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From the Board: Towards a Social Europe?

At the end of June 2018, just before the summer break, EU Member States' ministers of social affairs and employment reached an agreement on a Council position in three legislative documents that should contribute to a more social Europe. These documents include a revision of the coordination of social security systems, a draft directive on work-life balance, and a draft directive on transparent and predictable working conditions.¹ Together with the adoption of the revision of the posting of workers directive (PWD) at the same Council meeting,² the Council positions symbolize the efforts the EU is making to address one of the sources of discontent that played a major role in the political debates in the run-up to the Brexit referendum: (perceived) unfair competition and displacement on the labour market caused by free movement of labour, especially since the 2004 enlargement of the European Union, and the role of the EU in requiring the weakening of social and labour rights during the sovereign debt crisis. While the UK White Paper on the future relationship between the United Kingdom and the European Union leaves no doubt as to ending free movement once the UK leaves the EU,³ extensive analysis of the Brexit vote has shown that there are personal determining factors making it harder to deal with economic and social change such as education level, age, and impact of austerity measures on one's situation, and they are more indicative of the leave vote than the number of migrants from Eastern Europe.⁴ In this perspective, the November 2017 solemn proclamation of the European Pillar of Social Rights (EPSR or Social Pillar), focusing on equal opportunities and equal access to the labour market, fair working conditions and social protection and inclusion, seems a good strategy to prevent other Member States from following the Brexit route. The

¹ Respectively COM(2016)815 final of 13 Dec. 2016, COM(2017)253 final of 26 Apr. 2017 and COM(2017) 797 final of 21 Dec. 2017.

² Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, *OJEU* L173/16 of 9 July 2018.

³ *The Future Relationship Between the United Kingdom and the European Union* Cm 9593, points 4.1.1 and 4.1.2 (July 2018), <https://www.gov.uk/government/publications/the-future-relationship-between-the-uk-and-the-eu> (accessed 8 Sept. 2018).

⁴ Sascha O. Becker, Thiemo Fetzer & Dennis Novy, *Who Voted for Brexit? A Comprehensive District-Level Analysis*, CESifo Working Papers 6438/2017 (Apr. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976254 (accessed 8 Sept. 2018).

EPSR contains twenty principles reaffirming existing EU social rights and ‘addressing challenges arising from societal, technological and economic developments’.⁵

The Social Pillar was initiated by the Juncker Commission as part of a response to broader populist challenges to the EU.⁶ It was also seen as a ‘cautious but steady paradigm shift, away from austerity’, at least within the Commission.⁷ The rationale behind the initiative is to withstand the ‘legacy of the crisis’,⁸ notably the idea that as a consequence of the crisis more people feel left behind or wronged by globalization, Europeanization and the rapid changes taking place in the world of work. They worry about life prospects, unemployment, growing inequalities and lack of opportunities. The analysis of the Brexit vote cited above confirms that this legacy of the crisis does exist. Furthermore, as others have remarked, the legacy of the crisis plays into an East–West and North–South divide.⁹ The East–West divide shows itself in the context of labour migration, where citizens in the West worry about free movement of persons that results in unfair competition on remuneration and labour conditions, and citizens from the East see labour mobility as one of the attractive elements of membership of the EU. The North–South divide resulted from the sovereign debt crisis, where citizens of Member States in the North worried that ‘their’ taxpayers’ money was used in credit arrangements for Member States in the South and where citizens from Member States in the South worried about the harsh fiscal conditions and the downgrading of national welfare provisions they were confronted with and that accompanied the credit arrangements.

The Council agreement of 28 June on the draft directives may be seen as a first small step in transforming the principles of the Social Pillar into concrete measures. The legislative documents on which the Council reached agreement have in common that they aim at social protection on the labour market, but their aim and scope is different. While the draft directives on work–life balance and on transparent and predictable working conditions apply to ‘every worker within the EU’, and in their preamble refer to both the EU Charter of Fundamental Rights and the European

⁵ Recital 14 to the preamble, EPSR, https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en (accessed 8 Sept. 2018).

⁶ Preamble of the EPSR (n. 5), recital 7 refers to the EPSR as enabling ‘support for the European construction’. See also C. Kilpatrick, *The Displacement of Social Europe: A Productive Lens of Inquiry*, 14 EU Const. 66, 62–74 (2018).

⁷ F. Vandenbroucke, *From the Gothenburg Social Summit to a European Social Union*, Soc. Eur. J. (17 Nov. 2017), <https://www.socialeurope.eu/gothenburg-social-summit-european-social-union> (accessed 8 Sept. 2018); cf. S. Deakin, *What Follows Austerity? From Social Pillar to New Deal*, in *A European Social Union After the Crisis* 194, 192–210 (F. Vandenbroucke, C. Barnard & G. de Baere eds, CUP 2017).

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, COM(2017)250 final of 26 Apr. 2017, at 3.

⁹ S. Garben, *The European Pillar of Social Rights: Effectively Addressing Displacement?*, 14 EU Const. 212–213, 210–230 (2018).

Pillar of Social Rights, the revision of the Social Coordination Regulation and the adoption of the revision of the PWD aim at cross-border labour and find their legal basis and ratio in the internal market. Revision of the PWD in particular was demanded by a number of Member States, among which was the UK, with a view to prevent 'unfair' competition and to meet the concerns of those feeling left behind.

The adoption of the revised PWD is formally not part of the Social Pillar, but the underlying aim to promote 'equal pay for equal work' matches the language of the Social Pillar. At the same time, the East-West divide could not be ignored during the revision. It makes it interesting to see how the revision tries to accommodate rights of posted workers, freedom of services provision and protection of local workers against competition on wages and labour conditions, and how it tries to take into account both the social interests of the 'old' Member States in the West and the 'new' Member States in the East. Before taking a closer look at the adopted text, I briefly recall the main positions in the debate on posting of workers, to sketch the divide between the market and the social, and between the 'old' and 'new' Member States that forms a common thread running through the posted workers saga. Of course, my overview is far from comprehensive but serves to illustrate that provoking a paradigm shift towards a more social EU is far from easy.

In the well-known Laval case¹⁰ the divide between old and new Member States, with 'old' Member States aiming to protect both their autonomy in organizing labour law and national social welfare systems and their national labour market, and 'new' Member States aiming to get access to the markets of the 'old' Member States for their service providers, became very clear. In this case, trade unions in Sweden blocked construction sites in order to force a Latvian service provider to sign a collective agreement for the building sector that would have resulted in higher pay for the posted workers but at the same time would have made the service provision far less competitive and consequently market access more difficult. The Court accepted that collective action could protect Swedish workers against social dumping and, in principle, could be considered an overriding reason of public interest justifying a hindrance to free movement. However, in Sweden the labour standards were negotiated on a case-by-case basis and therefore it would not be possible for the service provider to know its obligations in advance.¹¹ Hence, the hindrance to free movement caused by the collective action was not justified. Furthermore, the Court ruled that service provision could not be made conditional upon observance of terms and conditions of employment that go beyond the mandatory rules for minimum protection as laid down in the PWD.¹² The case has been criticized for giving too much weight to 'the market' as

¹⁰ Case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:809.

¹¹ *Ibid.*, para. 99.

¹² *Ibid.*, para. 80.

opposed to 'the social'. The arguments of the parties and the intervening Member States in this case and subsequent cases on the PWD however hardly ever focused on the protection of the rights of the posted workers.¹³ Instead the arguments of the protection of national labour law, protection of collective actions as a fundamental right and protection of the national labour market against social dumping on the one hand, were opposed to those of broad access to the market under free movement of services and of the idea that alignment of wages across Member States should come as a consequence of further economic development.¹⁴ The *Finnish Electrical Workers Union* forms an exception in the line of cases on the PWD, as the Finnish trade union in that case was representing the posted workers involved.¹⁵

As stated above, the targeted revision of the PWD was pleaded in a letter to the Commission from nine Member States from Northwest Europe.¹⁶ The subsequent proposal for revision however was subject to a yellow card procedure in which parliamentary chambers, mostly from 'new' Member States, opposed the revision because it would go against the idea of an internal market and competitiveness. The yellow card procedure again showed how debated the revision was and how diverged the East and West were. However, the Commission decided to maintain its proposal.¹⁷ When subsequently the Council found compromises on expanding the minimum protection on 'wages' to 'remuneration' and a time limit of twenty-four months on posting, the revision seemed ready for adoption in June 2017. However, the French president Macron re-opened the discussion on the time limit for posting and wanted a reduction to twelve months.

Meanwhile the European Parliament also discussed the proposal. It considered the possibility to add as a legal basis Article 153 TFEU, a provision that provides the EU with (shared) competence in social policy. That proposal did not survive the compromise that was reached in the trilogue negotiations between Parliament, Council and Commission.¹⁸ The European Parliament adopted the final

¹³ See also Z. Rasnača, *Identifying the (Dis)placement of 'New' Member State Social Interests in the Posting of Workers: The Case of Latvia*, 14 EU Const. 141, 131–153 (2018); M. Houwerzijl & A. Schrauwen, *From Competing to Aligned Narratives on Posted and Other Mobile Workers Within the EU?*, in *Towards a Decent Labour Market for Low Waged Migrant Workers. An Introduction* 81–108 (T. de Lange & C. Rijken eds, Amsterdam University Press 2018). A first case in which protection of the rights of posted workers was addressed as opposed to that of the service provider only recently.

¹⁴ This argument is also expressed in a letter of Ministers of nine 'new' Member States to the Commission, cited in Communication from the Commission on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No2, COM(2016)505 final of 20 July 2016, at 4.2.1.

¹⁵ Case C-396/13, *Sähköalojen ammattiliitto ry*, ECLI:EU:C:2015:86.

¹⁶ <http://rijksoverheid.nl/archiefweb.eu/#archive> (accessed 8 Sept. 2018).

¹⁷ COM(2016) 505 final of 20 July 2016, *Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal of a directive amending the Posting of Workers Directive, with regards to the principle of subsidiarity, in accordance with Protocol No 2.*

¹⁸ See for an overview of the issues that were on the table EU Observer (25 Oct. 2017), 'EU posted workers face hurdles', Brussels, <https://euobserver.com/social/139625> (accessed 8 Sept. 2018).

compromise with 446 votes to 147, with 49 abstentions,¹⁹ and the Council adopted it with 2 votes against (from Hungary and Poland), and 4 abstentions (from Lithuania, Latvia, Croatia and the United Kingdom).²⁰

The revision in Directive 2018/257 is based on Articles 53(1) and 62 TFEU, and therefore clearly a measure within the framework of free movement of services. Despite the identical legal basis, the revision does however add to the scope and subject matter of the PWD by adding to Article 1 PWD two paragraphs. Firstly Article 1 is complemented with the phrase that the PWD ‘shall ensure the protection of posted workers’ during the posting and secondly a paragraph is added in which it is made clear that the PWD does not affect the exercise of fundamental rights ‘including the right or freedom to strike or to take collective action.’

The ‘same pay pay for the same work in the same place’ mantra is reflected in the revision of the minimum wage guarantee that is replaced by a guarantee of equal remuneration, including thirteenth month allowances, travel expenses or compensation for work during public holidays or night work. Furthermore, employers need to provide posted workers with adequate housing conditions. Also, equal treatment between temporary agency workers and local workers needs to be ensured. If the posting exceeds twelve months,²¹ all applicable terms and conditions of employment of the host state apply. The explicit exclusion of supplementary occupational retirement pension schemes remains though.

As stated above, the revision of the PWD formally is not part of the Social Pillar, but is closely connected to it both in its aim of protecting local workers from ‘unfair’ competition on the labour market while preserving labour mobility, as well as in its presentation as an element of the ‘new social dimension’ of the EU.²² And at first sight the revised PWD shows signs of a ‘new social dimension’ or a ‘change of paradigm away from austerity’. The explicit reference to protection of posted workers as subject matter of the PWD and the replacement of ‘wage’ guarantees by ‘remuneration’ guarantees may serve as example. However, it remains uncertain whether the Court will take the added paragraphs on protection of posted workers or protection of collective actions as a basis for reconsidering the balance between the market and the social that was struck in earlier cases on the PWD. On top of that, it is possible that equal remuneration would make posting of workers less attractive, and thereby it would undermine the opportunity to work abroad as a posted worker. The revision does not really address the concerns of ‘new’ Member States. With competition on wages and labour conditions being less obvious, there is a risk that service

¹⁹ See <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1536419&t=d&l=en> (accessed 8 Sept. 2018).

²⁰ Document ST_10422_2018_INIT.

²¹ Extendable to eighteen months on submission of a motivated notification by the service provider.

²² See also Garben, *supra* n. 9, at 215.

providers will look for competitive advantages on the basis of social security contributions or tax laws in order to be able to respond to demand for labour at low cost. That scenario might even deepen the East-West divide in the EU.

The targeted revision of the PWD needs to be implemented before 30 July 2020. It can be considered a first step in the direction towards a more social outlook for the EU, but as always, a lot will depend on how Member States implement and enforce it. However, if the pace with which the institutions have taken up the launch of the Social Pillar is indicative for their willingness to turn away from austerity and embrace a more socially oriented EU, the implementation of the revised PWD might go hand-in-hand with the adoption of other measures contributing to a fair and inclusive labour market – preferably a labour market that also takes into consideration the concerns of Member States other than those in the Northwest of the EU.

A. S. August 2018