EPSR as its procedural weight for changing how EU law, both soft and hard, is made. A more content-oriented assessment of the EPSR can be found elsewhere.³⁰ While I of course use some examples, I do not evaluate each and every one of the EPSR’s principles and rights individually, instead choosing to focus on the overall trends.

Overall my assessment leads me to the conclusion that the EPSR alone does not necessarily change much; however, depending on the way it will be taken up and introduced into the policy process within and across the EU, there is potential for the EPSR to have a meaningful impact. As explained in more detail below, there are at least three ways in which the EPSR could matter for the making of EU law in the future. First, the EPSR might serve as a trigger for legislative change at both primary and secondary law level. One could argue that the EPSR implicitly sets out a social agenda which, if it had been done explicitly, would perhaps be more effective. The last attempt to adopt a new social agenda (similar to the action programmes from 1973 and 1989) was scrapped with the introduction of the Europe 2020 strategy.³¹ Second, the principles embedded in the EPSR have the potential to influence the content of future initiatives within and beyond the social dimension. Here the legal framework matters, especially the legal basis for the EPSR and also its legal form. Third, according to a statement made already before 26 April 2017, the EPSR cannot be seen as a separate process from the Better Regulation

28. Juncker J.-C. (2014).

29. European Commission (2015: 8–9).

30. Lörcher K. and Schömann I. (2016).

31. See the European Commission’s dedicated website at https://ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en

agenda, but rather must be ‘at the very heart of it’.³² This suggests that the EPSR might potentially bring some change for the policy-making process *within* the Commission.

However, while these ideas are promising, it is important to emphasise that they will mean nothing without the support from all the key stakeholders, starting with the Member States, and continuing with the EU institutions and also European social partners.

In the first part of the paper I give a short summary of what the EPSR is all about. In the second part of the paper I analyse the Pillar’s potential for changing the making of labour law and social policy in the EU. In particular, I assess what discernible impact of the EPSR is already visible in the accompanying legislative initiatives. Thirdly, I look at the potential impact of the EPSR on other areas of EU law beyond the social dimension, an aspect neglected by the Commission in the accompanying documents. Finally, I conclude.

32. Speech by Inge Bernaerts (the head of cabinet of Commissioner Thyssen) at the NETLEX 2017 conference in Brussels on 23 February 2017.

2. What exactly is the EPSR and the 'Pillar package'?

On 26 April 2017 the Commission published the so-called 'Pillar package' consisting of a number of documents. The documents included a recommendation³³ and a proposal for an inter-institutional proclamation³⁴ on the EPSR. Taken together, these two documents represent what is referred to as the 'EPSR' in this paper. Further documents in the package were either supporting documents or documents comparatively independent from the EPSR itself. Among the latter there were some soft law documents, such as communications assessing the impact of earlier recommendations, some legislative initiatives (on work–life balance, on the revision of the Written Statement Directive, and on access to social protection), a reflection paper on the EU social dimension that is part of a broader process of contemplating the future of Europe, and a Social Scoreboard.³⁵

The three key elements of the Pillar package issued by the Commission are its content, its legal form and its addressees. I consider each of these three aspects in turn.

2.1 The 'Pillar package'

The two most important documents for my purposes are the recommendation³⁶ and the proposal for an inter-institutional proclamation.³⁷ These documents are identical in their content, but they differ in their impact and legal form. While the recommendation is effective as of 26 April, the adoption of the proclamation has not been planned until the Social Summit for Fair Jobs and Growth which will take place on 17 November 2017 in Sweden.³⁸ Currently the Commission has entered into negotiations with the European Parliament and the Council to 'work towards broad political support and high-level endorsement of the Pillar'.³⁹ The Commission also plans to amend the

33. European Commission (2017), C(2017) 2600 final.

34. European Commission (2017a). COM(2017) 251 final.

35. European Commission (2017b), COM(2017) 206 and European Commission (2017g), SWD(2017) 200 final.

36. European Commission (2017) C(2017) 2600 final.

37. European Commission (2017a) COM(2017) 251 final.

38. European Commission (2017c: 8) COM(2017) 250 final.

39. European Commission (2017d) Commission presents the European Pillar of Social Rights, Brussels, 26 April 2017. http://europa.eu/rapid/press-release_IP-17-1007_en.htm

content of the recommendation in accordance with any changes to the text of the proclamation;⁴⁰ therefore the content of both of these instruments might still change.

For now, however, the EPSR consists of a preamble setting out the legal and political context, and a set of ‘rights and principles’⁴¹ structured under three headings:

- equal opportunities and access to the labour market
- fair working conditions
- social protection and inclusion.

The principles/rights set out in the EPSR range from matters where the EU has clear legislative competence (for example, promoting a ‘healthy, safe and well-adapted work environment’) and where there is a rather strong legal framework in place at both primary and secondary law level (for example, gender equality), to areas where the EU has limited or no legislative competence at all (for example, ‘housing and assistance for the homeless’ and ‘wages’). Overall, the content regarding some matters has notably changed from the consultation paper initially issued in spring 2016, now providing for a higher level of protection. For example, whereas before the EPSR talked about ‘housing of good quality’, it now establishes ‘the right of vulnerable people not to be evicted’ (instead of ‘protection should be ensured’); it also now states that ‘adequate shelter’ rather than merely a ‘shelter’ should be provided to the homeless.⁴² At the same time, it is not clarified what exactly are the criteria for evaluating shelter as ‘adequate’.

The EPSR covers a great number of matters, containing 20 principles/rights in very diverse areas, and it is characterised by a great variety in terms of EU competence, especially because in some cases it clearly goes beyond the limits of the reach of EU law, as it currently stands.

At the same time, however, there are three aspects worth mentioning that are missing in the EPSR. First, the EPSR does not propose any special or increased protection for intra-EU migrant citizens and workers, even though in this area the EU has a clear competence.⁴³ This is also in spite of the fact that the public consultation highlighted the protection of migrating citizens as one of the areas where problems persist,⁴⁴ and regardless of the very limiting recent case

40. Ibid.

41. The EPSR outline proposed for the consultation used only the term ‘principles’. The current version instead refers to both ‘principles’ and ‘rights’, therefore giving the instrument more legal weight.

42. Compare Point 19 in the new version with 19 in the old version (European Commission (2016), COM(2016) 127 final and European Commission (2017), C(2017) 2600 final).

43. There is a mention of the legal framework concerning residence rights of highly qualified third-country nationals in European Commission (2017e: 23), SWD(2017) 201 final, and of the social security coordination rules for moving citizens in European Commission (2017e: 48), SWD(2017) 201 final.

44. It remains to be seen whether a European Labour Authority will fill this gap.

law by the CJEU concerning migrating citizens.⁴⁵ The only meaningful exception is the idea of introducing a pan-European Personal Pensions instrument alongside the domestic personal pension schemes, but even this idea has been around already since 2011.⁴⁶ This is a missed opportunity by the authors of the Pillar to address gaps in a clearly insufficiently protective legal framework in an area where meaningful action can be taken only at the EU level and there is no shortage of legal basis and no concerns about subsidiarity issues.

Second, clearly defined interaction between the EU level and international level of protection of social rights is missing in the Pillar. While the preamble of the EPSR does refer to the European Social Charter, the European Code of Social Security of the Council of Europe, the ILO conventions, and the UN Convention on the Rights of Persons with Disabilities,⁴⁷ any further explanations and linkages with international law are missing. The only other connection is the suggestion that the Member States ‘may’ ratify, if they have not yet done so, the relevant ILO conventions, the European Code of Social Security and the Revised European Social Charter, and may review the reservations made for some Articles of the revised European Social Charter.⁴⁸ The use of ‘may’ instead of ‘ought’ is telling.

Finally, the EPSR does not propose anything new when it comes to the role of the social partners and collective bargaining. The Explanations merely repeat the same phrase about the obligation to consult the social partners where it is relevant, and that they have the right to enter into a dialogue and also to collect and exchange good practices across the Union.⁴⁹ No new remarkable solutions for strengthening the role of the social partners and social dialogue either at the national or international level have been proposed.⁵⁰ This again is a missed opportunity because the European-level social dialogue begs for reform, taking into account that very little has been achieved in this process in recent years, especially in terms of hard law.

Further documents included in the ‘Pillar package’ can be divided into two groups. The first group comprises documents explaining, setting out and enforcing the EPSR; this includes the Communication on the EPSR and three staff working documents: a summary of public consultation results,⁵¹ a doc-

45. European Commission (2017c: 5), COM(2017) 250 final. The most striking recent example of the CJEU curtailing EU citizens’ rights is the Judgment of 14 June 2016, *Commission / United Kingdom* (C-308/14) ECLI:EU:C:2016:436.

46. European Commission (2017e: 60), SWD(2017) 201 final; COM White Paper: An Agenda for Adequate, Safe and Sustainable Pensions, available at: http://eur_lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDF

47. *Ibid.*, 2.

48. *Ibid.*, 50.

49. *Ibid.*, 56.

50. One hope was for the Commission to propose something to address the current situation where, in an economically integrated internal market, companies with branches in different countries cannot use a collective bargaining framework for all workers affected; and, also, where migrating workers, even if they move within one company with branches in different countries, cannot benefit from collective bargaining protection across borders.

51. European Commission (2017f) SWD(2017) 206 final.

ument explaining each of the principles set out in the EPSR,⁵² and a Social Scoreboard.⁵³ The latter two are the most important: the Explanations because they set out the Commission's intentions and understanding of the content of the EPSR, and also propose possible avenues for its enforcement; the Scoreboard is relevant because it consists of a set of indicators and is the first actual implementation instrument for the EPSR.⁵⁴

In the second group are documents that were associated with the EPSR (but arguably could just as well be seen as separate initiatives) and issued by the Commission on the same day (26 April) including a Reflection paper on the social dimension,⁵⁵ a proposal for a Directive on work–life balance for parents and carers,⁵⁶ the first-phase consultation on the Written Statement Directive (Directive 91/533/EEC)⁵⁷ together with the REFIT evaluation report,⁵⁸ the first-phase consultation on a possible action on access to social protection,⁵⁹ three documents relating to implementation and interpretation of the Working Time Directive,⁶⁰ and two documents assessing the impact of two earlier recommendations (one on investing in children⁶¹ and another on active inclusion⁶²). These documents, while not constituting a part of the EPSR itself, could be used for assessing the potential future impact of the EPSR on policy initiatives in the area of social policy.

The Commission itself has allocated the EPSR a strikingly ambitious role, and it has pledged to mobilise a set of various instruments for its enforcement:

- ‘EU law, with an emphasis on the enforcement of the rich *acquis* already existing, to be updated and complemented where necessary’;
- ‘social dialogue, to engage with and support the work of EU social partners’;
- ‘policy guidance and recommendation, through the European Semester of economic policy coordination’;
- and ‘financial support, through a diversity of EU funds’.⁶³

The Commission envisions the EPSR to act, first, as a ‘compass for a renewed process of upward convergence towards better working and living conditions in Europe’.⁶⁴ Second, it will, according to the Commission, also require

52. European Commission (2017e) SWD(2017) 201 final.

53. European Commission (2017g) SWD(2017) 200 final, 26 April 2017.

54. For a more in-depth analysis of the Scoreboard, please see ETUI (2017) *The Social Scoreboard revisited*, Brussels, ETUI. [forthcoming]

55. European Commission (2017b) COM(2017) 206.

56. European Commission (2017h) COM(2017) 253 final. See also European Commission (2017i), COM(2017) 252 final.

57. European Commission (2017j) C(2017) 2611 final.

58. European Commission (2017k) SWD(2017) 205 final.

59. European Commission (2017l) C(2017) 2610 final.

60. European Commission (2017m) SWD(2017) 204 final.

61. European Commission (2017n) SWD(2017) 258 final.

62. European Commission (2017o) SWD(2017) 257 final.

63. European Commission (2017c: 7) COM(2017) 250 final.

64. European Commission (2017d) http://europa.eu/rapid/press-release_IP-17-1007_en.htm.

further legislative initiatives.⁶⁵ Notably, the enforcement of already existing EU law is mentioned as a significant dimension of the EPSR; however, the Commission has so far failed to deliver anything more concrete on this matter. The sole exception is the working time guidance that is accompanied by an implementation report;⁶⁶ however, this is an exception and notably the Commission does not commit to initiating any infringement procedures when it comes to the many discrepancies between the Working Time Directive and national legal regimes identified in the implementation report.

In the next sections I almost exclusively focus on the first set of documents, and in particular the recommendation and the proclamation, while using the secondary set of documents as examples of the EPSR's influence or lack thereof.

2.2 The legal nature of the EPSR

While content-wise the two EPSR documents (recommendation and draft proclamation) are identical, their legal basis as well as their legal nature differs slightly.

While the recommendation has been adopted on the basis of Article 292 TFEU, the draft proclamation cannot clarify its basis because the Treaties do not explicitly provide an option to adopt 'proclamations', and so no such legal basis exists. Therefore, the nature and impact of the latter instrument is slightly obscure. However, both instruments refer to Articles 3 TEU, and 9, 151, 152 TFEU, the EU Charter of Fundamental Rights (the Charter) and also the internal market framework (Articles 45 to 48, and 49 to 55 TFEU), the social policy title (Articles 151 to 161 TFEU), education provisions (165 and 166 TFEU), health (Article 168 TFEU), economic, social and territorial cohesion (Articles 174 to 178 TFEU), the implementation of the guidelines of the economic policies (Article 121 TFEU), the formation and implementation of the employment guidelines (Article 148 TFEU), and more generally to the approximation of legislation (Articles 114 to 117 TFEU).⁶⁷ These then could be seen as the 'areas' which the EPSR primarily aims to influence.

When it comes to the legal nature of these two instruments, the recommendation is certainly the more straightforward one, at least when it comes to its impact. The Commission can adopt recommendations under Art. 292 TFEU. As an instrument a recommendation is meant to suggest a course of action; it is not binding, and generally recommendations have been described as 'instrument[s] of indirect action aiming at preparation of legislation in member states, differing from the directive only by the absence of obligatory

65. European Commission (2017c: 7) COM(2017) 250 final.

66. European Commission (2017p) COM(2017) 254 final. See also European Commission (2017m), SWD(2017) 204 final.

67. Recital 6 in European Commission (2017) C(2017) 2600 final.

power'.⁶⁸ The overall idea behind this instrument, and accordingly behind the recommendation on the EPSR, is to influence national legislation and to facilitate national compliance with the principles and rights laid out in the instrument. Hence the recommendation is aimed primarily at triggering change at the national level.

When it comes to the proposal for interinstitutional proclamation the story is more complex.⁶⁹ While the adoption of such an instrument is indeed not explicitly envisioned in the Treaties, there are some precedents for a similar approach. First, on 4 April 1977 the European Parliament, the Council and the Commission adopted a joint declaration on the importance they attach to the protection of fundamental rights.⁷⁰ Second, the EU Charter of Fundamental Rights itself was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000.⁷¹ It was then signed and, due to several amendments related to its subsequent annexation to the Lisbon Treaty, again solemnly proclaimed by the Presidents of the Parliament, the Council and the Commission on 12 December 2007.⁷² Notably, this latter example was used as the relevant precedent by the Commission when it introduced the EPSR.⁷³

In any case, both recommendation and proclamation are soft law instruments without legally binding force. Nevertheless, they have already been criticised as going too far by some stakeholders.⁷⁴ In this way, therefore, the EPSR contains more of a promise rather than a binding pledge to use the principles and rights embedded in it for fashioning a more substantial social dimension and achieving better future protection for workers in Europe. The vagueness of its content and the obscurity about how to ensure its observance create reasonable doubts about whether or not the EPSR can deliver the long-awaited social answer for the European Union. This is particularly prescient when we take into account that the imbalances with the internal market rules and the EMU are due to these areas being often enforced with hard law measures, or at least underpinned by very strong mechanisms of economic coordination such as fines, or even conditionality when it comes to the bail-out states. A soft law answer, as hopeful as it is, might simply not suffice. Therefore, at best the EPSR marks only the very beginning of a long road towards a more social Europe. Nevertheless, even with its current form and weaknesses, it is certainly a step in the right direction.

68. Kaeding M. (2012: 20).

69. European Commission (2017a) COM(2017) 251 final.

70. European Parliament, Council and European Commission (1977).

71. European Commission (2010: 3, fn 6) Communication from the Commission. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573/4, 19 October 2010.

72. Ibid.

73. European Commission (2017c: 6) COM(2017) 250 final.

74. Overall, it seems that the Commission recognises that soft law is currently the only realistic option, but this of course then merely emphasises the general lack of real ambition in this area.

2.3 Who will deliver on the EPSR?

Another key question is who, at the end of the day, is responsible for upholding and advancing the rights embodied in the EPSR? While the recommendation as an instrument is primarily addressed to the Member States,⁷⁵ which are therefore the actors responsible for its implementation, the situation with the draft proclamation is more complex.

Of particular interest concerning the proclamation is whether or not all Member States in the Council will approve of its adoption. If all the Member States agree, then the instrument can be proclaimed by the three EU institutions – the Council, the Commission, and the European Parliament. In such an event it will gain a primarily inter-institutional character because by their very nature inter-institutional proclamations are aimed principally at the EU institutions rather than at the Member States. One could even argue that the legal nature of such a proclamation is something akin to that of an inter-institutional agreement – a relatively informal instrument but one that is capable of changing the relationship between institutions and introducing more checks and balances into the political system.⁷⁶ Deidre Curtin has argued that inter-institutional commitments in certain situations can ‘pre-cook’ an inter-governmental (Treaty) change.⁷⁷ This would be very much in line with the precedent referred to by the Commission – the Charter – and its initial role in the EU system. In this scenario the EPSR (proclamation) would be primarily addressed to the EU institutions rather than the Member States.

On the other hand, if some Member States object to the proclamation, it will gain inter-governmental rather than inter-institutional character in relation to the agreeing Member States and, accordingly, it will be more directly aimed at the agreeing Member States, as well as the European Parliament and the Commission. Some Member States then will be clearly exempted from the ‘influence’ of the instrument and this would also mean that the Council as such is not bound by the measure, but rather only the states individually. It would also mean that such states, in contrast to others, would undertake to uphold the standards required by the EPSR.⁷⁸ Another option for any doubtful Member States would be not to reject but to simply abstain from endorsing the EPSR. This might be a viable option, especially since the EPSR is, in any case, primarily conceived for the euro area countries but applicable to all states only if they wish to join.⁷⁹ Therefore its personal scope would also potentially be restricted in this way and it seems likely that stakeholders in a certain number of Member States would not be able to invoke the EPSR and it would not be ‘implemented’ in those states. Finally, conditional support that might involve

75. And, at least according to its legal basis (Article 292 TFEU), the non-Eurozone countries cannot be excluded.

76. Curtin D. (2009: 11).

77. Ibid 12.

78. This would be while still fully participating in the single market. In this way the social disparities in the EU could even increase.

79. European Commission (2017a) recital 12, COM(2017) 251 final.

exceptions from material or personal scope, or, for example, certain rights embedded in the EPSR, is another possible scenario.

For now, the fate of the proclamation is undetermined. However, here I work with the scenario in which the proclamation will be successful. Indeed, the recommendation is already primarily aimed at the Member States, and while the proclamation would indirectly make a reciprocate Member State commitment stronger and thus give the EPSR more political weight, the intention to steer national policies is also clear from the recommendation alone. The proclamation and its inter-institutional character (in the case of it being agreed to or at least not rejected by all Member States, and then proclaimed by the Council, the Parliament and the Commission) is an important element to determine the level of commitment to the EPSR from the EU institutions involved. However, since here I mainly look at how the proclamation should affect the discretion of the Commission, as explained in more detail below, the analysis will remain relevant even if all Member States do not endorse the EPSR and therefore it is approved only by some, along with the Commission and the European Parliament.

When it comes to the accompanying materials, for now it is clear that the Commission has intended the EPSR to be primarily addressed to the Member States rather than to itself and the other EU institutions. Indeed, it is clear that without strong endorsement from the Member States both within the Council, within the various committees, and also at the national level, the EPSR is doomed to fail; especially as the Commission and the European Parliament might also be reluctant to commit to implementing and upholding the rights embodied in the Pillar if there is no Member State support.

According to the Commission, most of the tools for delivering on the EPSR are in the hands of local, regional and national authorities, while the EU (and the Commission in particular) can help by setting the framework, giving direction and establishing a level playing field.⁸⁰ Furthermore, regarding the implementation of specific rights and principles in the EPSR, the Commission's Explanatory Communication about the content of the EPSR is aimed primarily at the Member States, while the current commitment for action at the EU level is weak.

In the first place, concerning every principle under the 'implementation' section, the Commission has, first, looked at what Member States and social partners can do, and second, at 'recent and ongoing activities at the EU level'. The way these tasks are formulated alone already shows that the primary addressees are the Member States, and the EU institutions' commitment concerns (only) recent and ongoing EU activities. Secondly, the content of the EU's part of the commitment towards enforcing the EPSR almost entirely contains only soft law measures (with the exceptions of already ongoing or proposed legislative measures – see in more detail below).

80. European Commission (2017k: 2) COM(2017) 250 final.

The Member States are seen as the key stakeholders for implementing the various rights and principles established by the EPSR. For example, concerning ‘education, training and lifelong learning’ the Commission invites the Member States ‘to give effect to the provisions of the Pillar in this context, in addition to applying it when implementing Union measures adopted in these fields’.⁸¹ This reveals a two-directional soft law obligation for the Member States: first, they should actively implement the specific EPSR provision, and second, they have to obey the Pillar provisions when implementing EU law that has been adopted in this area. In addition, for example, concerning ‘equal opportunities’ the Commission invites the Member States, in order to put the EPSR into effect, to go beyond the minimum standards established in the Union *acquis*.⁸²

To conclude, then, the EPSR is currently addressed primarily at the Member States; however, depending on the destiny of the proclamation, stronger or weaker commitment from the EU institutions can be expected. For EU-level policymaking it means that both the EU institutions and the Member States when acting at the EU level in their capacity as, for example, members of the Council or members in various committees, are responsible for advancing the EPSR and ensuring compliance with the rights and principles embodied therein.

81. European Commission (2017e: 7) SWD(2017) 201 final.

82. *Ibid* at 14.

3. How will the EPSR affect EU-level policymaking?

The main question when it comes to the EPSR is whether it will actually change anything. As we saw, it is not a legally binding instrument, and its impact therefore will be much more subtle than the impact of an actual Treaty change or even the adoption of a piece of EU secondary law would be.

While this paper will not involve an evaluation of each of the individual principles and rights, what I want to do in this section is to assess the change the EPSR will bring to the EU social policy landscape, and its potential impact on the EU policymaking process both within the areas of social policy and labour law and beyond. Accordingly, I start this section, first, by looking at the impact of the EPSR on the making of EU social policy and labour law, and second, at its impact on the policymaking process in other areas. I look not only at the specific role of the EPSR but also at the broader picture and try to sketch some options concerning how this initiative could be used in the future, even if such use is not (yet) explicitly envisioned by the Commission.

3.1 The EPSR and the making of EU social policy

What change does the EPSR potentially bring to the making of labour law and social policy at the EU level? First, it could potentially change the EU primary law dimension concerning social rights depending on whether or not this initiative follows the precedent of the Charter. Second, it has a promising impact on the body of EU secondary law. The EPSR could serve as an inspiration for new legislative measures and also as a foundation for establishing a social agenda. Finally, the Commission plans to indirectly incorporate the EPSR standards into the Scoreboard and mainstream them through the main soft governance tools that affect social policy across the EU (for example, the European Semester). This is the most concrete impact that has been promised so far.

3.1.1 Primary law

The relationship between the EPSR and the body of EU primary law, and especially the EU Charter, is rather unclear. While the EPSR seems to offer a way to concretise Article 9 TFEU (social clause) and pave the way for achieving the EU social objectives (for example, Article 3(3) TEU, 151 and 152 TFEU), its

relationship with the Charter is particularly ambivalent. First, the history of the Charter might serve as a precedent for the EPSR. Second, the future interaction between the Charter and the EPSR is somewhat unclear. Should they be seen as complementary instruments, and if yes, then in what way exactly? Could the EPSR replace the Charter in so far as social rights are concerned?

When it comes to the EPSR, the Commission as a precedent has chosen to refer to the Charter⁸³ rather than other EU social policy instruments that could just as well have been used for reference (for example, the Community Charter of Fundamental Social Rights of Workers).⁸⁴ If we take this reference to the proclamation of the Charter seriously, then there is a possibility that just like the Charter of Fundamental Rights, the EPSR might at some point inspire a Treaty change, be incorporated into EU primary law and become legally binding. Recent discussions about the need to revise the Treaties have made this an even greater possibility.⁸⁵ If any such revision actually takes place, then an argument could be made for incorporating the EPSR into EU primary law and affording it legally binding force. It would be an important step forward towards instrumentalising Article 9 TFEU (the social clause) at the level of primary law and establishing a strong commitment to social protection and the advancement of labour law standards at the EU level.

The Commission, however, has not announced any plans of pursuing such a path. In fact, it does not even refer to the possibility that the EPSR could become hard law in the future. This means that we could also consider the situation the other way around. The EPSR might have been issued as an alternative or even in order to avoid Treaty change. Requests for strengthening the EU social dimension have been mounting in recent years, and the EPSR might represent a response that consciously avoids embedding legally binding social standards in EU primary law. For now, the fate of the EPSR in this regard remains unclear.

However, in contrast to the initial proposal put on the table for the consultation in spring 2016, the EPSR now talks not only about ‘principles’ but, similarly to the Charter, about ‘rights’. Which parts of the EPSR contain ‘rights’ and which contain ‘principles’ is not yet entirely clear, but this change does have important legal consequences and the language does play a significant role in the enforceability of the EPSR. Moreover, at times the EPSR Explanations clearly go further than the Charter. When it comes, for example, to ‘social protection’, the Pillar clearly goes further than the Charter and unambiguously talks about a right where the Charter established only a ‘principle’.⁸⁶

83. Recital 5 in European Commission (2017a) COM(2017) 251 final.

84. The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States.

85. Open Europe (2017) Macron and Merkel open to EU treaty change, as Macron calls for a ‘joint roadmap’, 16 May 2017. <http://openeurope.org.uk/daily-shakeup/macron-and-merkel-open-to-eu-treaty-change/>

86. Compare European Commission (2017e: 48) SWD(2017) 201 final with Article 34 of Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326, 26 October 2012, 391/407.

When it comes to the relationship between the Charter and the EPSR, the Commission seems to see these instruments as complementary. The nature of this complementarity, however, is left unclear. One clear difference between the Charter and the EPSR in its currently proposed form is the legally binding force. While there is an obligation for the EU and for the Member States to comply with the social rights embedded in the Charter, such legal obligation does not exist with the EPSR and also will not exist even after it is proclaimed.

Regarding the enforcement of the Charter, the EPSR could be seen as a complementary instrument that elaborates in more detail than the Charter on particular rights. For example, Article 21 of the Charter prohibits discrimination on several grounds. Principle 3 in the EPSR has largely the same content. However, the EPSR adds to the Charter that ‘equal opportunities of under-represented groups shall be fostered’. In this way the EPSR goes further and is more detailed than the Charter. One could then make the argument that when interpreting Article 21 of the Charter, Principle 3 should be taken into account, and initiatives supporting equal opportunities of under-represented groups should always be supported and can never be struck down on the basis of prohibition to discriminate (positive discrimination should be fostered rather than eliminated). In this way the EPSR might serve as an interpretation aid for the social rights included in the Charter.

In the Explanations, the Commission on occasion explicitly indicates that the EPSR goes further than the Charter. For example, concerning Principle 1 (‘Education, training and lifelong learning’) the Commission states that this principle goes further than Article 14 of the Charter by focusing on quality and inclusiveness.⁸⁷ This wording suggests that the Commission sees the EPSR as complementary but not necessarily as an instrument that aims at the enforcement of Charter rights. In this sense the EPSR’s principle in question adds ‘another’ or ‘extra’ commitment concerning education, training and lifelong learning which should be obeyed; however, this additional commitment lacks the legally binding character that Charter rights have.

While at the moment, therefore, the EPSR’s impact on the landscape of EU primary law remains slightly obscure, it does have some potential in this regard, especially if there is sufficient political will from the Treaty-makers (the Member States) during the next Treaty revision.

On the other hand, the question could also be asked about the role of the Charter in protecting social rights, and whether the EPSR will not end up diminishing it in the social area. There is almost a consensus among social rights experts that the Charter has not in practice significantly improved social rights protection in the EU, and has instead unnecessarily elevated the importance of some rights, such as the freedom to conduct a business, that could directly contravene social rights.⁸⁸ Was the EPSR then simply proposed because the

87. European Commission (2017e: 6) SWD(2017) 201 final.

88. For example, Judgment of 21 December 2016, AGET Iraklis (C-201/15) ECLI:EU:C:2016:972. See the argument made by O’Gorman R. (2011) and also Garben S., Kilpatrick C. and Muir E. (2017: 6).

Charter has failed in the social area? For now, the EPSR is not legally binding; therefore legally it is even weaker than the Charter itself. Depending on how events develop in the future, one could imagine that the EPSR could either complement or even partly replace the Charter as a new social constitution for the EU (if incorporated in the Treaties) or it could maintain its soft law character and function as a complementary instrument and be seen either as an aid in interpreting the Charter rights or as an instrument adding and expanding via soft law the social rights already incorporated in the Charter, or even both at the same time depending on the particular case and context.

In sum, while the EPSR might potentially one day influence the body of EU primary law, this outcome is not yet certain. In any case, any such incorporation would also raise a series of questions about the relationship between the Charter and the EPSR and which would have the most relevance.

3.1.2 Secondary law

There are two ways in which the EPSR might change the practices of making EU labour law at the secondary law level. First, it might serve as an inspiration and a trigger for new legislative initiatives in the area of labour law and social policy. Second, the rights and principles embedded in the EPSR could influence the content of future initiatives in the field. To assess this latter element, I use the legislative initiatives that accompanied the EPSR as my case study.

a. A promise of more EU-level labour law?

The Commission has pledged to mobilise all the various instruments available for enforcing the EPSR, including ‘EU law [...] to be updated and complemented where necessary’.⁸⁹ The Commission also refers to the European-level social dialogue as one of the avenues through which the EPSR could be brought to life.⁹⁰ This promise of secondary law change was made even more likely by the Commission through its inclusion of three legislative initiatives in the Pillar package – one on the work–life balance, one on the revision of the Written Statement Directive,⁹¹ and one on access to social protection.

At the same time, after assessing all the accompanying documents, one becomes increasingly suspicious about the promise of the EPSR of triggering new legislative initiatives because a clear list of such initiatives is visibly missing. For the most part, the Commission only mentions initiatives that have already been proposed or initiatives that were already in the pipeline during the preparatory stages of the EPSR.

89. European Commission (2017c: 7) COM(2017) 250 final.

90. *Ibid* 9.

91. 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, Official Journal of the European Union, L 288/32.

First, the Commission invites the EU legislator to continue negotiations on the proposed new Equal Treatment Directive to expand protection against discrimination based on religion or belief, disability, age or sexual orientation beyond occupation and employment⁹² and also promises to support the proposal on amending the Social Security Regulation that is currently being debated in the Council.⁹³ Furthermore, it also recalls the recently proposed amendments to Directive 2004/37/EC84 (the Carcinogens and Mutagens Directive) aimed at improving the protection of workers by establishing binding exposure limit values for a number of dangerous chemical agents,⁹⁴ the proposal for European Accessibility Act,⁹⁵ and the revision of the Electronic Communications Regulatory Framework.⁹⁶ Second, it repeatedly mentions the legislative initiatives that already accompany the EPSR.⁹⁷

Third, there is some (not very strong) promise of three brand new initiatives. First, the Commission reiterates its promise that was first announced in the Commission's Work Programme 2017 to prepare a legislative initiative with a view to creating a pan-European Personal Pensions instrument alongside domestic personal pension schemes.⁹⁸ This, however, because it was already previously announced, cannot be seen as a 'brand new' initiative. Second, under Principle 10 (healthy, safe and well-adapted work environment and data protection) in the context of the ongoing amendments to the Carcinogens and Mutagens Directive, the Commission pledges to continue (in consultation with social partners) to propose updates of the Directive to introduce binding limit values to combat occupational cancer.⁹⁹ Third, the Commission pledges to put forward proposals to remove or update outdated health and safety provisions in the light of scientific, technical and societal changes.¹⁰⁰ However, even this promise seems more concerned with the REFIT results on health and safety *acquis*¹⁰¹ rather than expansion in any new areas. This is admittedly very little and brings into question whether the EPSR as an instrument is capable of triggering broad legislative change in the EU.

There is also a significant imbalance between what we have in the area of social policy and what is proposed in terms of EU action in the future in the EPSR Explanations. While what we have and what, as the Commission itself explains, constitutes the EU social dimension, is a significant number of measures of EU secondary law, what is proposed for future adoption are only soft

92. SWD(2017) 201 final, p. 15.

93. The Proposal to amend Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 of the European Parliament and of the Council, COM (2016) 815.

94. European Commission (2017e: 43) SWD(2017) 201 final.

95. *Ibid.*, 66.

96. *Ibid.*, 76.

97. See e.g. *ibid.*, 20, 24, 39.

98. *Ibid.*, 60.

99. *Ibid.*, 43.

100. *Ibid.*, 43.

101. European Commission (2017q) Annex I, COM(2017) 12 final.

law measures for the most part. While the EPSR indeed goes beyond the current *acquis*, as the Commission itself shows by, for example, extending protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation to the areas of social protection beyond employment and occupation,¹⁰² this is not always backed up by clear and ambitious legislative proposals as means for actual implementation.

While, as noted already above, one can agree with the Commission that turning the principles and rights enshrined in the EPSR into reality is a shared commitment and responsibility between the Union, its Member States and the social partners,¹⁰³ proposing and announcing legislative initiatives is the job of the Commission. The absence of such new initiatives for the future to come is telling of how far the Commission itself considers the EPSR's function as an impetus for legislative change. What we have seen so far, therefore, is somewhat disappointing. It does not, however, mean that the EPSR cannot still serve as a trigger for a future social agenda. For now it remains to be seen whether it will manage to acquire such a role, and whether the Commission comes up with a legislative agenda based on the EPSR.

b. Will the EPSR affect the content of future legislative initiatives?

Another way for the EPSR to affect the future making of EU labour law would be by using it as a reference point for the content of any new legislative initiatives in the area of social policy. Indeed, the EPSR might serve as a sort of inspiration and basic minimum standard of reference, something that currently does not exist in the EU realm. In addition, as the Charter has found its way into the preambles of many legislative measures proposed after its incorporation in the Treaties at Lisbon, the EPSR might serve at least a similar role.

Since no new legislative initiatives in the area of social policy and labour law have been issued by the Commission since the adoption of the Pillar package, it is hard to gauge what the impact has been so far. However, one could imagine that potential influence might already be revealed in the legislative initiatives included in the Pillar package.

First, when it comes to the revision of the Written Statement Directive, explicit references to the EPSR can be found only in the explanatory part of the proposal and not in the text of the revised version of the Directive. The proposal refers to the announcement of the EPSR by Jean-Claude Juncker and the result of the public consultation which *inter alia* revealed the need to extend the protection to workers in new and non-standard forms of employment relationships.¹⁰⁴ Then the proposal explicitly refers to Principles 5 and 7 of the Pillar ('Secure and adaptable employment' and 'Information about employment conditions and protection in case of dismissals') by citing them,

102. European Commission (2017e: 15) SWD(2017) 201 final.

103. Ibid, 3–4.

104. European Commission (2017j: 2) C(2017) 2611 final.

but without further clarification of the rights they entail.¹⁰⁵ That means that the notion can be freely interpreted at the national level without any limits set out by the EPSR.

Content-wise, in line with the EPSR and the Commission's explanations of Principles 5 and 7, the proposal does seem to take some steps towards implementing the EPSR. First, the Commission alleges that the scope of the Directive is insufficiently broad and does not cover all types of employment relationships. Therefore it proposes that a universal definition of employee or worker be incorporated in the Directive to make sure that everyone who needs protection is covered.¹⁰⁶ This is in line with the EPSR's occasional extension of the personal scope of the principles beyond the current *acquis* and acknowledges the particular need to do this when it comes to EU law in the area of social policy.¹⁰⁷ Second, the proposal plans to cut the two-month deadline for the obligation to provide the employees with information on the essential aspects of their employment relationship. This is in line with Principle 7 ('information about employment conditions and protection in case of dismissals') which, according to the Commission's own explanations, requires the information about the working conditions to be given to the worker at the start of the employment relationship rather than later.¹⁰⁸

Second, the first-phase consultation document on access to social protection for people in all forms of employment seems to have been influenced by the EPSR and the surrounding consultation. As the Commission reports, during the consultation one of the main points raised was the lack of protection for workers in all forms of employment¹⁰⁹ and it sees this initiative as a direct response to this problem.¹¹⁰ According to the proposal, the initiative is intended, through concrete EU-level action, to address challenges directly related to several principles and rights set out in the EPSR, in particular Principle 4, 'Active support to employment', Principle 5, 'Secure and adaptable employment' and Principle 12, 'Social Protection'.¹¹¹ It also executes the EPSR's promise of going beyond the current *acquis* in that it concerns the protection of the self-employed – a direction never before taken (and unavailable) under the Social Policy Title of the TFEU. To get around this lack of appropriate legal basis, the Commission proposes the adoption of the initiative under both Article 151 and Article 352 TFEU (the so-called 'flexibility clause').¹¹²

With the proposal the Commission wants to ensure similar social protection rights for similar work (in line with Principle 12 of the EPSR on social protection), to tie social protection rights to individuals and make them transfer-

105. Ibid, 3.

106. Ibid, 8.

107. See, for example, European Commission (2017e: 15, 23) SWD(2017) 201 final.

108. Ibid, 32.

109. European Commission (2017l : 2) C(2017) 2610 final.

110. Ibid, 2.

111. Ibid, 2–3.

112. Ibid, 11.

able, to make such rights and related information transparent (in line with Principle 4, and its explanations, on active support to employment¹¹³) and to simplify administrative requirements. Yet again, therefore, in the explanatory part but also in terms of the content one can detect the EPSR's influence.

Finally, the proposal for a Directive on work–life balance for parents and carers and for repealing the Parental Leave Directive¹¹⁴ seems to be the least connected with the EPSR out of the three initiatives. While it could be seen as implementing Principle 9 on work–life balance that, *inter alia*, foresees flexible working arrangements for parents and persons with caring responsibilities, and Principle 2 on gender equality, it does not even reference these principles. The only reference to the EPSR is to the result of the public consultation which revealed a need for EU action in this area.¹¹⁵

In sum, the proposed initiatives do reference the EPSR to some extent in the explanatory part of the proposals and their content also corresponds to both the principles and rights embedded in the EPSR directly or at least to the Commission's Explanations about the content of the EPSR. In that way it seems that the EPSR might indeed serve as a sort of reference point for the content of the EU legislative measures in the area of labour law and social policy in the future. On the other hand, the EPSR is not referred to even once in the 'body' of the legislative texts proposed by the Commission on the revision of the Written Statement Directive. References to the Pillar are used more as a means to show that the content of the proposal corresponds to the matters covered by the EPSR, rather than that the EPSR actually serves as the key departure point for establishing standards at the EU level. This then gives the impression that the new legislative initiatives were arbitrarily included in the Pillar package for it to look more meaningful and therefore did not constitute an actual attempt to enforce the EPSR principles. Nevertheless, the impact of the EPSR certainly cannot be ignored, and initial signs indicate that it will play at least some role where the content of new legislative initiatives is concerned.

3.1.3 The EPSR and soft law mechanisms

Where we have the greatest clarity about the consequences of the EPSR concerns the governance mechanisms and the body of EU soft law in the area of social policy. Here the Commission has planned to utilise the Scoreboard attached to the EPSR as the instrument setting out indicators to be mainstreamed in the governance processes. One very realistic mechanism where the Commission pledges to use and mainstream the EPSR and the Scoreboard is the European Semester.

113. European Commission (2017e: 20) SWD(2017) 201 final.

114. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, Official Journal of the European Union L 68, 18 March 2010, 13/20.

115. European Commission (2017h: 4) COM(2017) 253.

According to the Commission, the Scoreboard¹¹⁶ has been attached to the EPSR to monitor progress closely and serve as a tracking device for trends and performance across countries.¹¹⁷ Another function is to inform policy guidance in the context of the European Semester of economic policy coordination, and also to serve as a reference point for assessing progress towards a ‘social triple A’ in the EU.¹¹⁸ The Scoreboard uses EU and euro area averages to benchmark Member State performance.¹¹⁹ Therefore, it could be that the Scoreboard will have real impact, but only if the statistical information delivered to the Scoreboard is relevant and has binding character in the Semester.

Similarly to the EPSR, the Scoreboard follows three dimensions for ‘measuring’ societal progress: equal opportunities and access to the labour market, dynamic labour markets and fair working conditions, and public support, social protection and inclusion.¹²⁰ The indicators are further divided into 12 areas ranging from education, skills and lifelong learning to healthcare and digital access.¹²¹ In each of these 12 areas, one to four specific indicators have been chosen for a follow up. For example, under the title of ‘education’ the four indicators chosen are the share of early leavers from education and training, adult participation in learning, underachievement in education, and tertiary educational attainment.¹²²

While the Scoreboard is undoubtedly an innovative and interesting way to monitor the social rights and principles included in the EPSR, some criticism concerning the chosen indicators is due. As a recent ETUI working document shows, in some areas more accurate indicators could have been chosen, and in other relevant areas of EU social policy such as information and consultation rights, the Scoreboard fails to propose a single indicator.¹²³ Overall the Scoreboard seems to overlap more with the indicators from the Europe 2020 strategy¹²⁴ rather than genuinely building a mechanism for monitoring compliance with the EPSR or instrumentalising the rights embedded therein. Hence reasonable doubts could be raised about the efficiency of the implementation of the EPSR, if the indicators included in the Scoreboard remain the only measurements specifying how adherence to these rights will be assessed. Moreover, these indicators also seem clearly insufficient to effectively measure and foster the implementation and compliance with the wide variety of rights and principles incorporated in the EPSR.

It also remains unclear how the Scoreboard will interact with the existing performance monitoring tools, for example those used to construct the so-

116. European Commission (2017g), SWD(2017) 200 final.

117. European Commission (2017c: 3), COM(2017) 250 final.

118. Ibid, 3.

119. European Commission (2017g: 2), SWD(2017) 200 final.

120. Ibid.

121. Ibid.

122. Ibid, 4.

123. ETUI (2017) [forthcoming].

124. Ibid, 5.

cial country-specific recommendations (CSRs), the Employment Performance Monitor and other scoreboards used in the economic governance system.

A key mechanism for implementing the EPSR, according to the Commission, will be the European Semester. In recent years the Commission has arguably started to mainstream and reinforce more social considerations in the European Semester.¹²⁵ This framework, according to the Commission, will be one of the mechanisms (or even the main one) where the EPSR principles will be mainstreamed. The CSRs will reflect and promote the EPSR principles, and the progress made towards their implementation will be monitored via the European Semester.¹²⁶ For this the Scoreboard will serve as an additional and new monitoring tool.¹²⁷

Currently, approximately 50 per cent of CSRs are linked to social policy.¹²⁸ Hence one could expect some redirection of the CSRs to fit better with the EPSR. At the same time, in the most recent set of CSRs issued by the Commission on 22 May 2017, no impact of the EPSR can yet be detected.¹²⁹ The recommendations are fully in line with those of the previous cycles, without new elements that would reflect any change brought about by the EPSR. It remains to be seen whether this will change in the next set of recommendations in the Semester cycle.

Finally, the communication on the EPSR also contains a rather vague promise to establish a new mechanism for mainstreaming social considerations in the EMU. This is in line with the Five Presidents' Report which alluded to the fact that some of the principles and rights established by the EPSR could serve the purpose of more binding standards in line with the process of deepening the EMU.¹³⁰ The idea is to move towards a formalised and more binding convergence process based on agreed standards.¹³¹ According to the Commission, the EPSR would serve as the instrument setting the minimum social standards in this process.¹³² The monitoring of these brand new and binding standards would be embedded in the surveillance system of the European Semester, building on existing scoreboards and benchmarks.¹³³

So far there has not been any follow-up action on this. The question, however, is what legal basis can be used for establishing 'binding' benchmarks and whether the Social Policy Title suffices in this regard, especially since the

125. EAPN (2017: 3–4).

126. European Commission (2017c: 9) COM(2017) 250 final.

127. Ibid.

128. See the overview in Clauwaert S. (2017) The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CRSs 2017–2018.

129. The country-specific recommendations are available at https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en

130. European Commission (2017c: 9–10) COM(2017) 250 final.

131. Ibid, 24.

132. Ibid.

133. Ibid.

EPSR goes further, meaning that the minimum benchmarks that will be established must also do so (for example, concerning wages). For any legally binding action, the legal basis is imperative. It remains to be seen what the Commission will specifically propose in this regard.

At the same time, even in its current soft law form the EPSR can help in guiding and constraining the social CSRs, and it may even be the first step towards rebalancing the weight between the economic and legally binding CSRs and the social ones. A legally binding character would give the social CSRs a much harder edge. However, by establishing clearer limits to the actions of the EU, even if exclusively via soft law, the EPSR can trigger some re-orienting of the economic CSRs in the future.

Overall, the mechanism on which the EPSR will have the most serious and clear impact will be the European Semester. The introduction of legally binding social benchmarks alluded to in the Commission's communication on the EPSR¹³⁴ would certainly give this mechanism more teeth. However, it is not clear how exactly the rights and principles found in the EPSR will be transformed into a set of clear criteria or indicators that would allow an adequate measuring of social standards across the EU and would also fit all the Member States involved. The Scoreboard, as it currently stands, seems too vague and is clearly insufficient in this regard. Any such exercise should also not be used as an argument for lowering the level of protection afforded by either national or EU law.¹³⁵ At the same time, if establishing such common standards is possible, then it might be a welcome development, effectively creating an actual floor of protection across the EU.

While the Scoreboard and the proposed indicators offer a good starting point for assessing Member States' adherence to the principles embedded in the EPSR,¹³⁶ it does not seem sufficient. A more serious commitment to mainstreaming the EPSR via the European Semester would certainly be welcome, together with practical examples of influence, especially because in the most recent set of CSRs it is impossible to trace any impact of the EPSR. The Scoreboard should also be strengthened and, finally, more concrete proposals about the intention of establishing binding benchmarks would be welcome.

3.2 The EPSR and policymaking beyond the 'social dimension'

Beyond the functions of the EPSR envisioned by the Commission and discussed above, there are some more aspects of EU policymaking that the EPSR could and should influence. Indeed, the areas where there is a clear conflict over their 'social impact' are the internal market and the EMU. Hence for the EPSR to fill in the gaps and raise the pan-European social standards, this in-

¹³⁴. Ibid, 9–10.

¹³⁵. Garben S., Kilpatrick C. and Muir E. (2017: 6).

¹³⁶. Brooks E. (2017).

strument needs to have an impact, perhaps not exclusively but definitely especially, in those areas of EU law.

As already discussed above, the intended proclamation of the EPSR will be an act with interinstitutional character and, accordingly, there are at least two practical ways in which the EPSR should influence the EU policymaking process beyond the social dimension, in areas such as the internal market and the EMU. First, the EPSR should have an impact on the REFIT process and, second, the EPSR should change the situation in terms of the obligations and the discretion left for the EU institutions. Accordingly, the Member States should be able to rely upon the fact that the Union institutions will not breach or facilitate breaches of the rights and principles embedded in the EPSR, not only within but also outside the scope of social policy (for example, in the internal market or EMU).

Notably, however, so far neither the Explanations, nor the EPSR itself mentions the institutional commitment and obligations arising from the EPSR. The primary focus so far has been on the obligations of the Member States instead of those of the EU institutions. While this makes sense with regard to the recommendation, a strong argument for institutional commitment could certainly be made concerning the proclamation.

Another aspect that must be mentioned here is the limited material scope of influence intended for the EPSR by the Commission in accordance with the Explanations. The Explanations do not suggest a very broad horizontal or cross-sectoral impact for the rights and principles embedded in the EPSR – the only objective seems to be to influence the making of exclusively social policy and labour law at the national, and to a lesser extent at the EU level, rather than to influence law-making in other areas of EU law. One might speculate therefore that the Explanations are more concerned with implementing the recommendation rather than the proclamation. However, such a limit has not been indicated anywhere by the Commission.

The Commission's interpretation also contrasts with what the EPSR itself provides. Its preamble refers to a much broader set of ambitions. First, the reference to Article 9 TFEU (the social clause) suggests an impact across all policy areas rather than merely the social dimension.¹³⁷ Second, Recital 6 of the preamble foresees that the EPSR will be embedded in a broader context: for example, the internal market rules (at least the right of establishment and the free movement of workers), economic and social cohesion, the formulation and surveillance of economic guidelines, and, more generally, the approximation of legislation (Articles 114 and 115 TFEU).¹³⁸ Hence the EPSR itself suggests a broader impact than the one designated to it by the Commission.

Some areas, however, are notably missing. First, the freedom to provide services, the free movement of goods, and the freedom of capital are not explicitly

137. European Commission (2017a) recital 2, COM(2017) 251 final.

138. Ibid, recital 6.

mentioned. The same can be said about the EMU. Indeed, while the EPSR was intended in large part as a mechanism to mainstream and introduce social considerations in the EMU, this aspect is suspiciously absent from the current text. The only mention of the EMU can be found in Recital 13, and it is mentioned only in order to limit the *ratione personae* of the EPSR to euro area Member States, rather than anything else. The idea that the EPSR could influence the policymaking in the EMU framework and induce it with some unbreachable social standards is thus at the moment almost completely absent. The only exception is the coordination of economic policies via the European Semester (even though it is also not explicitly mentioned in the text of the EPSR). However, the European Semester is only one aspect of the EMU's economic governance.

In spite of these limitations, however, and on the basis of the EPSR's inter-institutional character, I do wish to make an argument for broader use of the EPSR than the Commission has currently envisioned. Two specific ways the EPSR could be instrumentalised in the broader policymaking context are via establishing a role for the EPSR in the REFIT process and by recognising its role in setting the limits on the discretion of EU institutions.

3.2.1 The EPSR and REFIT

There is a widespread common opinion (at least among the academics interested in labour law) that the REFIT process, when it comes to workers' rights, is deregulatory in nature, and rather than improving protection with its objective of cutting the 'red tape' it is injurious to the very existence of the EU-level social *acquis*.¹³⁹

At the same time one cannot deny that the outcome in some REFIT exercises (for example, the one on the Written Statement Directive) could be seen as positive, since the Scrutiny Board proposed to broaden the scope of the Directive and to raise the overall level of protection instead of reducing burdens for businesses.¹⁴⁰ However, despite such examples, the REFIT exercise undoubtedly puts the social *acquis* in a defensive position¹⁴¹ and it is also underpinned by a cost–benefit analysis which does not yield easily to a satisfactory assessment of social rights and social values.¹⁴²

Therefore, when the head of cabinet Commissioner Thyssen announced, prior to its launch, that the EPSR cannot be seen as a separate process from the Better Regulation agenda and the REFIT, but rather that it would be 'at the very

139. Van den Abeele E. (2014). See also Brooks E. (2017).

140. Garben S, Kilpatrick C. and Muir E. (2017: 6).

141. It might be having a tremendous effect on the Commission's (DG EMPL) capacity to actually develop new policies in the social area and to oversee the implementation of the already existing ones.

142. Van den Abeele E. (2014: 23–24).

heart of it',¹⁴³ this gave the impression that the EPSR might be used to counterbalance or change this process. This therefore suggests a potential change in the policymaking process *within* the Commission.

However, the way in which the Commission has so far proposed to instrumentalise the EPSR does not indicate that it intends to commit to accommodating its standards within the REFIT process. The only exception of this can be found in the communication on the EPSR which argued that the EPSR 'offers a new way to assess whether existing EU legislation is designed and governed in a way that it is fit-for-purpose [...]'.¹⁴⁴ The rest of the accompanying explanations of the EPSR's role, however, reveal that instead of embedding the EPSR within its own policymaking process, the Commission has chosen to orientate it towards the Member States.¹⁴⁵

Nevertheless, in line with the interinstitutional character of the proclamation, one could argue that, if proclaimed, the EPSR will be primarily binding for the EU institutions, including the European Commission, rather than the Member States, and therefore the EPSR should become part of a reference or vetting framework for the Commission's own policy process. Due to the interinstitutional character of the EPSR one could then request the Commission to comply with and obey the rights embedded in the EPSR *inter alia* in all parts of its own internal policymaking process, including the REFIT, and in areas beyond social policy and labour law. Integration of the principles and rights embodied in the EPSR into the REFIT framework has also been seen as a valuable and much-needed route for the mainstreaming of social considerations elsewhere.¹⁴⁶

A stronger emphasis on the social aspects in the REFIT process would indeed be welcome, and I would argue that it is also constitutionally mandated by Article 9 TFEU. Using the EPSR for the vetting of EU policy initiatives in all areas of EU law might help to successfully counterbalance the much-criticised economic bias of the REFIT process and improve its quality.

3.2.2 The EPSR and institutional obligations

Beyond the specific REFIT process, one could also imagine a role for the EPSR standards in a broader context of institutional obligations. While this has not yet been worked out in the accompanying documents, the EPSR could in fact act as a limit on institutional activities and also in certain situations potentially as a shield for the Member State social systems.

143. Speech by Inge Bernaerts (the head of cabinet of Commissioner Thyssen) at NETLEX 2017 conference in Brussels on 23 February 2017.

144. European Commission (2017c: 8) COM(2017) 250 final.

145. Accordingly, via soft law instruments it will be incorporated as a policy guidance and recommendation through the European Semester (Ibid, 7).

146. Brooks E. (2017) and Rasnača Z. (2017).

First, while there is no clear case law on proclamations, the CJEU has used interinstitutional agreements as a reference point for establishing the institution's obligations towards third parties.¹⁴⁷ Soft law instruments have often been used as auxiliary sources of EU law or as aids for interpretation. In addition, before the Charter became legally binding (with the Lisbon Treaty), the CJEU had used it as an auxiliary source for interpreting EU law and even defining the responsibilities of EU institutions. At first, shortly after the proclamation of the Charter, only the General court and the Advocates General extensively referred to the Charter.¹⁴⁸ Later the CJEU also joined and endorsed the Charter (then a soft law instrument) in its case law. For example, when dealing with the European Parliament's challenge to the Family Reunification Directive, the Court found that while the Directive does not breach Article 7 of the Charter, the Charter could be used as a yardstick for evaluating the legality of a secondary EU law measure.¹⁴⁹

Second, concerning soft law instruments in general, the CJEU has ruled that soft law commitments serve the function of ensuring that the institution's actions are transparent, foreseeable and consistent with the principle of legal certainty.¹⁵⁰ The CJEU has in this regard even admitted legally binding effect for soft law instruments via the general principles of EU law by, for example, ruling that by publishing such instruments the Commission creates legitimate expectation that it will apply and obey them, and therefore accordingly limits its own discretion.¹⁵¹ If the Commission departs from its own commitment, it can be found to be in breach of general principles of EU law such as legal certainty.¹⁵² Although this case law has mostly been developed in the context of competition law, one would by analogy transfer it to the situation with the EPSR.

Since the Commission (and also the Council and the European Parliament) commit themselves to the EPSR, third parties can reasonably have legitimate expectations that these institutions will not breach the rights and principles embedded therein. This is the case with institutional activities both within and beyond the area of EU social policy, since the EPSR does not explicitly limit its scope in this regard, and EU law, be it soft or hard, has to be interpreted coherently. The EPSR could therefore be used as a reference point and as an instrument for clarifying the institutional discretion. Oana Stefan has argued

147. See, for example, Judgment of 12 July 2005, Alliance for Natural Health and others (C-154/04 and C-155/04, ECR 2005 p. I-6451) ECLI:EU:C:2005:449, para. 92.

148. Judgment of 3 May 2002, *Jégo-Quéré / Commission* (T-177/01, ECR 2002 p. II-2365) ECLI:EU:T:2002:112, AG Tizzano Opinion in C-173/99, *Elchinov*, ECLI:EU:C:2010:336, AG Jacobs Opinion in C-50/00 *UPA v Council*, ECLI:EU:C:2001:197, and AG Geelhoed Opinion in C-413/99 *Baumbast*, ECLI:EU:C:2001:385.

149. Judgment of 27 June 2006, *Parliament / Council* (C-540/03, ECR 2006 p. I-5769) ECLI:EU:C:2006:429.

150. Judgment of 25 June 2013, *Commission v Czech Republic* (C-241/11) ECLI:EU:C:2013:423, para. 43 and the case law cited.

151. Judgment of 28 June 2005, *Dansk Rørindustri and others / Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR 2005 p. I-5425) ECLI:EU:C:2005:408, para 211.

152. *Ibid.*

that soft law should generally be recognised as viable swords or shields for litigants to use in cases before the court.¹⁵³ In this sense, the EPSR potentially obtains a bit of a hard law edge when it comes to the institutional obligations and discretion.

The interinstitutional character of the proclamation is the key element here. Interinstitutional instruments like agreements are mostly made to change or regulate an interinstitutional relationship by, for example, clearly dividing functions and tasks, and setting clear limits to each institution's competences.¹⁵⁴ An interinstitutional proclamation can be seen as an instrument akin to an interinstitutional agreement. Indeed, it has been argued that the Charter's initial proclamation was in fact an interinstitutional agreement.¹⁵⁵ Hence the primary actors bound by the proclamation will be the three institutions – the Commission, the Council and the European Parliament.

Nevertheless, when it comes to questioning in which areas the EPSR can be used as either a sword or a shield against EU institutions, it gets complicated. While it is clear from Recital 6 in the draft proclamation that such areas certainly include, among other matters, the right of establishment (Articles 49 to 55 TFEU), economic and social cohesion (Articles 174 to 178 TFEU) and the coordination of economic policies (Article 121 TFEU), whether such obligations would concern other areas such as competition law remains somewhat open. While the Commission should not be able to pick and choose the areas where it obeys and where it does not obey EPSR rights, the question is whether matters not explicitly mentioned in Recital 6 are excluded from the Pillar's influence. Such exclusion, however, is somewhat doubtful, since any exclusion from the EPSR's scope should have been explicitly made or at least explained in the accompanying documents.

In addition, the EPSR's role in the EMU is somewhat puzzling. While the Commission, when explaining the role of the EPSR, states that the Pillar should restart convergence within the EMU and its rights and principles could act as guidance towards more binding standards for the euro area,¹⁵⁶ this intention is, as already noted above, visibly missing from the EPSR itself.

Furthermore, the Commission's reflection paper on the deepening of the EMU does not seem to promise possible entrenchment of the EPSR in its structures. While the paper emphasises that the EMU is not an end in itself, the Pillar is mentioned only twice. First, a wish is expressed that the EPSR will be a renewed compass for strengthening the coordination of economic policy leading towards better working and living conditions.¹⁵⁷ Second, there is a reference

153. Stefan O. (2014: 367).

154. See, for example, European Commission (2015a: 4).

155. Stirn B. and Bjorge E. (2017).

156. European Commission (2017d). See also European Commission (2017c: 9), COM(2017) 250 final.

157. European Commission (2017r: 24) Reflection Paper on the Deepening of the Economic and Monetary Union, COM(2017) 291, 31 May 2017.

to the EPSR as a tool producing standards that could be used in line with the vision in the Five Presidents' Report for creating a more formalised and binding convergence process based on agreed standards.¹⁵⁸ These two remarks did not bring more clarity than the documents that were already included in the Pillar package.

If before it seemed that the EPSR would be primarily intended to reform the existing EMU legal framework (like Article 136 TFEU),¹⁵⁹ then currently the EMU is almost completely absent and it is not clear whether and how exactly the EPSR will be part of it.

It is unfortunate because, as already mentioned above, the economic and fiscal governance does represent the second of the two great imbalances plaguing the EU. At the same time, if we accept the EPSR's role in implementing Article 9 TFEU, then an argument could be made about the EPSR affecting the discretion of the EU institutions also in the EMU. While it does not help when it comes to the European Central Bank and its activities, the Commission's commitment to the EPSR is significant, and here again the EPSR could be used as a sort of shield for the Member States.

The argument becomes much more far-fetched when we consider the inter-governmental mechanisms such as the European Stability Mechanism, the key bail-out tool for the euro area countries. It is doubtful that the EPSR will have any impact on the inter-governmental sphere. Even though one could try to make an analogous argument to the one made by the CJEU in *Ledra Advertising* that even outside the scope of EU law the institutions (the Commission in this case) remain bound by standards established in the EU realm,¹⁶⁰ it is admittedly not a particularly strong commitment for the institutions. Hence while there might be a limited role for the EPSR to act as a shield for the Member States in such situations, which could certainly be explored in practice, it is insufficient for reversing any austerity-oriented conditionality in the area beyond the strict confines of EU law.¹⁶¹

In addition, even if the Commission wished to adopt binding social standards for the euro area alone (for example, to implement the EPSR there), it is unlikely that the implementation could happen without the help of hard law measures. Currently there is no legal basis for developing social legislation for the euro area alone,¹⁶² so the EPSR could be implemented only via, for example, enhanced cooperation.

In sum, the EPSR's inter-institutional character implies a certain impact of this instrument on EU policy and in particular on the discretion of the EU

158. Ibid.

159. Lörcher K. and Schömann I. (2016: 14).

160. Judgment of 20 September 2016, *Ledra Advertising / Commission and ECB* (C-8/15 P to C-10/15 P) ECLI:EU:C:2016:701.

161. See Kilpatrick C. (2014).

162. European Commission (2017b: 28) COM(2017) 206.

institutions, also beyond the area of social policy and labour law (in areas like the internal market and even the EMU). However, any such role for the EPSR has so far remained unrecognised, despite it being initially marketed as an initiative to re-balance the economic rationale of the EMU.¹⁶³ In its current form and interpretation, the EPSR does not seem capable of delivering much change, especially when it comes to deregulation and austerity policy fashioned via inter-governmental cooperation mechanisms or led by institutions other than the Commission, the Council and the European Parliament (for example, the ECB). Nevertheless, it remains to be seen whether some role for the EPSR could be carved out in this area.

163. Speech by Juncker J.-C., (2015) State of the Union 2015: Time for honesty, unity and solidarity, Strasbourg, 9 September 2015, http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm

4. Conclusion

When the Commission first proposed the EPSR, it was after almost a decade of little hope for the EU social dimension. For years, the EU has been under heavy criticism concerning imbalances between the internal market and economic and monetary governance, from one side, and the social dimension from the other. Unsurprisingly, the EPSR initiative was taken up by the stakeholders and treated as the last hope for re-establishing a belief in a genuinely social Europe. Again unsurprisingly, however, it has not delivered a fully-fledged response to all the social problems plaguing Europe, not least because there is a constant backlash to transferring more power in the social field to the EU.

The EPSR definitely brings something new to the EU social dimension, and it can and should be seen as a positive development. However, while the EPSR has the potential to bridge some gaps in EU-level protection, the majority of its potential currently remains untapped. To a certain extent this is because the EPSR was issued only recently, and the more important part of it – the proclamation – is yet to be proclaimed. At the same time, we could have expected to see a little bit more of the EPSR's influence already: at least some impact on the recently issued CSRs in the context of the European Semester, or in the form of more specific proposals about how exactly the EPSR will be instrumentalised (the binding benchmark plan), how it will help with completing the EU social *acquis* (a set of new legislative initiatives), and how it will help in implementing already existing EU law (the implementation plan and the activation of infringement procedures). For now, it remains to be seen how exactly the Member States and EU institutions (especially the European Commission) will instrumentalise the EPSR and whether it will result in an actual change of policy discourse in the EU.

The Pillar package reveals that the EPSR is mainly addressed towards the national level and aimed at completing and furthering the EU social dimension, rather than re-balancing the existing imbalances and reversing the austerity discourse that prevailed in the EU during the sovereign debt crisis. The Commission has addressed the principles and rights primarily to the Member States, and indeed without their full support and endorsement the EPSR is unlikely to succeed. However, this paper has argued that beyond various implementation measures at the national level, the EPSR leaves room for and even requires a lot of activity at the EU level both from the Member States as actors that play significant roles on the EU stage and the EU institutions, especially the Commission.

Be that as it may, the EPSR, if endorsed, has the potential to change the policymaking process, and to bring some change at various levels of EU law. First, if the events unfold in the same way as they did when the Charter was proclaimed, then the EPSR might be incorporated in the Treaties during the next Treaty revision. For now at least it can be seen as a source that complements and supplements the social rights embedded in the Charter. Second, at the level of secondary EU law the EPSR might trigger new initiatives in the area of social policy and labour law, although currently an actual list is missing and the Explanations set out a mostly soft law rather than hard law agenda for the EU in the social field. It could also be used as a reference framework for minimum protection standards when the content of any new legislative initiatives is concerned, and to an extent this function is already visible in the legislative initiatives that accompanied the EPSR in April 2017. Finally, the EPSR will be mainstreamed (with the help of the Scoreboard) in the European Semester. While so far no action has taken place in this regard, the Commission has clearly promised to incorporate the EPSR rights and principles into this framework.

Any impact of the EPSR beyond the boundaries of the social dimension *per se* is not yet clear. The Commission has failed to clarify how and whether the EPSR will play a role in other areas of EU law, such as competition law, the internal market and the EMU. Even though the reference to Article 9 TFEU in the EPSR is promising, and some areas of EU law such as the internal market rules and economic policy coordination are explicitly mentioned as areas where the Commission intends for the EPSR to have an impact, until now it has failed to propose anything concrete in this regard. This is especially surprising regarding the EMU, since the EPSR was initially proposed with the intention of establishing the social standards exactly within this framework. While there may be some impact within the context of the European Semester, it does not seem that it will be sufficient.

Another missing point so far is how the EPSR will affect the REFIT. I have argued above that the EPSR in the form of the proclamation should have an impact on the policymaking processes and discretion of all the institutions that will proclaim it, and it principally concerns the European Commission and, *inter alia*, its REFIT process.

In conclusion, the EPSR could serve as the first step and the first trigger towards changing the current paradigm in Social Europe; however, for now it is still too early to say whether it will take a shape that can fulfil this promise. It might lead to a change in EU primary law in the future, and particularly to an extension of the social dimension of EU primary law that many hope for. It might serve as a trigger and inspiration for new legislative initiatives, and for better implementation of the old ones. At the same time, when we look at the accompanying documents, the EPSR does not suggest a grand legislative re-shaping of the EU-level social policy *acquis*. Moreover, its impact on the already proposed legislative initiatives is ambiguous. The Pillar might also significantly affect the European Semester mechanism. I have also argued that the EPSR holds promise beyond the strict confines of the

EU social *acquis*. Through setting the potential agenda and also the limits on the discretion of the institutions, the EPSR might lead to a broader paradigm shift and influence other areas of EU law (for example, the internal market and the EMU).

However, the keyword here is ‘might’. For now, the EPSR’s potential impact remains untapped and in some aspects obscure. While I have sketched out some possible routes for change, they must be picked up and followed by the relevant stakeholders for the EPSR to actually matter for EU citizens. Without strong support from the Member States and all EU institutions, the EPSR might follow the destiny of some previous ‘social’ initiatives and fail to bring the expected change. Because the Pillar process has just begun, the current question as to whether the EPSR truly constitutes a solution to the undermined and under-developed social dimension at the EU level cannot be fully answered.

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