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## Economic Constitutionalism and the “European Social Model”

### *Can European Law Cope with the Deepening Tensions between Economic and Social Integration after the Financial Crisis*

Christian Joerges,\* Vladimir Bogoeski,\*\* Lukas Nüse\*\*\*

Contribution to the conference “*The Metamorphosis of the European Economic Constitution*” at the University of Luxembourg, 21-22 September 2017, organized by Herwig Hofmann, Katerina Pantazatou and Giovanni Zaccaroni. The final version of the present draft will be published with Edward Elgar in a collective volume to be edited by the conference organizers.

### Introductory Explanations

Alan Milward, in his seminal work on the history of the European integration process,<sup>1</sup> argued that the European project was under the ideational leadership of the UK to defend the post-war developments of welfare states in Western Europe. Their customs union incentivised, so he submitted, a modernisation of national economies, while the allegiance of new constituencies (farmers, labour, lower middle class) was ensured through policies which defended their interests.<sup>2</sup> With the benefit of hindsight, it seems clear that Milward’s narrative was all too positive. Economic historian Bo Stråth, professor at the EUI in the decade from 1997 to 2007, has convincingly documented that the post-Maastricht EU was no longer the “Europe of Milward”,<sup>3</sup> underlining that the erosion of welfare state accomplishments had commenced much earlier.<sup>4</sup> We agree – but will nevertheless defend Milward’s insights. We will argue that it was precisely the one-sidedness of the integration process, its promotion of ever deeper economic integration, which contributed to the legitimacy crisis with which the EU is confronted at present. This crisis, we will submit, has, in the course of the efforts to tame the financial crisis through Europe’s new modes of economic governance, led to a de-legalisation of European rule and thereby affected the “law as such”. Our argument will proceed in three steps: (1) we will start with a re-construction of the tensions between “the economic” and “the social” at national level. Here, we identify two competing constitutional traditions, namely, that of economic constitutionalism and that of the welfare state (*Sozialstaat* in German parlance). This is a conceptual exercise, albeit one which prepares the ground for the re-construction of the European constellation. (2) In our second section, we will give a critical account of the “crisis law” which has transformed the European project profoundly. We refrain from any definite evaluations as to the sustainability of this new

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<sup>1</sup> Alan Milward, *The European Rescue of the Nation State*, New York: Routledge 1992.

<sup>2</sup> In a similar vein most notably Andrew Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, Cornell UP, 1998; also his book review in (1995) 67 *The Journal of Modern History*, 126-128.

<sup>3</sup>Bo Stråth, “Still the Europe of Milward? On the Need for a New Long-Term Historical Understanding of Today’s Europe”, UCL Working Paper No. 1/2011, London 2011.

<sup>4</sup>Stråth built, *i.a.*, on the seminal analysis of Fritz W. Scharpf, “The European Social Model: Copying with the Challenges of Diversity” (2002) 40 *Journal of Common Market Studies*, 645-670.

constellation and do not engage in speculations about the future. (3) We will, instead, in our concluding section, discuss the “return of the social” in three projects of different kinds. One is the “European Pillar of Social Rights” as “solemnly proclaimed by the European Parliament, the Council and the Commission” at the *Social Summit* in Gothenburg, Sweden, on 17 November 2017. The second is a conflict constellation of exemplary importance, namely, the Revision of the Posted Workers Directive, which has had to respond to the discrepancies between social justice within consolidated democracies and social justice between the Member States of the Union. The third is a political effort to contribute to European solidarity through a European Employment Insurance.

## I. Two Competing Constitutional Conceptions

Concerns about Europe’s “democratic deficit” and the shortcomings of the “European social model” tend to contrast the integration project with the accomplishments of consolidated democratic states. This is unsurprising. Our objective in the present section is to sketch out a principled alternative. We submit that one can meaningfully systematise the debates on a “constitutionalisation” of Europe by just two traditions of legal thought, and illustrate their specifics with references to German examples. One looks, indeed, very German, namely, the notion of “economic constitutionalism”. A core assumption of this theoretical tradition is that the free economy is, to an essential degree, an autonomous entity with an inherent legitimating potential. This potential, however, is vulnerable. It has to be respected and protected by law and strong institutions. German ordoliberalism provides a pertinent example which has recently gained critical prominence.<sup>5</sup> But the Anglo-Saxon varieties of economic liberalism and so many defenders of market economies share important premises. The (in-) famous majority opinion in the *Lochner* case of 1905 was a like-minded forerunner.<sup>6</sup> The origins of Germany’s “economic constitutionalism” date, of course, back to the times of the Weimar Republic. So does the counter-vision, namely, Herman Heller’s theory of *soziale Rechtsstaat*,<sup>7</sup> which inspired the most prominent contemporary proponent of democratic constitutionalism, namely, Jürgen Habermas.<sup>8</sup> The two traditions are an instructive eye opener for our *problématique* because it is so readily apparent why one of them, economic constitutionalism, seems so

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<sup>5</sup> See Josef Hien, “Ordoliberalism as an Irritating German Idea?” (2016), available at <http://www.euvisions.eu/ordoliberalism-irritating-german/> and the introductory chapter to Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics*, Oxford: Hart Publishing 2017.

<sup>6</sup> *Lochner v. People of State of New York*, U.S. Supreme Court, 198 U.S. 45 (1905). Among the few who have noticed the affinities with economic constitutionalism is Danny Nicol, “Europe’s *Lochner* Moment”, (2011) *Public Law*, 308-329.

<sup>7</sup> See in particular his *Rechtsstaat oder Diktatur?*, Tübingen: Mohr 1930; Rudolf Wiethölter, “Die Position des Wirtschaftsrechts im sozialen Rechtsstaat“, in: Helmut Coing, Heinrich Kronstein, Ernst-Joachim Mestmäcker (eds), *Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm am 16. Februar 1965*, Karlsruhe: C.F. Müller, 41-62 and the recent *hommage* by Agustín José Menéndez; “Hermann Heller NOW” in (2016) 21 *European Law Journal*, 895-904.

<sup>8</sup> The references to Heller in *Faktizität und Geltung*, Frankfurt a.M.: Suhrkamp 1992, are brief but the affinities are strong; see Peter Christian Caldwell and William E. Scheuerman (eds), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic*, Boston-Leiden-Cologne: Humanities Press 2000 and Stefan Müller-Doohm, *Habermas. A Biography*, Cambridge: Polity 2017, 92 ff.

well compatible with the integration project, whereas the other, democratic constitutionalism, suffers from a serious competitive disadvantage: “economic constitutionalism” provides a legitimation for the type of economic governance which the EEC and the EU seem well equipped to establish, namely, a “market without a state”,<sup>9</sup> whereas the democratic organisation of “economy and society” pre-supposes the framework of a constitutional state.

We refrain from any further elaboration of this dichotomy and will focus instead on a re-construction of its traces in the integration project. This re-construction will evidence a twofold failure. The diagnosis of a failure to establish an equivalent to the democratic nation state at European level may be like carrying coals to Newcastle. The diagnosis of a failure to establish economic constitutionalism may be somewhat surprising, but less regrettable. From the perception of this twofold failure follows what is, in our view, the present challenge, namely, the search for a “third way” between state-building and technocratic rule.

### *1.1. The Law on the Road from Rome to Maastricht*

The following re-construction of the stages of the integration project up to the turning-point of 1992 is only concerned with the tensions between “the economic” and “the social”. “Economic constitutionalism”, as we could paraphrase Karl Polanyi’s famous observation on the establishment of the liberal market economies of the nineteenth century, “was planned”, a social countermove was not.<sup>10</sup> Economic constitutionalism was certainly in line with the preferences of powerful economic interests, but its “planning” occurred essentially through institutional configurations which were designed to promote the integration project in its entirety. Notions such as “economic constitutionalism” were unknown to the “founding fathers” of the integration project, and “ordoliberalism” was a school of thought virtually unknown to legal scholarship outside the Federal Republic. And yet, the primacy of “the economic” over “the social” was of an irresistible strength. This thesis is anything but original.<sup>11</sup>

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<sup>9</sup> Christian Joerges, „Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik“, in: Rudolf Wildenmann (ed.), *Staatswerdung Europas? Optionen einer Europäischen Union*, Baden-Baden: Nomos 1991, 225-268 (= EUI Working Paper No. 91/15, San Domenico di Fiesole, 1991); English translation (“The Market without the State? The ‘Economic Constitution’ of the European Community and the Rebirth of Regulatory Politics”), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=302710](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302710)

<sup>10</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, Boston MA: Beacon Press, 1957, 141.

<sup>11</sup> Its leading exponents are affiliated to the Max-Planck Institute for the Study of Societies ([http://www.mpifg.de/index\\_en.asp](http://www.mpifg.de/index_en.asp)). Path-breaking were the studies of Fritz W. Scharpf, in particular his *Governing in Europe: Effective and Democratic?*, Oxford/New York: Oxford University Press. A recent summary by Martin Höpner, “Curbing negative integration: German supervisory board codetermination does not restrict the common market”, (2018) *Maastricht Journal*, published online in July 2018, DOI: 10.1177/1023263X18773052. Höpner’s essay is concerned with the flagship of the “German Model”: Case C-566/Konrad Erzberger v. TUI AG, EU:C:2017:562. We see here a signal of resistance of national economic culture against the imposition of the neoliberal market utopia. The strength of this signal remains questionable; Martin Höpner himself has articulated strong doubts; see his comment on the Polbud judgment of 25 October 2017, ECLI:EU:C:2017:804, at <https://verfassungsblog.de/regime-shopping-unter-dem-schutz-des-europarechts-das-polbud-urteil-des-europaeischen-gerichtshofs/>.

## *1.2. The Strength of the “Integration through Law” Project and its Flaws*

Legal scholarship during the so-called foundational period of the integration project was deeply committed to the concept of “integration through law”, the idea, as the present President of the EUI, Renaud Dehousse, and his predecessor have explained in a joint publication, that law should, and, in fact, would, operate as the “agent and the object of integration”.<sup>12</sup> The formula needs to be understood in the light of the early jurisprudence of the (then) ECJ and its proclamation of a “constitutional charter” for the EEC. The doctrinal edifice of this charter was of a stunning stringency: (1) European law constitutes a genuine order; it is neither state nor international law. (2) European law, where sufficiently substantiated, as, in particular, the four economic freedoms, has “direct effect”, and is the “law of the land”. (3) “Direct effect” implies that it enjoys primacy (*Anwendungsvorrang*) over national law. (4) European citizens can invoke the rights granted by European law against national legislation and thus promote its impact. (5) European law must be uniform throughout the Community; the ECJ is the guardian of European law with the authority to interpret and rule upon EU law, thereby ensuring this unity.

Generations of European law scholars and practitioners have defended these principles. To the best of our knowledge, none of them has ever characterised the “constitutional charter” as a variety of “economic constitutionalism”. The great exception was the community of ordoliberal scholars in the Federal Republic. The integration through law project had much to offer to this school of thought. To outline briefly their commonality:<sup>13</sup> conceptually, ordoliberalism was particularly suited to the European realm, justifying, in its self-limiting liberal mode, the theorem of the primacy of European law and further detailing the precise, and similarly self-limiting “economic constitutional” content of European integration: the individual economic freedoms guaranteed by the founding Treaty, the opening up of national economies, and the non-discrimination principles and competition rules were all easily represented as a collective decision in favour of an economic constitution that mirrored and matched the ordoliberal framework conditions for the establishment of a market economic system. More fundamentally, the simple fact that Europe began its life as an *economic* community, lent enduring plausibility to ordoliberal arguments: where Europe could be portrayed as a law-based order, committed to the guarantee of economic freedoms, it attained an “meta-political” legitimacy of its own, independent of the institutions of the democratic constitutional state.<sup>14</sup> In this way, ordoliberalism was able to answer the question about the legitimacy of the project of

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<sup>12</sup> Renaud Dehousse and Joseph H.H. Weiler, “The Legal Dimension”, in William Wallace (ed.), *The Dynamics of European Integration*, London: Pinter, 1990, 242-60, 243.

<sup>13</sup> Cf., already, Christian Joerges, “The Market without a State?”, note 9 supra; more recently idem, “The Overburdening of Law by ordoliberalism and the Integration Project”, in Hien/Joerges supra note 5, 179-200.

<sup>14</sup> The foundational characteristics have been formulated by Alfred Müller-Armack, “Die Wirtschaftsordnung des Gemeinsamen Marktes”, in: idem (ed.), *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur Europäischen Integration*, Freiburg: Rombach, 1966, 401-415, at 401 ff.

integration more conclusively than the prevailing orthodoxy. The fact that the EEC had constituted itself as a “market without a state” did not raise eyebrows in European legal scholarship.<sup>15</sup>

What is so irritating about the orthodoxy of integration through law and its ordoliberal hijacking? The main fallacy was not as plainly visible as it became after the financial crisis: Legal diversity is not just a result of particular, however democratically legitimate processes, but an evil in itself, because it is an obstacle to economic integration which needs to be overcome for that reason. In other words, harmonised law is a better law because it accomplishes more Europe. This is the substantive message. Its sociological assumptions are equally weak. How can law be the driver and guide of the integration project? Law reflects political history, societal struggle, ambitions. It will never be a “system”, but will have to live with internal contradictions. We will take a second look at all this in Section II in the light of Karl Polanyi’s economic sociology and its messages, namely, economic institutions will always be embedded in political and cultural life, and will have to respond to the societal demands; the economy is always a field of *political* conflict that involves the state.

### *1.3 The European Turn to Anglo-Saxon Neoliberalism*

The integration project entered its most dynamic phase after the Single European Act,<sup>16</sup> with its turn to majority voting, and the subsequent European-wide support for Jacques Delors’ Single Market Programme.<sup>17</sup> Delors was a charismatic leader. He understood that the *Zeitgeist* of the 1980s was in favour of an alliance which included Margaret Thatcher’s Britain, was supported by Reagan’s America and a strong belief in economic liberalism. Germany’s ordoliberal tradition had undergone a transformation of paradigmatic dimensions. It had replaced its founding fathers, the economist Walter Eucken and the lawyer Franz Böhm, by a new generation, which adhered to the economic philosophy and constitutional theory of Friedrich A. von Hayek. There were no significant *practical* differences left between the Anglo-Saxon and the German variety of economic liberalism.<sup>18</sup> It may have been Delors’ political identity as a French socialist, which helped him to overcome the established animosities between market-oriented and interventionist policies. Be that as it may, his internal market programme promoted a broad range of innovations which transformed the Economic Community and its law

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<sup>15</sup> The theoretical master mind of the ordoliberal tradition clearly is Ernst-Joachim Mestmäcker. At the occasion of an interview honouring his 90th birthday he explained: No one has ever mentioned the competition rules during the ratification process; none of the Member States imagined that the economic freedoms would be conceptualised as directly applicable individual rights. To rephrase these memorable explanations: nobody realised that economic constitutionalism was to become the Community’s “constitutional charter”. The interview was given to Werner Mussler and published in the *Frankfurter Allgemeine Zeitung* of 22.02.2018, no. 45, p. 22.

<sup>16</sup> OJ 1987, L 169/1.

<sup>17</sup> European Commission, *Completing the Internal Market*, COM(85) 310 final.

<sup>18</sup> See in more detail Christian Joerges, “What is left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review* 461-489, with references at p. 472 to the position of the *Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft* (Advisory Board of the German Ministry of the Economics), *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt* (Schriften-Reihe 51), Bonn 1986.

through new regulatory endeavours. Its trademark became the move towards “social regulation”, a synthesis of the market-building agenda with the establishment of new regulatory techniques in the spheres of consumer protection, safety at work, and environmental policy.

“Social regulation” was meant to improve the functioning of markets and must not be equated with the re-distributional politics of the welfare state. Giandomenico Majone, the most important advocate of social regulation in the internal market, has explained time and again that distributional politics would require majoritarian politics and a type of legitimacy that the European Community could not provide.<sup>19</sup>

Our focus here is on the tensions between Europe’s market-building and its welfare-state legacy. In this respect, the new dynamics of the integration process were by no means a renaissance. And yet, the quest for a “more social” Europe could not be neglected. Under the Presidency of Romano Prodi, the Commission sought a constructive response in 2001 in its White Paper on “European Governance”.<sup>20</sup> This move seemed to respond quite convincingly, in principle, to widely-shared perceptions of the *impasses* of the “old” community method and the enormously increasing regulatory burdens on the EU system. The governance initiative did, in fact, generate manifold innovations. Any one-dimensional assessment of these activities would be misplaced. But the liberation of the European *praxis* from the bedrock of the “integration through law” agenda and the discipline of the rule of law was risky and went, in a particularly glamorous instance, a step too far. It was the Lisbon European Council of 2001 which recommended resort to the Open Method of Co-ordination (OMC) in areas of social policy where the Treaty had failed to confer legislative powers. The OMC became regarded as the new mode of governance *par excellence*. Its advocates expected that it would open opportunities to cure Europe’s notorious “social deficit”.<sup>21</sup>

With the benefit of hindsight, the affinities between the new modes of “integration through de-legalisation”,<sup>22</sup> the post-crisis turn to the “Union method” and the transformation of economic and social governance are readily apparent. The pre-crisis

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<sup>19</sup> See his first pertinent intervention “The European Community Between Social Policy and Social Regulation” (1993) 31 *Journal of Common Market Studies*, 153-170 and then the classic: *Regulating Europe*, London: Routledge 1996.

<sup>20</sup> European Commission, “European Governance. A White Paper”, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5; [http://europa.eu.int/comm/governance/index\\_en.htm](http://europa.eu.int/comm/governance/index_en.htm). Tellingly enough, Majone refused to contribute to the symposium edited by Christian Joerges, Yves Mény and J.H.H. Weiler, “Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”, European University Institute-Robert Schumann Centre/ NYU School of Law-Jean Monnet Center 2002 (available at <http://www.eui.eu/Documents/RSCAS/Research/OnlineSymposia/Weiler.pdf>) underlining that the White Paper did not deserve the attention it attracted.

<sup>21</sup> See David M. Trubek and Louise G. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination” (2005) 11, *European Law Journal*, 343-364; Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, 2006; Charles F. Sabel and Jonathan Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, (2008) 14 *European Law Journal*, 271 – 327.

<sup>22</sup> Christian Joerges, “Integration through de-legislation?: An irritated heckler” (2007), European governance papers (EUROGOV), no N-07-03, available at <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf> [“Integration Through De-Legalisation?”, *European Law Review* (2008) 33, 219-312].

turn to governance replaced the legal enforceability of legislative and administrative acts by co-ordination processes, procedures of multilateral supervision upon the basis of guidelines or benchmarks laid down by the European Council, the Council and the Commission. Public support for this policy of the co-ordination and comparison of best practices was intended to provide the necessary incentives to ensure success and performance, which would inevitably lead to adaptation and change of national policies at Member State level. The evidence upon which such positive expectations were based has always been slim. What seems much more unsettling, however, are the deeper institutional and political defects which the turn to governance revealed rather than cured. What the proponents of the OMC sought to accomplish was nothing less than a transformation of Europe's constitutional constellation (its *Verfassungswirklichkeit*) by what in the post-crisis Euro-speak today would be called "unconventional" means. What they under-estimated, however, was the power of the interest configurations which militated against "social Europe" and could not be overcome by persuasion and argumentation.<sup>23</sup>

## II. The Maastricht EMU and its Aftermath

The Maastricht Treaty was welcomed by the broad mainstream of European legal studies as a continuation and a deepening of what had been accomplished, a strong move, hence, towards "an ever closer Union". The deepening of economic integration by monetary integration ("One Market, one Money")<sup>24</sup> was accompanied by a broadening of European powers (environmental policy, industrial policy), a strengthening of the "social dimension" of the European project, and the establishment of a European citizenship. The importance of the Treaty is beyond doubt. What has changed drastically, however, is its evaluation. The establishment of EMU by the Treaty of Maastricht was as a turning-point of the utmost, albeit tragic, importance. EMU did, by no means, foster a stronger convergence of economic policies. The expectation that the pressure to harmonise, stemming from integration, would become stronger and even irresistible under a common currency,<sup>25</sup> which may have had its *fundamentum in re* in the smaller and more homogeneous Community of the 1960s and 1970s, has become implausible. EMU, as it was established in Maastricht, can no longer be defended as a command of economic reason, but is more adequately understood as a political project, assuring Germany's neighbours that the country would be faithful to its European commitments.<sup>26</sup> Conceptually speaking, the Maastricht compromise has produced a hybrid, an odd

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<sup>23</sup> Admirably insightful back in 1939 Friedrich A. von Hayek, "The Economic Conditions of Interstate Federalism", in Friedrich A. Hayek, *Individualism and Economic Order*, Chicago: University of Chicago Press, 1949, 255-272 (reprinted from the *New Commonwealth Quarterly* V. 2, September 1939), 131-149.

<sup>24</sup> European Commission, "An evaluation of the potential benefits and costs of forming an economic and monetary union", available at [http://ec.europa.eu/economy\\_finance/publications/publication7454\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication7454_en.pdf).

<sup>25</sup> Ernst-Joachim Mestmäcker, "Power, Law and Economic Constitution", (1973) 2 *The German Economic Review*, 177-198.

<sup>26</sup> Kenneth Dyson, "Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency", (2013) 35 *Journal of European Integration*, 207-222; Barry Eichengreen, *Hall of Mirrors: The Great Depression, The Great Recession, and the Uses-and Misuses-of History*, Oxford: Oxford University Press 2015, 90 ff.



mixture of German ordoliberal ideas and French *planification* with Germany defending its stability philosophy in substantive principles and statutory norms ceding to French preferences in the procedural norms of the General ECB Council.

### *II.1. EMU as a “Diagonal” Conflict Constellation*

Monetary policy had become an exclusive competence of the Union (Article 3(1) c TFEU). With this provision, the Union claims supremacy in the policy area conferred to it, in that respect “vertical conflicts” between European and national policies were no longer conceivable. However, the conferral of powers did not include economic and fiscal policies. These were not “pre-empted”. This is why European monetary policy and national policies could still come into conflict. This “diagonal” conflicts constellation is by no means unique.<sup>27</sup> It is, however, particularly precarious: both the Union and the Member States are certainly interested in the functioning of their economies. But the powers needed to accomplish this objective are attributed to two distinct levels of governance. The type of conflict resolution foreseen in Article 119 TFEU is “the adoption of an economic policy which is based on the close coordination of Member States’ economic policies” as substantiated in Article 121 TFEU. As is plainly visible from the legal texts and substantiated by meticulous analyses,<sup>28</sup> this instrument was a *lex imperfecta*, an order devoid of meaningful sanctions. The “stability community” of the EMU existed only on paper. The Treaty of Maastricht neither provided for mechanisms to enforce its ideational basis, nor did the successive Stability and Growth Pact (SGP) of 1997 complement the Treaty accordingly. The functioning of the whole new regime was dependent on good economic luck and constant political bargaining.

If the Maastricht EMU and the SGP are, legally speaking, too soft, why not fix the construct through strong rules? This question which is so often answered in the affirmative, leads to the true gist of the matter both in practical and in constitutional terms. Not only does the diversity of socio-economic conditions, even within the Eurozone, generate a great variety of competing interests, the differences in the institutional configurations, economic cultures and social norms practiced explain why European command and control governance cannot accomplish its objectives. The normative and constitutional implications of that conflict constellation are of fundamental importance. What is so problematical about the European case and what distinguishes the European order from consolidated constitutional democracies is the lack of a political infrastructure and the unavailability of an institutional framework in which democratic political contestation could occur and legitimate a completion or improvement of the imperfect edifice that has been established. We have to conclude, sadly, that the Maastricht arrangement was an ill-defined political compromise, rather than a sustainable accomplishment of constitutional validity and strength.

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<sup>27</sup> See Christian Joerges, “The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective”, (1997) 3 *European Law Journal*, 378-406 at 398 ff.

<sup>28</sup> Beate Braams, *Koordinierung als Kompetenzkategorie*. Tübingen: Mohr Siebeck. 2013.

## II.2 Emergency Europe and its “Crisis Law”

The fragility of the Maastricht arrangement was a birth defect that remained latent until the economic crisis began to unfold in 2008. Since then, we have witnessed a turbo-speed establishment of new modes of transnational economic governance and unheard of regulatory techniques. Detailed descriptions are readily available<sup>29</sup> and need not be reproduced here.

Our main concern in this essay is with “the social” under the impact of the crisis. The commitment to establish “a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection” (Article 2 TEU) has become invisible in crisis law and politics. An irresistible logic militates against a defence, let alone a deepening of the “European social model”. Under the conditions of Monetary Union, Member States can respond to the objective of a strengthened competitiveness only through “internal devaluations”, *i.e.*, austerity measures such as reductions of wage levels and/or social entitlements. These measures reach out into the whole range of economic and social policies with requests for structural reforms and adjustments.

This impact on social justice “within” the Member States of the EU is still an incomplete account. However compelling this reasoning may seem, the practice, Europe’s crisis politics, has, in addition, created a sharp asymmetry between the North and the South of Europe.<sup>30</sup> The so-called receiving states have become unable to control their own vulnerability. The rules of the Fiscal Compact and the “rescue” programmes of the Memoranda of Understanding have transformed them into “zero choice democracies”.<sup>31</sup> European studies in both law and economics, and, to a large degree, also in political science, remain complacent.

“After over half a decade of legal measures and prolific commentary on those measures, it is helpful to stand back and take stock. We will consider whether

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<sup>29</sup> See, for comprehensive collection of pertinent legal materials Fernando Losada and Agustín José Menéndez (eds), *The Key Legal Texts of the European Crises Treaties, regulations, directives, case law*, ARENA Centre for European Studies, Oslo 2014 is available at <http://www.sv.uio.no/arena/english/research/publications/publications-2014/menendez-losada-legal-texts-v1-170914.pdf>. The mainstream of European scholarship raises few objections, a minority does, *e.g.*, Christian Joerges, “Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation”, *German Law Journal* (2014) 15, 985–1028, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595); Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance*, Oxford: Hart Publishing, 2014.

<sup>30</sup> We refrain for reasons of space from a discussion of The Varieties of Capitalism approach – still the most important explanatory framework of the Eurocrisis in comparative political economy; for a particularly illuminating analysis of the North/South asymmetries see Torben Iversen, David Soskice and David Hope, “The Eurozone and Political Economic Institutions”, (2016) 19 *Annual Review of Political Science*, 163-185; for an important critical renewal see Lucio Baccaro and Jonas Pontusson, “Rethinking comparative political economy: the growth model perspective”, (2016) 44 *Politics & Society*, 175-207.

<sup>31</sup> Niklos Heplás, “Supra-national Technocracy and Zero Choice Democracy: The Greek Experience”, contribution to the workshop “Technocracy and Democracy in Times of Financial Crisis”, University of Darmstadt, 6-7 March 2014 (on file with authors).

euro-crisis law ... has by now mainly become simply the macro-economic law of the EU.”<sup>32</sup>

Europe’s most famous public intellectual holds a different view: our crisis politics, Jürgen Habermas submits, has divided Europe because of its “palpable, indeed glaring social injustice”.<sup>33</sup> We are, of course, aware of Mario Draghi’s “great bazooka”, which is very generally held to have “saved” the common currency<sup>34</sup> - and was, at the same time, a response to the North-South asymmetry in the Eurozone, which corrected the risk assessments of southern economies by the financial markets.<sup>35</sup> We are equally aware of the machinery of the “European Semester” which has enhanced not only the European governance capacity of policy formulation, guidance and monitoring, but has also, by the same token, replaced the “one size fits all” philosophy of European rule by a differentiating operation in the entire spectrum of Member States’ economic and social policies.

This may be more or less effective. However, we are concerned with the democratic deficiencies of the new modes of European governance. The much praised rescue operations of the ECB have been justified in the *Gauweiler* judgment<sup>36</sup> by a blatant de-constitutionalisation of European rule: monetary policy, so we have been told, is not politics, which would require democratic accountability; it is, instead, an epistemic task, albeit one which is insulated against epistemic objections, because “the law” has decided that the required expertise “devolves solely upon the ECB”.<sup>37</sup> Not only is this decided by law, but the law also knows where that expertise resides. The learned AG did not hesitate to characterise this arrangement as a “constitutional framework”. This, however, is a

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<sup>32</sup>Thomas Beukers, Claire Kilpatrick and Bruno De Witte, “Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead”, in id. (eds) *Constitutional Change through Euro-Crisis Law*, Cambridge: Cambridge University Press, 2017: comprehensive coverage available at <http://eurocrisislaw.eui.eu/>.

<sup>33</sup> “Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible”, (2015) 21 *European Law Journal*, 546–557, 550. (Habermas’ command of the German language is simply stunning; the original of the pertinent passage reads: „...*einer Krisenpolitik...*, *die infolge ihrer handgreiflichen, ja schreienden sozialen Ungerechtigkeit die europäischen Nationen gegeneinander aufgebracht hat*“).

<sup>34</sup> “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me it will be enough,” explained Mario Draghi in London on 26 July 2012, *verbatim* at <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

<sup>35</sup> See in more detail Christian Joerges, “*Pereat iustitia, fiat mundus*: What is left of the European Economic Constitution after the OMT-litigation, (2016) 23 *Maastricht Journal of European & Comparative Law*, 99-118, also available at SSRN: <http://ssrn.com/abstract=2691929> and <http://journals.sagepub.com/doi/pdf/10.1177/1023263X1602300106>.ML ; “Nicole Scicluna (2017): Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis, *Journal of European Public Policy*, DOI:10.1080/13501763.2017.1362026 (online version at 7).

<sup>36</sup>Case C-62/14 - *Peter Gauweiler and others v. Deutscher Bundestag*[ECLI:EU:C:2015:400].

<sup>37</sup> The reasoning of the *Gauweiler* judgment had been anticipated by its Advocate General Cruz-Villalón (Opinion in Case C-62/14 *Peter Gauweiler and others v. Deutscher Bundestag*, delivered on 14 January 2015). The pertinent passage of his opinion deserves to be cited at some length: “The ECB must ... be afforded a broad discretion for the purpose of framing and implementing the Union’s monetary policy. The Courts, when reviewing the ECB’s activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB’s activity, its mandatory nature aside, must be characterised by a considerable degree of caution,” AG Opinion, para. 127.

framework beyond any constitutional, let alone, democratic, credential. The ordering of the entire economy of the Eurozone is conceptualised as a non-political *epistemic* task. This task is delegated to a supranational bureaucracy which enjoys practically unlimited discretionary powers.

The Semester is less dramatic, but still deplorable. The confidence of the Commission that an adoption of the recommended reforms will help the Member States “to recover from the crisis and create sustainable growth”<sup>38</sup> seems all too tainted by an unwarranted “pretence of knowledge”<sup>39</sup> and is insensitive to the resistance of the national economic cultures against imposed changes. And what about the legitimacy of such endeavours and practices? “[T]he Semester allows EU institutions to exercise quasi-normative functions, issuing recommendations that are very detailed and that are not just ‘broad guidelines’, as envisaged by Article 121 TFEU...These recommendations constrain national authorities’ autonomy, leaving non-compliance as the main way out. Yet, this option is not readily available to all Member States. Due to its power-based nature, the effectiveness of the mechanism depends on the vulnerability of the State to this threat. Those States at risk of being put under an excessive deficit procedure have few other options apart from complying with the supranational recommendations.”<sup>40</sup> Acting under high uncertainties and normatively deeply problematical conditions is anything but a promising prospect.

### III. Countermoves? Europe’s Welfare Legacy is still Alive but Unwell

Back to the beginning: Alan Milward’s diagnosis that the European project served as a rescue of the welfare state, so we have submitted in the first section, may experience a renaissance. We will, in our concluding section neither engage in prophecies about the future of the integration project nor deliver a blueprint of its renewal. We will, instead, comment on three recent initiatives. One of them, the “European Pillar of Social Rights” is a somewhat bombastic example of the European political culture of unlimited optimism.<sup>41</sup> The second, namely, the Revision of the Posted Workers Directive, is an overdue response to the East-West conflicts – with both pros and cons. The third is the project of a European Employment Insurance, which seems to be an acid test of European solidarity.

#### *III.1. The European Pillar of Social Rights: Of Promises and Reality*

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<sup>38</sup> EU Commission MEMO, Q&A: Country-specific recommendations, Brussels, 2 June 2014, available at [http://europa.eu/rapid/press-release\\_MEMO-14-388\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-388_en.htm).

<sup>39</sup> Friedrich A. von Hayek, “The Pretence of Knowledge”. Nobel memorial Lecture, 11 December 1974, (1989) 79 *The American Economic Review*, 3-7, available at <http://pavroz.ru/files/hayekpretence.pdf>.

<sup>40</sup> Francesco Costamagna, “Industrial Relations and Labour Law in the EU Economic Governance Mechanisms: the cases of Italy and Germany”, ms. Turin 2018 (on file with authors).

<sup>41</sup> Giandomenico Majone, “The Deeper Euro-Crisis or: The Collapse of the EU Political Culture of Total Optimism,” Working Paper, 2015, <http://cadmus.eui.eu/handle/1814/35281>.

As the governance of the Eurozone crisis kept raising concerns about its effects on social justice and democracy, both at European and Member State level,<sup>42</sup> the EU leadership has responded by officially declaring its commitment to achieving a “Social Triple-A”.<sup>43</sup> What followed thereafter was the Commission’s announcement of a European Pillar of Social Rights (EPSR or the Pillar) on 8 March 2016.<sup>44</sup> Although immediately related to the Eurozone and the policies of austerity, the EPSR has also come as a response to the wider critique and concerns about the generally weak(ened) social dimension of the European integration project.<sup>45</sup> These concerns are related to some of the contested effects of free movement, which is exemplarily expressed in the posting of workers debate and the CJEU’s controversial case law, which we will discuss in the following section.<sup>46</sup> After one year of consultations since its announcement, on 26 April 2017, the final proposal for the EPSR has been issued by the Commission, and was inter-institutionally proclaimed on 17 November 2017 at the Social Summit in Gothenburg.<sup>47</sup> Except for expressing the political commitment of the EU institutions to increased social convergence, the Proclamation does not have a legally-binding force. But, even if it were to include legally-binding elements, as once happened with the EU Charter of Fundamental Rights,<sup>48</sup> we doubt that the Pillar has the potential to overcome Europe’s socio-economic diversity and contravene the effects of austerity governance – conditions hence which block the establishment of a social dimension of the integration project of general validity.

Without going into detail about the Pillar’s content,<sup>49</sup> we see the weakness of the instrument less in its non-binding nature, but rather in the Commission’s approach to socialise Europe and the Eurozone through the proclamation of another declaration of individual social rights. The majority of the rights and principles, with a few possible exceptions referring to non-discrimination and fair working conditions, require active policy and legislative measures, as well as very substantial budgetary means, in order to establish the institutional structures indispensable for a meaningful realisation of these rights. Almost all rights and principles from the third chapter “Social Protection and Inclusion” (childcare and support to children, social protection, unemployment benefits, minimum income, old age income and pensions, *etc.*) express rights and entitlements to public services and benefits, and they are all are of a programmatic nature. Without the essential legislation and institutional structures, the judicial enforcement of such rights would be futile. For example, a genuine realisation of the right to life-long learning<sup>50</sup>

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<sup>42</sup> See Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis*, Cambridge: Cambridge University Press, 2017.

<sup>43</sup> European Commission, “Completing Europe’s Economic and Monetary Union”, 2015, available at [https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf).

<sup>44</sup> European Commission, Communication of 8 March 2016 launching a consultation on a European Pillar of Social Rights, COM(2016) 0127.

<sup>45</sup> The context and the motives are comprehensively documented in, European Parliament, Report on a European Pillar of Social Rights (2016/2095(INI)).

<sup>46</sup> See Sasha Garben, “The European Pillar of Social Rights: Effectively Addressing Displacement?”, (2018) 13 *EUConst Special Issue*, 210-230.

<sup>47</sup> Press Release 673/17, European Pillar of Social Rights: Proclamation and signing, Brussels, 17/11/2017.

<sup>48</sup> Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02.

<sup>49</sup> For a detailed analysis of the Pillar’s content see Zane Rasnača, “Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking”, ETUI Working Paper 2017.05.

<sup>50</sup> Art. 1, EPSR.

would imply that each Member State has a concrete obligation to adopt laws and allocate sufficient means for establishing national programmes for life-long learning. Where such programmes do not (sufficiently) exist, it is hard to imagine how judicial recognition and enforcement of that particular social right would increase social justice. This pursuit of social objectives through the language of social rights instead of politics, might lead to what Florian Rödl calls “the juridical misconception” of social rights (*juridisches Mißverständnis*).<sup>51</sup> Although the Pillar itself recognises that legal enforcement of the principles and rights first requires dedicated measures or legislation to be adopted at the appropriate level,<sup>52</sup> it still remains unclear how that will be achieved in concrete terms. As the realisation of most of these rights will depend on the structural and material capacity of each Member State, the current diversity of national social models and differences in terms of the availability of the resources in the respective Member States will certainly be reflected in the Pillar’s outcome. Hence, our concerns about the suitability of the Pillar’s approach to achieve social convergence both in the Eurozone and, even less so, in the EU.

Adding a social dimension to the market integration through individual rights has been the rule, rather than the exception, in the history of the European integration project,<sup>53</sup> and thus the approach of the EPSR should not come as a great surprise. What the rights approach of this endeavour ultimately unravels is the inherent difficulty in further advancing systemic social reforms at EU level through real harmonisation measures due to the high level of diversity in the Member States’ *social acquis*.<sup>54</sup> Regarding the European varieties of capitalism and the diversity of the national social models shaped through a long-standing history of authentic socio-economic processes, full social harmonisation is not only difficult or impossible, but also undesirable.<sup>55</sup> Under these circumstances, what the Pillar fails to do, and where a legally-binding character might have been decisive, is to offer concrete and adequate protection to the existing Member States’ social models from the negative effects of economic and monetary integration. This is part of what Vandenbroucke *et al.* define as a “European Social Union”, in which the core idea is the aspiration for “a Union that enables Member States to be flourishing welfare states, not that the EU should become a welfare state itself”.<sup>56</sup> Several times, both in its Preamble and in the articles, the Pillar refers to the importance of the national social arrangements and institutions,<sup>57</sup> but it does not provide clear and concrete response to the two most pressing threats, namely, the dis-embedding forces of the internal market rationality which is exemplarily expressed in the *Laval-Viking-Rüffert* jurisprudence of

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<sup>51</sup>Florian Rödl, “Soziale Rechte in Europa: Von irreführenden Versprechen und notwendigen Kämpfen2, WSI-Herbstforum 2017.

<sup>52</sup> Preamble recital (14), EPSR. Also see the SWD?

<sup>53</sup>See more on this debate in Martin Höpner and Armin Schäfer, “Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration”, MPIfG Discussion Paper 10/8 2010.

<sup>54</sup>See Martin Höpner, “Mogelpackung: Warum soziale Individualrechte die Europäische Union nicht sozialer machen,” May 25, 2017, available at <http://www.ipg-journal.de/rubriken/europaeische-integration/artikel/mogelpackung-2047/>.

<sup>55</sup> See Vandenbroucke *et al.*, *supra* note 42.

<sup>56</sup>*Ibid.*

<sup>57</sup> Preamble recital (17), EPSR.

the CJEU, on the one hand, and in the negative impact of the financial crisis and the turn to austerity policies, on the other.

The message that the Pillar sends is clear: EU legitimacy is in crisis and that needs to be addressed by strengthening the overall social dimension of the European integration project, or social convergence in the Commission's words. In this regard, we acknowledge that in recognising the social consequences of the crisis and emphasising the urgency to address them, the EPSR has a value in itself.<sup>58</sup> Yet, the responses that the Pillar provides are unlikely to countervail the problems that it has identified. This is what Simon Deakin describes as a "discrepancy between the Pillar's means and ends".<sup>59</sup> Two years after its first announcement, the Pillar has, however, undoubtedly raised high expectations.<sup>60</sup> As broken promises may easily backfire and increase populist sentiments, the future of the EPSR will largely depend on the capacity of the EU and Member States to develop and implement concrete social policies in order to realise its objectives.

### *III.2. The Problems with Social Justice in an ever more Heterogeneous Union: The Exemplary Importance of the Revision of the Posted Workers Directive*

Have the chances of reconciling Milward's welfare state with Europe's economic constitutionalism improved through Europe's turn to the Anglo-Saxon variety of economic liberalism? This is simply inconceivable, notwithstanding the solemn commitment to a "highly competitive social market economy" in Article 3.3 of the Lisbon Treaty. This wording is a camouflage. There is no way to realise an equivalent to the *soziale Marktwirtschaft* as it was once conceptualised by Alfred Müller-Armack in the early years of the Federal Republic.<sup>61</sup> The proponents of a "more social" Europe were not prepared to face these difficulties. They continued to operate in the paradigm of integration through law and its commitment to an ever more uniform Europe. They were not irritated by the publication in 1990 of Gøsta Esping-Andersen's seminal study on *The Three Worlds of Welfare Capitalism*,<sup>62</sup> in which he identified deep differences between "liberal", "Christian democratic" and "social democratic" varieties of welfarism, and listed the enormously complex differences between these systems. Everybody could hence know and should have known why a unitary European welfare state was not conceivable, and was completely illusionary after Eastern enlargement. What legal scholarship is unable to understand, political practice has, nevertheless, to address. The Posted Workers Directive (PWD), which has recently undergone revision,<sup>63</sup> does precisely this.

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<sup>58</sup> Preamble recital (10), EPSR.

<sup>59</sup> Simon Deakin, "What Follows Austerity? From Social Pillar to New Deal", in Vandenbroucke et al., supra note 42, at 208.ff.

<sup>60</sup> See Statement from the Meeting of the trade union leaders of the Visegrad countries, Budapest, 10.-11. May 2018.

<sup>61</sup> See in much detail Christian Joerges and Florian Rödl, "The 'Social Market Economy' as Europe's Social Model?" in: Lars Magnusson and Bo Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, Brussels: Lang 2005, 125-158, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=635362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362).

<sup>62</sup> Princeton, NJ: Princeton University Press, 1990.

<sup>63</sup> COM(2016) 128 final.

What started as a topic mainly of interest to labour law scholars, has grown into a European issue of great salience, particularly due to a series of infamous CJEU rulings known as the *Laval quartet*.<sup>64</sup> The rulings have illustrated the tensions of European integration that we have described earlier in exemplary fashion.<sup>65</sup> The “embedded liberal bargain”<sup>66</sup> has not only been unravelled, but broken, as the diversity of the national *social acquis* and industrial models was no longer immune to the forces of economic integration. This understanding of the posting model meant that companies could temporarily post workers to another Member State, avoiding the more demanding labour law regulation of that state.<sup>67</sup> It was mainly due to the Court’s narrow interpretation of the already narrow framing of the options for wage- and standard-setting offered by the PWD, which failed to fit some of the national social models, especially those that relied on wide usage of collective agreements.<sup>68</sup> This limited capacity of the social partners and the national regulation to set and regulate social objectives in a posting constellation, raised fear of downward pressure on labour and social protections standards, attributing another social failure to the integration project and questioning its legitimacy. Its salient presence in the recent French election campaign,<sup>69</sup> as well as in the overall public debate, points to the significance of this topic for the general acceptance and (social) legitimacy of the European integration project.<sup>70</sup> One issue, in particular, among the plethora of concerns that the posting model has repeatedly given rise to through the years, was the question of wages: the way in which they are set and the definition of pay. *Laval*, *Rüffert*, but also the more recent cases *Bundesdruckerei*,<sup>71</sup> *RegioPost*,<sup>72</sup> and *Finnish Electricians Union (Sähköalojen ammattiliitto)*<sup>73</sup>, have, time and time again, struggled with it, paving the way for the recent revision of the PWD.

The procedure of the revision might be more interesting than the outcome itself, as it has again unveiled the much deeper tension behind the posting of workers, namely, the West-East division upon the issue of labour mobility in general.<sup>74</sup> The “equal pay for posted workers” principle as well as the extended meaning of pay resulted in the national

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<sup>64</sup> C-319/06 *Commission v Luxembourg* [2008] ECR I-4323; C-341/05 *Laval un Partneri* [2007] ECR I-117767; C-346/06 *Rüffert* [2008] ECR I-11767 and C-438/05 *The International Transport Workers Federation and the Finnish Seamen’s Union* [2007] ECR I-10779.

<sup>65</sup> See Christian Joerges and Florian Rödl, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*”, (2009) 15 *European Law Journal*, 1–19.

<sup>66</sup> Diamond Ashiagbor, “Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration,” (2013) 19 *European Law Journal* 19: 303–24.

<sup>67</sup> Simon Deakin, “Regulatory competition after *Laval*”, RePEc–Econpapers, 2008.

<sup>68</sup> See Mark R Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond*, Oxford: Hart Publishing, 2014.

<sup>69</sup> *Le Travail Détaché, Un Dossier Qui a Enflammé Les Débats de La Présidentielle | L’Opinion*, accessed 18 May 2018, <https://www.lopinion.fr/edition/economie/travail-detache-dossier-qui-a-enflamme-debats-presidentielle-132577>; ‘La Directive Travailleurs Détachés: L’élection Présidentielle’, *Le Monde.fr*, 2017, <http://www.lemonde.fr/programmes/economie-europeenne/la-directive-travailleurs-detaches>.

<sup>70</sup> See Jotte Mulder, ‘Social Legitimacy in the Internal Market : A Dialogue of Mutual Responsiveness’ 2016, <http://cadmus.eui.eu/handle/1814/41264>.

<sup>71</sup> C-549/13 – *Bundesdruckerei* [ECLI:EU:C:2014:2235].

<sup>72</sup> C-115/14 – *RegioPost* [ECLI:EU:C:2015:760].

<sup>73</sup> C-396/13 - *Sähköalojen ammattiliitto* [ECLI:EU:C:2015:86].

<sup>74</sup> See Maurizio Ferrera, “The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights”, (2016) 22 *European Law Journal* x-# x, at 791.



parliaments of eleven Member States (all but Denmark from Central and Eastern Europe) sending reasoned opinions to the European Commission, reaching the threshold for a yellow card.<sup>75</sup> The potential deprivation of an important competitive advantage was rendered unfair by the new Member States, regardless of the effects such competition might have on the labour and social arrangements of the old ones. Discussions on the social well-being of the posted workers themselves and principles such as equality in the workplace found themselves suppressed by the economic argument about the restrictiveness of the Revised Directive for posting companies from the East. Without entering the debate on the commodification of labour in the internal market as is evident from the yellow card discussion,<sup>76</sup> it has shown that justice and fairness in the EU are predominantly conceptualised based upon market rationality.

After two years of enduring negotiations, on 29 May 2018 the final text of the Revision was approved in the European Parliament by a large majority,<sup>77</sup> and then adopted by the EPSCO Council on 21 June 2018.<sup>78</sup> The Revision is a continuation of PWD's arduous endeavour to reconcile the EU's market-building goals and its social objectives, by attempting to accommodate the posting model in the ever more diverse Union after the Eastern enlargement(s). In the search for a middle ground, the focus of the Revision and the accompanying political campaign<sup>79</sup> on the "equal pay" principle, aims, foremost, at responding to the demands to regulate social dumping.<sup>80</sup> In this manner, the Revision re-addresses the territoriality principle of labour law or, in the words of Aukje van Hoek, who draws on Karl Polanyi's concept of embeddedness, it might be seen as an attempt to re-embed the employment relationship, which had been dis-embedded by CJEU's interpretation of the previous legal framework.<sup>81</sup>

The cumbersome course of the Revision reflects, on the one hand, the difficulty in reconciling market efficiency and worker protection, and, on the other, the complexity of conceptualising a substantial social dimension to a heterogeneous Union, in which structural inequalities and palpable differences between the national welfare-state and industrial-relations models exist. It has demonstrated that, in a highly diverse Union of (still) 28 Member States, a measure of social protection for some, could easily be rendered

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<sup>75</sup> The reasoned opinions were formally backed by subsidiarity concerns. See more in Diane Fromage and Valentin Kreiling, "National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive," (2017) 10 *European Journal of Legal Studies*, 125–60.

<sup>76</sup> See the #ProtectionismIsNotFair Campaign by the Polish Labour Mobility Initiative <https://www.mobilelabour.eu/12342/protectionismisnotfair-campaign-show-support/>.

<sup>77</sup> 456 votes yes to 147 no, with 49 abstentions, see at <http://www.europarl.europa.eu/news/en/press-room/20180524IPRO4230/posting-of-workers-final-vote-on-equal-pay-and-working-conditions>

<sup>78</sup> 'Posting of Workers: Council Adopts the Directive - Consilium', accessed 28 June 2018, <http://www.consilium.europa.eu/en/press/press-releases/2018/06/21/posting-of-workers-council-adopts-the-directive/>.

<sup>79</sup> 'Travailleurs Détachés : La Victoire Européenne de Macron - Libération', available at [http://www.liberation.fr/france/2017/10/24/travailleurs-detaches-la-victoire-europeenne-de-macron\\_1605391](http://www.liberation.fr/france/2017/10/24/travailleurs-detaches-la-victoire-europeenne-de-macron_1605391).

<sup>80</sup> For more on the notion of "social dumping" see Catherine Barnard, 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution', in *50 Years of the European Treaties: Looking Back and Thinking Forward*, ed. by Michael Dougan and Samantha Currie, Oxford: Hart Publishing, 2009.

<sup>81</sup> Ankie van Hoek, "Re-Embedding the Transnational Employment Relationship: A Tale about the Limitations of (EU) Law?," (2018) 55 *Common Market Law Review*, 449–87.

protectionist by others. By introducing the principle of “equal pay for equal work in the same place” as one of the main substantial novelties, the Revision intervenes where the posting regime has been the most fragile and was thus accused of contributing to social dumping and downward pressure on labour and social standards in the host Member States. However, the final compromise of the Revision does not explicitly allow for wage- and standard-setting for posted workers by collective agreements that are not declared universally or generally applicable.<sup>82</sup> With regard to the national industrial-relations models which do not rely on universally or generally applicable collective agreements, this might further maintain the *Laval* conundrum.<sup>83</sup> Finally, far from being perfect, the Revision should be considered a step in the right direction as it rejects a conception of social fairness based upon direct competition between labour- and social-protection models from the centre and the periphery, and it recognises the necessity for exempting Member State welfare achievements from the market logic. Its effectiveness, however, will largely depend on good cross-border implementation of the regulatory framework and effective enforcement of rights, which needs to be further examined once the revised directive has been transposed into Member State law.

### *III.3 Unemployment Insurance as an Automatic Fiscal Stabiliser*

#### *III.3.1 Convergence of Unemployment Insurance Systems in the Euro Area as an Example for the Benefits and (Un-) feasibility of a Social Union*

An important line of argument in favour of a Social Union departs from the design of EMU. The heterogeneity of social models in the euro area has adverse implications for its functioning and resilience.<sup>84</sup> We examine the diversity in the designs of national unemployment insurance systems (UISs) in the Eurozone to illustrate this point.<sup>85</sup> Heterogeneity of the key features of UISs (income replacement rate, maximum duration of benefits and coverage ratio) causes differences in their capacity as automatic macroeconomic stabilisers in an economic downturn. This negatively affects the collective resilience of the Eurozone economy.

The Eurozone crisis has highlighted significant flaws in the architecture of the monetary union which, if not addressed, could cause the dissolution of the common currency area in the inevitable next economic crisis. The economic literature has focused primarily on financial (e.g., banking union) and fiscal policy (e.g., central fiscal stabilisation capacity) as a means of strengthening the crisis resilience of the Eurozone economy. However, in order to strengthen its architecture, there is a need for both economic and social convergence. Due to the diversity of social institutions which are the result of long run,

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<sup>82</sup> Revision in supra note 63.

<sup>83</sup> On the *Laval* conundrum see Claire Kilpatrick, “*Laval*’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Posted Workers”, (2009) 34 *European Law Review*: 844–65.

<sup>84</sup> See introductory chapter by Vanderbroucke in Frank Vandebroucke, Catherine Barnard, Geert De Baere (eds). Vanderbroucke rightfully argues that a monetary union can only accommodate a limited degree of heterogeneity of national social security models, in particular due to their stabilising role in the economy. Thus, there is a role for supranational coordination of social policy.

<sup>85</sup> The analysis draws on Lukas Nüse, “Mission Accomplished? Unemployment insurances as automatic stabilisers in EU Member States During the great recession”, Master Thesis, Hertie School of Governance, Berlin 2018.

country specific political processes a significant degree of social convergence seems unfeasible. This is in particular due to a lack of legal authority on the European level and a lack of common will for action amongst some Member States.

Unemployment benefits, as opposed to minimum-income benefits, are usually non-means tested, and funded by contributions from employers and employees. They disburse benefits that partially replace previous income, for a limited period directly after an individual has become unemployed. In addition to mitigating the socio-economic impact of unemployment, an UIS also acts as an automatic macroeconomic stabiliser. An automatic stabiliser is a mechanism for macroeconomic stabilisation that automatically provides fiscal stimulus in a recession and reverses during the boom. In the case of unemployment, the benefits paid will partly substitute previous income and thus enable households to smooth consumption, which, in turn, contributes to stabilising economic growth.

### *III.3.2 Comparison of Unemployment Insurance Systems in EU Member States*

Although UISs vary across several parameters, there are three key dimensions which determine the effectiveness of the UIS as an automatic stabiliser:

- i. Replacement rate: What percentage of previous income is replaced by benefits in the case of unemployment?
- ii. Maximum duration: How long are unemployment benefits paid for?
- iii. Coverage ratio: What share of the short-term unemployed actually obtain benefits?

The more generous the UIS benefits are (replacement rate and duration) and the larger the share of unemployed covered, the higher the potential stabilisation effect in a recession is expected to be. At the same time, incentives to search for jobs and to accept an offer during the boom are negatively associated with the system's generosity. Furthermore, more generous UIS require more financial resources.<sup>8687</sup>

The net replacement rate during the first month of unemployment in the Eurozone varies from 28% in Greece to 86% in Luxembourg.<sup>88</sup> Euro-area countries provide higher rates on average (60%) than non-euro area countries (49%). A number of countries provide flat rates of insurance coverage independently of previous income (Greece: €360/month, Ireland: €772/month and Malta: €193/month). These countries stand out as providing the lowest levels of replacement rates: Greece (28%), Malta (29%), and Ireland (34%) only provide about half of the average rate of euro-area countries. This suggests that, for these countries, there should only be relatively little stabilisation from the public UIS.

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<sup>86</sup> The comparison follows the work of Ingrid Esser, Tommy Ferrarini, Kenneth Nelson, Joakim Palme, Ola Sjöberg, "Unemployment Benefits in EU Member States", European Commission, Brussels 2015.

<sup>87</sup> For the comparison we also include non-eurozone Member States for completeness.

<sup>88</sup> We compare net replacement rates (net of taxation) for a representative household consisting of a single person with no children and earning a country average wage in employment. Source: OECD (Tax and Benefit Systems), effective net replacement rates of previous income for a single person with no children and 100% average wage (2015).

In EMU, the duration of benefits for the representative household is the lowest in Cyprus and Malta (both 22 weeks) and highest in Belgium (unlimited<sup>89</sup>).<sup>90</sup> It is, on average, about 57 weeks in euro-area countries (not including Belgium) and 47 weeks in the remaining Member States. The long duration of benefits in southern Member States of the euro area (France, Italy, Spain and Portugal) are noteworthy, with duration of around two years. Cyprus, Malta and Slovakia (26 weeks) stand out in this regard. Although nothing can be inferred from this analysis with regard to the exact effect of an UIS as an automatic stabiliser in a given Member State, for Malta, the low replacement ratio as well as short duration of the UIS suggests relatively little stabilising power compared with other countries.

As pointed out by Maquet *et al.*,<sup>91</sup> there are methodological challenges in calculating the coverage rate and there is no consensus on how it should be computed.<sup>92</sup> The authors conclude that “indicators based on the Labour Force Survey provide the most comparable and timely estimates”.<sup>93</sup> There is great variation of coverage rates in the euro area, ranging from about 15% in Italy to more than 80% in Germany.<sup>94</sup> The more people receive unemployment benefits, the higher the stimulus provided by an UIS should be. In this regard, the low figures for Italy, Slovakia (18%), Malta (20%) and Cyprus (20%) are worrying.

### *III.3.3 Implications for the Functioning of EMU*

Non-eurozone Member States can partially offset the lack of automatic macroeconomic stabilisation by using monetary policy. This measure is not available for members of the common currency area.<sup>95</sup> Automatic stabilisers, thus, play a vital role in the fiscal response as they ensure timely and sizable *stimuli*. Furthermore, in the event that discretionary fiscal policy measures are not (sufficiently) applied either because their usage is limited by austerity or because their necessity is not acknowledged (in time), the economic impact of a recession is only inadequately cushioned in the absence of potent automatic stabilisers. This may contribute to a situation in which a Member State ultimately requires fiscal transfers from other Member States.

The analysis highlighted great heterogeneity regarding the designs of UIS in the Eurozone. This affects their capacity as automatic stabilisers during a recession and

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<sup>89</sup> The level of benefits, however, gradually decreases over time and after 48 months of unemployment only a flat-rate benefit of €13 per day is being disbursed.

<sup>90</sup> Maximum duration of unemployment benefits (in weeks) for a single person in the age group of 40 to 50 with 20-25 years of contributions and no children. Sources: Mutual Information System on Social Protection (MISSOC) and own calculations.

<sup>91</sup> Isabelle Maquet, Virginia Maestri, Céline Thévenot, “The coverage rate of income support measures in the EU: measurement and challenges“, Working paper 2, European Commission: DG Employment, Social Affairs and Inclusion, 2016.

<sup>92</sup> Problems mostly concern the data sources (administrative records vs. EU Labour Force Survey (LFS) vs. EU Statistics on Income and Living Conditions).

<sup>93</sup> *Ibid.*

<sup>94</sup> Unemployment benefits coverage estimated through LFS (2014). Short-term unemployed (<12 months). Source: (Maquet *et al.*, 2016).

<sup>95</sup> Particularly, there is a special need for strong automatic stabilisers in a monetary union in which the central bank faces the zero lower bound (ZLB). In a scenario in which monetary policy is constrained by the ZLB, fiscal policy is left as the only measure to stabilise the economy.

therefore the resilience of EMU as a whole. UISs with low amounts of flat rate benefits (Greece, Ireland and Malta), short durations of benefits (Cyprus, Malta and Slovakia) and/or low coverage of benefits (Italy, Slovakia, Malta and Cyprus) can be expected to provide relatively little stimulus in a recession. The ends of a Social Union should therefore include the convergence of national unemployment insurance systems. Legislation could, for example, mandate (minimum) levels for replacement rates and/or durations of unemployment benefits and/or control their coverage by regulating access to the insurance system (e.g., for self-employed workers who are often excluded). This would strengthen national automatic stabilisers and thus increase the collective resilience of the euro area economy.

The inherent contradiction of the current social and economic state of the EU with regard to the possibility of a Social Union is that, despite its economic appeal, it seems unattainable. The differences in the UISs of the EU Member States exemplify this. Significant heterogeneity of the designs of UISs in EMU not only necessitate their convergence, but also illustrate its limited feasibility in the current political environment. To achieve the same level of stabilisation by UISs, not only would the extent of the benefits and their coverage have to converge, but also, for example, the way in which they are funded (which is as heterogeneous as the other parameters).<sup>96</sup> This would imply changes to a social institution which is deeply embedded in a country's culture and history. Fierce opposition from the Member States would be certain. Legislative action in this field is therefore unappealing and also largely excluded by EU law. Art. 153.4(1) TFEU states that "The provisions adopted pursuant to this Article: shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof". This would challenge any legislation which aims at significantly increasing the generosity of UIS benefits. One solution to this dilemma would be the voluntary co-operation of a subset of EMU (and possibly EU) countries to agree on minimum standards of UIS benefits. The European Pillar of Social Rights could work as a vehicle to facilitate such an agreement. Principle 13 "unemployment benefits" of the Pillar already addresses this issue.<sup>97</sup>

In the long run, a European UIS (EUIS) could complement or replace national insurance systems to add a layer of supranational fiscal stabilisation. A European fund set up as a re-insurance mechanism – as recently endorsed by German Minister of Finance Olaf Scholz<sup>98</sup> – would ensure that, even in times of economic distress, UIS benefits would be disbursed and would thus contribute to stabilising the economy. This was not the case during the Eurozone crisis in some countries which cut benefits while unemployment increased (e.g., Greece). In retrospect, a EUIS would have both mitigated the economic as well as social economic consequences of the crisis.

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<sup>96</sup> Generally, there are three sources of funding for an UI: Contributions from employees and/or employers as well as contributions from the central government.

<sup>97</sup> European Pillar of Social Rights Key Principle 13: "The unemployed have the right to adequate activation support from public employment services to (re)integrate in the labour market and adequate unemployment benefits of reasonable duration, in line with their contributions and national eligibility rules. Such benefits shall not constitute a disincentive for a quick return to employment."

<sup>98</sup> DER SPIEGEL, 24/2018.

A twofold difficulty continues to militate against the project of UIS as a new dimension of a European Social Union. The enormous diversity of insurance schemes reflects the socio-economic diversity of the Eurozone and the Union in general. This diversity is deepening, rather than fading away. A European UIS would nevertheless constitute a normatively attractive move towards more European solidarity. However, it is not just the resistance against the “transfer Union” which inhibits such an initiative, but the normative quality of welfare entitlements.<sup>99</sup> “The social” continues to be regarded as an essential of the democratic autonomy of the Member States. Thus, with regard to the supranational co-ordination of social policy, only cautious and pragmatic innovations are conceivable.

## Epilogue

Our three case studies of the last section all document that the co-existence of market integration and national welfare states as diagnosed by Alan Milward<sup>100</sup> is no longer conceivable. This, however, does not mean that Milward got it wrong when he submitted that European integration was about the “rescue of the welfare state”. What our case studies suggest instead complements our analysis of the failing of EMU as established by the Maastricht Treaty. What distinguishes Milward’s Europe from today’s Union is not only the “supremacy” of economic liberalism in its Anglo-Saxon variety as the dominant pattern of economic and “social” ordering,<sup>101</sup> but also the deepening of socio-economic divergences under the impact of the financial crisis and the conflict constellations generated by Eastern enlargement. It is important for the analyses we have submitted so far as well as for the normative perspective with which we are going to conclude that the Union’s present difficulties were not created wilfully. “Economic liberalism” was, to cite Polanyi again, “planned”;<sup>102</sup> the responses to it, which we have observed follow a different logic.

We believe that our case studies are of exemplary importance. This assumption is inspired by the works of the Harvard political economist Dani Rodrik. In his book, *The Globalization Paradox*,<sup>103</sup> Rodrik asserts the impossibility of simultaneous pursuit of economic globalisation, democratic politics and national determination (autonomy), highlighting a trilemma in which only two goals can be paired: economic globalisation and democratic politics, or democracy and national autonomy. For Rodrik, the validity of the trilemma thesis must not be restricted to globalization. The EU, so he submits, furnishes dramatic illustration of his thesis.<sup>104</sup> The implications are dramatic as he

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<sup>99</sup>Economically, the challenge of a EUI is to credibly assure its long-run fiscal neutrality. An almost impossible task which will ensure continuous opposition in potential net contributor countries.

<sup>100</sup>Note 1 supra.

<sup>101</sup>See Stråth, note 3 supra.

<sup>102</sup>Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, Boston MA: Beacon Press, 1957, 141.

<sup>103</sup>Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, New York-London: W.W. Norton, 2011.

<sup>104</sup>Rodrik’s recent *Straight Talk on Trade. Ideas for a Sane World Economy*, Princeton NJ-Oxford: Princeton UP, 2017, has a chapter with an update on Europe (pp. 48-78). Therein Rodrik repeats: “If European democracies are to regain their health, economic integration and political integration cannot remain out of sync. Either political integration catches up with economic integration or economic

underlines. On the one hand, the EU could transnationalise democracy through federalisation and thereby defend the advantages of the common market; at the same time, however, it would be forced to establish a common European politics to legitimise its necessary assumption of fiscal and social policy, with negative consequences for national sovereignty. In the absence of such a denationalising will and the move into a truly federal transformation of the European project, the EU should better give up the common currency and accept economic disintegration.<sup>105</sup>

At this point we depart from Rodrik's. We believe that his dichotomy of federalisation v. disintegration omits a "third way" which Europe could and should pursue. Europe's varieties are deeply embedded in national histories, the patterns of a variety of economic cultures, long-term formations of policy preferences. To be sure, the ensuing differences are not written in stone. Their development should, however, be left in principle to the concerned jurisdictions. This is what democratically legitimated processes require and deserve. To cite Wolfgang Streeck: "[T]he *acquires démocratiques* of the national *demos* in Europe ... importantly comprise a wide range of political-economic institutions that provide for democratic corrections of market outcomes – for democracy as *social democracy*."<sup>106</sup>

We conclude that Europe should take the fortunate motto of the ill-fated Draft Constitutional Treaty of 2004 seriously: "united in diversity is a European vocation which can provide Europe's constitutional form. For an elaboration of this perspective we have to refer to prior works."<sup>107</sup>

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integration needs to be scaled back (at 76). There are, however signals of a re-orientation. The in my view most promising of these is in line with his more general ideas about globalization. Globalisation requirements must remain consistent with democratic delegation; they must "enhance democratic deliberation domestically" (at 65).

<sup>105</sup> Dani Rodrik, "The Future of European Democracy", ms. Princeton NJ, 2014, available at: <https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/Future-of-Democracy-in-Europe.pdf>.

<sup>106</sup> Wolfgang Streeck, *How Will Capitalism End?*, London: Verso Books, 2016, 198, n. 20; *cf.*, in a surprisingly similar vein Karl-Heinz Ladeur, "Conflicts Law as Europe's Constitutional Form' ... and the Conflict of Social Norms as its Infrastructure", in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Conflicts-Law Constitutionalism and Authoritarian Managerialism*, Oxford: Hart Publishing 2013, 383-396.

<sup>107</sup> Most recently Fabian Bohnenberger and Christian Joerges, "A conflicts-law response to the precarious legitimacy of transnational trade governance", in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law*, Cheltenham: Elgar, 2018.