Chapter X

Local interests and social integration in Europe: integrating the Member States under the European Pillar of Social Rights?

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Abstract

One of the declared aims of the EU is to set up fair and well-functioning labour markets with the ultimate goal of creating better-performing economies and more equitable societies in Europe. The EU's intervention is, however, grossly delimited by the competences and the autonomy retained by the Member States in the social domain as well as by the closely protected prerogative of the Member States to define the fundamental principles of the national system of social protection. Integration in the social field is also inhibited by the diversity of the institutional setups of local socio-economic models (capitalisms), which prevents institutional convergence among the Member States. In this light, social integration in the EU, especially when designed to be implemented through binding legal regulation, faces considerable difficulties, which raises doubts about the level of integration achievable. This may well be particularly true for the recent initiative to revive the social dimension of European integration under the European Pillar of Social Rights,, which in the light of previous experiences has to overcome fundamental divergences of interests in the different Member States.

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1 Introduction

As a part of his political vision for the future of European integration, President Juncker mentioned in his 2016 State of the Union address that social injustice is still present in the EU and claimed that "Europe is not social enough" (European Union 2016). He, therefore, proposed the urgent establishment of a European Pillar of Social Rights (EPSR). Shortly after, in April 2017 the Commission made public a proposal for creating the EPSR, the declared general political aim of which was to introduce a set of key principles and rights capable of supporting fair and well-functioning labour markets in Europe with a view to creating ultimately better-performing economies and more equitable societies. The implementation of these principles and rights at the national level came, however, with the caveat that they and their realisation should not affect the prerogatives of the Member States in determining the fundamental principles of national systems of social protection and defining their operation. Integration under the EPSR was, thus, subjected to the condition of respecting the different local institutional models (of capitalism) in the Member States and recognising the roles and the impact of that diversity in EU market integration.

Such framing of the Commission's policy proposal aiming to enhance the social dimension of EU integration did not come as a surprise. Integration in the social domain – often as regulated in law – has always been exposed to what domestic institutional models allowed and how their respective diversity, which emerged from the very different interests and needs appearing at local level, could be accommodated. The "European social landscape" was quite rightly claimed to be composed of various institutional designs of macro-economic, labour-market and social policies (Jepsen and Pascual 2005, 235). Moreover, the social domain in EU integration has traditionally been characterised by the Member States closely following European developments and actively safeguarding their autonomy in policy-making (Schiek 2017). Overall, national governments, bound by their political mandates and seeking re-election in the national political arena, are rather keen on preserving the relevant national competences and ensuring that competitiveness and local institutional designs are not damaged by the integration process. With this background, the EPSR, especially if it is implemented through binding legal rules, faces considerable difficulties in delivering its objectives and achieving the desired level of integration.

The present chapter is structured as follows. First, it provides an overview of the progress of economic and social integration in Europe and the issues and dilemmas which led to the proposing of the EPSR and the preparation of legislation thereunder. This prepares the discussion on differences in national economic models and their effect on social integration in the second part. The arguments made in this section are developed further by the examination of two case studies: one on the posting of workers and the other on the regulation of working time, the experiences from which are directly relevant for the EPSR and its prospects in a regional policy arena characterised by diverse national interests in the social field.

2 The dilemmas of economic and social integration

In the course of European integration, the economic and the social dimensions developed at different pace. The Treaty of Rome focused predominantly on the economic aspects of market integration. It was believed that the expected increase in productivity would lead to a parallel improvement of living and working conditions. The legal framework introduced for establishing the "common market" allowed for little interference with national social policies, which were closely defended by Member States, and its development was, and still is, dominated by generating an "economic constitution" for EU market integration (Schiek 2017, 613). The bias towards the economic is also reflected in the provisions in the Treaties. The core legal obligations addressed to the Member States aimed at interfering with Member States' policies so as to ensure that the freedoms of economic operators are adequately safeguarded. As a result of this "embedded liberalism" of EU integration guarantees for the free market were created at supranational level, while policies for the social domain were restricted (remained exclusively) at the national level (Giubboni 2006, 29). Despite the explicit commitment to promoting social development as a general political objective of the EU, the development of formalised instruments, in particular with those of significant redistributive effect, was lagging far behind the opening up of national markets to international trade and competition.

The main cause of the different pace and pathways of development of economic and social integration must be found in the national governments anxiously safeguarding – in the national interests – their autonomy in policy-making in the social domain. This is explained by, and has

led to the further entrenchment of, considerable differences across the European Union in regards the concept and framework of social policy and the various entitlements and guarantees within (Schiek 2017, 613). Nor was social integration in the EU supported by active judicial involvement from the EU Court of Justice as it was experienced in the case of the enforcement of the fundamental economic freedoms of the Single Market. There was, however, the problem of the Court of Justice interfering, in the course of the interpretation of the fundamental freedoms, with Member State social legislation and, thus, with national social models. From its perspective, any piece of national legislation, or any national rule or practice, which hinders or makes less attractive the exercise of fundamental freedoms guaranteed by the Treaty,[1] raises issues under EU law and may need to be "set aside" , even those which pursue genuine and legitimate social policy objectives (Schiek 2011, 27). It was raised in this connection that in the absence of EU level constitutional guarantees of social rights market integration diminishes the capacity of nation States to maintain, complementary to economic freedoms, social policy, which in fact is needed to maintain the social legitimacy of economic integration (Schiek 2017, 613).

The earlier mentioned constitutional asymmetry of EU integration, that while market integration enjoys constitutional protection, the social dimension was not offered a similar status, has its roots in the politico-historical context of European integration. On the one hand, there was initial agreement that there is no need to duplicate the system of rights protection available under the UN and the Council of Europe frameworks providing sufficient transnational standards. Reserving Union action to the economic also had the benefit of avoiding controversial and perhaps unnecessary interferences with the securely guarded national systems of social protection, labour law regulation and industrial relations. On the other, the earlier mentioned quasi-Durkheimian premise was also broadly accepted that market integration will lead to speedy improvements in productivity, which will then guarantee an automatic increase in social standards, which was used to deny the need to address social rights and social protection at the European level (Haas 1968). However, with the publication of the White Paper in 1985 it became apparent that market integration has considerable negative effects, felt at the level of national economies, such as the competitive advantages gained by countries with lower productivity costs and the downward pressure on local wages and national social standards (European Commission 1985). At that time, however, the Member States were not prepared politically to transfer competences in the social field to the Union, therefore, an alternative political avenue was sought in order to integrate social rights into the constitutional frame of rapidly expanding market integration in Europe (Hatzopoulos 2012, 115).

As well known, 1989 saw the adoption of the Community Charter of the Fundamental Social Rights of Workers.[2] The charter, not dissimilar from the EPSR, set forth a principle-based catalogue of the rights of workers. It was associated with two broader purposes. Firstly, the Member States were assured that EU competences would not be extended in the area of social policy. Secondly, EU action to combat social dumping and protect minimum working conditions in the integrating European market was legitimised. The political momentum generated by the charter was used to launch a targeted programme of developing and, potentially, adopting legislative

[1] Inter alia, Judgment of 30 November 1996, *Gebhard*, C-55/94, EU:C:1995:411.
[2] Final draft No. 9430/2/89 REV 2 SOC 370 (30 October 1989).

and non-legislative measures in the social domain (Kenner 2003, 10–14). The charter, together with the European Social Charter, was the precursor of the economic and social rights included in the later adopted, now legally binding Charter of Fundamental Rights of the European Union (EUCFR) (Sciarra 2008). The EUCFR contains an extensive, although far from comprehensive, list of social provisions (see Kenner 2003, 19; cf. Deakin 2003, 27). While politically it was a significant achievement, the normative relevance of these rights and principles is more doubtful as they seem to be regulated as non-justiciable norms and their implementation, in the very different national political and social contexts, is subject to the Member States exercising the competences reserved to them in these areas (Kenner 2003, 17).

At the constitutional level, significant changes were brought about by the Lisbon Treaty. It introduced Article 151 TFEU on social policy which clarified the role of social partners in policy-making in this domain. Crucially, this provision provides an explicit recognition of the diversity of national systems and emphasises the autonomy of social partners. Article 3(3) TEU of the new Treaty framework identifies the social market economy as one of the core instruments to further improve living standards in the EU and defines social policy as a shared competence between EU and the Member States (Liebert 2011, 55). Nevertheless, it was still claimed that the EU continues to bear only a small share of this competence and that despite the repositioning of the social dimension in the Treaties social policy, as dictated by the political interests of the majority of the Member States, remains primarily within national competences (Piris 2010, 313).

The political status quo was, however, shaken up by the global financial and economic crisis, the treatment of which in Europe, very often through austerity policies, brought light to the prevailing, and sharply increasing, inequalities in European societies and the inability of markets to provide an effective response (Eigmüller 2017, 353). It served as a stark reminder – even an "existential crisis" – for EU market integration and the Eurozone that they are failing to deliver on the core promises of the European Treaties (Deakin 2017, 194). The uneven distribution of EU competences in the monetary, economic and social policy domains became a pressing issue preventing effective supranational responses and there was pressure on European politics to rethink the role of social policy as a production factor, implying that social protection need to be embedded in the process of economic integration (Deakin 2017, 202). The European Commission recognised this, and the social dimension was made the centrepiece of President Juncker's political vision for the future of Europe (European Commission 2014; see also European Union 2016).

The political determination of the Commission to address the social hiatus of market integration in the EU led to the formal delivery, after a broad public consultation, of the European Pillar of Social Rights in April 2017 (European Commission 2017a). The EPSR is now adopted as an inter-institutional proclamation among the Parliament, the Council and the Commission (European Parliament, Council and Commission 2017). It sets out 20 principles and rights to support fair and well-functioning labour markets and welfare systems pursuing the ultimate political objective of achieving better-performing economies and more equitable and resilient societies. They all have economic and social importance for the overall economic performance of the Member States. The EPSR mostly confirm rights that already exist in the EU and in the international acquis. For some particular fields, it adds, however, new elements supplementing the acquis and makes these rights more explicit. These areas focus on emerging social challenges, most notably new forms of employment triggered by the digital revolution.

Three main areas of policy action are recognised in the EPSR. The first is equal opportunities and access to the labour market, which also covers skills development and life-long learning

and active support for employment, the increasing of employment opportunities, facilitating transitions between different employment statuses, and improving the employability of individuals. The second concerns fair working conditions covering matters, such as establishing an adequate and reliable balance of rights and obligations between workers and employers as well as between flexible of working conditions and job security, facilitating job creation, job take-up and the adaptability of firms, and promoting social dialogue. The third policy domain is adequate and sustainable social protection, which includes matters, such as access to high quality essential services, including childcare, healthcare and long-term care, ensuring dignified living and protection against risks, and enabling individuals to participate fully in employment and more generally in society.

The EPSR places emphasis not only on the enumeration, but also on the potential implementation of the relevant rights and principles. It is made clear that they will gain normativity only through the individual pieces of legislation dedicated to their implementation, adopted either by the Union or individually by the Member States. Under this framework, the Member States and national social partners remain key actors responsible for securing the rights included in the EPSR. In the Commission's view, implementation can take place using various means, such as legal regulation, social dialogue, policy guidance and recommendation, progress monitoring and financial support (European Commission 2017b) guaranteeing flexibility not only in terms of the instruments used in implementation, but also the actors involved. Much will depend on the outcomes of the ongoing wider discussion on future directions for EU integration (see European Commission 2017c).

There are, however, a number of already visible weaknesses of the EPSR affecting its credibility as a political measure as well as its implementation. It mostly repeats the existing social acquis and it is not especially ambitious in addressing many of the topical questions of social regulation.[3] This might pose a dilemma for the Member State as to whether it encourages deregulatory changes in national law. The form found for the EPSR is also problematic. As another document expressing political commitment in the EU to the protection of social rights, it may achieve very little beyond framing the policy and legislative efforts already in the pipeline. The realisation of its broader objective of creating a competitive social market and a well-functioning welfare system requires a concentrated effort based on concrete, legally expressed and enforceable obligations capable of influencing the conduct of relevant actors, despite their competing and/or contradictory interests. This is obviously the central dilemma of the EPSR as proposed by the Commission. As revealed by its preamble, the renewed commitment to the implementation of the rights enlisted was subjected to observing the diversity of national institutional models and respecting, in line with the principle of subsidiarity, the competences of the Member States in defining and delivering employment and social policies in their territory, including labour law and the organisation of national welfare systems. Viewed from the perspective of the institutional diversity of national economies and the different interests of national governments in maintaining local competitiveness and comparative advantages, this

[3] For example, in connection with the issue of protection against unfair dismissal the EPSR makes only a general reference to a reasonable notice period and the right to (some) compensation, which falls short of the detail in other international norms, such as the ILO standards or the European Social Charter.

amounts to an admission that the integration of the Member States under the EPSR will be rather limited.

3 Varieties of local capitalisms and social integration in Europe

As already raised, perhaps the most significant impediment to the integration of European markets and societies, if that is desirable politically or from a policy perspective, follows from the diversity of local economic (socio-economic) models and their particular institutional setups (see Leino 2017). This is explicitly recognised by the EPSR which makes the realisation of the common social objectives recognised subject to demonstrating due deference to Member State sovereignty and competences in the social domain as well as to the legitimate diversity of local models of capitalism. Politically, achieving any form or degree of (institutional) convergence among the Member States faces nearly insurmountable obstacles. National governments are closely safeguarding the local institutions which they consider as available to guarantee the competitiveness of the national economy and as capable of maintaining (comparative) advantages over other national economies. Hopes of social integration in Europe, even under the EPSR, must contend with the reality of institutional differences and competing differences. Earlier experiences with the adoption and the implementation of common rules affecting the social domain, namely the rules on the posting of workers and the regulation of working time, demonstrate with clarity the severity of political opposition and the hiatuses of the compromise solutions achievable in Europe.

The institutional differences among national economies in Europe, which prevent meaningful progress is some of the core areas of EU integration, have been extensively analysed under the "varieties of capitalism" frame applied in political economy scholarship. The two major models identified among the group of large OECD countries are coordinated market economies[4] and liberal market economies[5] (Hall and Soskice 2001; see also Hall and Thelen 2009) (cf. Schneider and Paunescu 2011; Bohle and Greskovits 2011) (cf. Esping-Andersen 1990; Sapir 2006) (cf. Sapir 2006; Baumol, Litan and Schramm 2007). A further six countries[6] were placed in a more ambiguous category, the so-called "Mediterranean model". Their key differences follow from the strategic interactions of economic actors that define the institutions of the particular regime; coordinated market economies and liberal market economies demonstrate significant differences in how they coordinate their respective institutional systems (Hall and Soskice 2001).[7] Importantly, it is not claimed that any of the models would be superior to another; both major types of capitalism have demonstrated their ability to ensure sustainable, satisfactory

[4] Germany, Japan, Switzerland, the Netherlands, Belgium, Sweden, Norway, Denmark, Finland, and Austria.

[5] The U.S., Britain, Australia, Canada, New Zealand, and Ireland.

[6] France, Italy, Spain, Portugal, Greece, and Turkey.

[7] In coordinated market economies, firms rely mostly on non-market relationships when coordinating their activities, depending on extensive information exchange and collaboration inside networks. These include relationships through powerful employer associations, strong trade unions, large business networks. Their coordination is backed up by legal or regulatory systems which facilitate collaboration in such frameworks. Actors are encouraged to enter into collective bargaining and to conclude agreements with each other. Conversely, in liberal market economies the activities of firms are chiefly organised via competitive market arrangements and equilibrium is usually provided by demand and supply conditions in competitive markets. Instead of resorting to regulated coordination, economic actors remain in arms-length relationships with each other and their coordination takes place only in response to price signals. Their labour markets are characterised by a high degree of managerial prerogative on hiring and firing and by limited collective bargaining.

macroeconomic performance (Hall and Soskice 2001). The more nuanced clustering by Farkas,[8] following a restructuring of national economies after the global financial and economic crisis, which took into account the changes affecting employment relations and industrial relations in Europe, made the point that the differences between national economies can put European integration into jeopardy, especially if structural inequalities within the Union further deepened (Farkas 2016). On this basis, there is no rational ground for arguing that supranational frameworks of economic governance, such as the EU Single Market, should favour one type of institutional arrangements over another. This is all the more so considering that there are considerable differences between individual national models as emerging in response to local interests and needs in their own particular socio-economic contexts, even within a single cluster of similar national economies.

The pitfalls of local institutional diversity for European integration have been recognised by the EU institutions as well as the possibility of mitigating them by the introduction of institutions at the European level (Delors Committee 1989). The latter is very much in line with general theorisation of the EU as an institutional actor; it was given the ability and the capacity to reconcile in a political process differences among the Member States (Moravcsik and Schimmelfennig 2009) and it has mandate and capacity to interfere with national governance and limit the ability of the Member States to pursue local interests, and, thus, to promote a particular model of economic structure (Christiansen et al 1999). This view is shared by analyses of institutional variety within the European Union holding that through EU-level institutions, for the sake of furthering integration, the behaviour of economic actors can be changed (Farkas 2016, 504).

The diversity of local economic models has had a palpable impact on the level and the modes of legal harmonisation achieved in the European Union (Leino 2017). In the matters, such as the prohibition of discrimination, or health and safety at the workplace, the approximation of national regulations has been very successful.[9] In other fields, a less thorough harmonisation was accomplished through minimum standards, such as the restructuring of undertakings,[10] the rights of workers engaged in atypical forms of work,[11] and, not so successfully, working time.[12]

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[8] Farkas put the 25 European countries into 5 clusters based on the varieties in labour market flexibility (considering the proportion of part time and fixed term employment contracts) and industrial relations (especially trade union density and bargaining power).

[9] See, for example, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] OJ L183/1.

[10] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L82/16.

[11] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, [1998] OJ L14/9; Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, [1998] OJ L131/10; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, [2008] OJ L327/9.

[12] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L299/9.

In the domain of labour and employment law, national law remained the main source of regulation allowing the Member States to push their national interests through the introduction of particular local institutional setups. For instance, the Member States are still entitled to lower standards in employment protection so as to gain a competitive advantage over other national economies in the Single Market. It was argued that this wide margin of regulatory local discretion has led to indirect competition between Member States putting a downwards pressure on labour law protection in the different national economies (Verschueren 2015, 150).

The dynamics of this framework have been largely affected by the intervention of the Court of Justice enforcing the fundamental freedoms in regards *any* national impediment to free movement. The Court's involvement was characterised above as controversial as it entailed the reduction of national policy autonomy in economic as well as other diffuse domains and has anchored the continuing dominance of the economic over the social in delivering EU market integration. In effect, by virtue of the legal doctrines of supremacy and direct effect governing the application and the enforcement of EU law in the Member States, individual economic operators were empowered to challenge before national authorities and courts any piece of national economic and social regulation which affected their freedoms in the economic domain and the Court of Justice was invited to decide the fate of the contested national policy instrument as an "ultimate arbitrator" (see Schiek 2011). Because of scrutinising complex socio-economic policies through the narrow lenses of the fundamental economic freedoms, the Court's activity attracted criticism for providing constitutional support to the ordo-liberal economic policy of European market integration and reducing the internal diversity which characterises the Single Market and which may be essential for its effective operation (see Schiek 2017, 621; see also the policy asymmetry argument in Scharpf 2009). The possibility of counterbalancing the Court's influence by adopting social legislation was seen as holding its own risks as the complexity of achieving political agreement among the Member States on social issues is likely to increase the weight of economic integration and will further inhibit the EU to become a social market economy (Schiek 2017, 614).

The prospects for social integration in the EU in an environment characterised irreconcilable institutional divergences among the Member States was clearly demonstrated by the difficulties and conflicts encountered during the adoption of two landmark measures of EU policy activity in the social domain. Achieving political consensus among the Member States was impossible, which threatened with market integration progressing further without providing protection to the instruments of national social policy exposed to the deregulatory impact of the fundamental economic freedoms and without imposing limits to the curtailment of national social policy autonomy. Any future measure adopted under the EPSR is likely to face similar political and legal hurdles and limitations.

3.1 The posting of workers

The regulation of the posting of workers in the EU, for it to become politically acceptable for the Member States, had to reconcile the interests of very differently institutionalised national economies. On the one hand, there were the Member States that saw the key to competitiveness in lower wage costs and lower regulatory burdens. On the other, there were the Member States that intended to protect national labour markets by securing a certain level of living standards

for their workers. The disagreement was not simply economic; it affected fundamental questions of social policy available to be determined in national competences. The case for EU legislative involvement was quite evident as the free movement of services had been threatening the institutions of labour markets in the host Member States, the maintaining of which, if that was the case, and in this regard the boundaries between the respective competences of the Union and the Member States had to be clarified in law. Ironically, the conflict between host States and the posting countries did not cease after the adoption of common rules. The political stakes were too high, especially after the expansion of the number posting countries following the Eastern enlargement of the EU, with further deregulation demanded from high-regulation Member States.

The EU measure adopted, the Posting of Workers Directive (PWD),[13] is clearly the product of socio-economic heterogeneity within Europe in a domain where national economies exhibit evident institutional and other differences. Depending on the perspective, the PWD can be characterised either as a minimum social policy instrument aiming to avoid social dumping with implications for the free movement of services, or a piece of economic regulation enabling economic operators to realise efficiency gains and national economies to boost their competitiveness. Apparently, despite the evident impact of the PWD regulating the social dimension of EU market integration, it, especially in light of the relevant jurisprudence of the Court of Justice, encouraged labour market liberalisation in the Member States. To make matters even more complicated, the reception of the directive in individual Member States depended on the particular policy perspective from which it was viewed. The policy interests and needs of national governments can be rather different when they struggle to protect national labour markets and the related social policy mechanisms within the Single Market and when wish to profit from market integration in order to fulfil demands from economic areas facing underemployment.

The Commission's original proposal intended to alter the regulatory compromise established between posting and hosting States in the landmark decision of the Court in the *Rush Portuguesa* case.[14] Hosting states used the judgment, which first addressed the conflict between the freedom to provide services and national labour law, to justify extending their national legislation and collective labour law agreements to cover posted workers and, thereby, maintain the variety of national labour laws despite the pressure to liberalise arising from EU legal obligations. In the Commission's viewpoint, however, the Court's ruling and its interpretation by the Member States damaged the free movement of services and led to a disproportionate application of national labour standards in the national territory (see Davies 2002). As revealed later in the preamble of the PWD, there was a clear need for clarifying at the European level the impact of the "transnationalisation" of employment relationships under the free movement of services national legislation on the applicable national legislation.

In Article 3, the PWD regulated provisions concerning the terms and conditions of employment in the host Member State. This triggered a fierce dispute during the negotiations not only among the Member States, but also among the Commission, the Council and the Parliament, which all

[13] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the provision of services, [1996] OJ L18/1.

[14] Judgment of 27 March 1990, *Rush Portugesa*, C-113/89, EU:C:1990: 142.

took very different positions. The first contested issue concerned temporality. The original proposal made a distinction between short-term posting, which is not longer than three months, where the freedom of movement should not be restricted, and long-term posting where the rules of the hosting State should be applied to posted workers, as permitted in the ruling in *Rush Portuguesa*. Finland, Germany, Austria, Luxembourg and France, however, pushed for more autonomy in regulating their national labour markets and the initial proposal for a three month period, during which the home State's labour regulations must apply, was reduced to eight days.

The second disputed issue concerned the scope of the Directive. Article 3(1) of PWD lists a number of mandatory rules providing minimum protection for posted workers. The Commission's original proposal tried to keep these to the minimum. This, however, fell victim of the interests held by the Member States with a higher level of social protection. The Member States, keen on protecting national sovereignty in regulating labour markets and maintaining national institutional arrangements, managed to agree on granting a broad scope for the application of host States' regulations (Davies 2008, 306). In its final version, Article 3(1) provides that the laws of the hosting States regarding maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, the conditions of hiring-out of workers, health and safety, the protection of pregnant women, women who recently gave birth, mothers and young people, and equality and equal opportunities are applicable to posted workers. It is quite clear, on this basis that the Commission failed to realise its original objective of departing in the interest of furthering market integration from the compromise struck in *Rush Portuguesa* (Martinsen 2015, 192).

The compromise solution consolidated in the PWD was, however, unexpectedly challenged by the Court of Justice in a series of judgments, called infamously as the "Laval Quartet"[15], prioritising the rights provided by the fundamental economic freedoms over the national regulation of labour markets. The Court's intervention, labelled critically as "normative Darwinism", was heavily criticised for disregarding the fundamental value of social solidarity and setting loose regulatory competition in social laws among the Member States (Supiot 2008, 6). In *Viking*, the Court had to resolve a conflict between the right to strike as provided in national law and freedom of establishment under Article 49 TFEU. While the judgment recognised the right to take collective action for the protection of the legitimate interests of workers as requiring protection under EU law, it ruled, when assessing the justifiability of the restriction resulting from the exercise of the right to strike, that under the proportionality principle the national court must consider whether the trade union had had less restrictive means at its disposal to settle its dispute with the employer (see Barnard 2008; Davies 2008).[16] As an important preliminary matter confirming the exposure of local institutions to the liberalisation agenda of the fundamental freedoms, the Court made it clear that social rights, such as the right to collective action fall under the scope of the free movement provisions and that the fundamental freedoms may indeed be invoked – horizontally – in regards the actions taken by trade unions (for a detailed assessment, see de Vries 2013, 175).[17]

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[15] Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772; Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:291; Judgment of 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, C-346/06, EU:C:2008:189; Judgment of 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxemburg*, C-319/06, EU:C:2008:350.

[16] Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti,* C-438/05, EU:C:2007:772, paragraph 77.

[17] Ibid. paragraphs 56–66.

In the parallel judgment in *Laval*, the Court was equally pessimistic about the maintainability of national social standards. It held that the collective action initiated by the Swedish trade union constituted a violation of Article 56 TFEU, read together with Article 3 of the PWD, as it forced a service provider from another Member States to enter into negotiations and sign a collective agreement on the terms and conditions of employment (rates of pay) that were more burdensome to it than the minimum conditions legislated in the PWD.[18] The Court also found that Articles 3(7) and 3(10) of the PWD regulating employment conditions did not provide any support to the application of the higher standards preferred by the local trade unions.[19] The controversial position taken in the jurisprudence, which was interpreted as the Court taking side in the clash of neoliberal and regulated capitalisms within the EU, was not altered substantially in subsequent cases. In *Rüffert*, it held that the public procurement act of Lower Saxony constituted an unjustifiable barrier to the free movement of services, particularly because Member States may not adopt legislative measures which require that contractors for public work contracts agree, in their tender submission, to pay their employees at least the rate set by a collective agreement.[20]

The relevance of this jurisprudence for any rights-based anchoring of common social standards in Europe is that in the domain of EU law nothing prevents them being measured and balanced against the particular economic policy objectives enshrined in the fundamental freedoms, which may jeopardise their normative status as "fundamental" rights. In particular, the limited weight guaranteed to them in the proportionality test before the Court of Justice and the resulting limited opportunities for individuals (trade unions) to justify the exercise of those rights and its circumstances indicate that their impact is secondary and are applied as instruments of last resort as opposed to granting them a privileged normative status (Martinsen 2015, 197). In general, the judgments were received by the Member States as the economic directly threatening national labour and social constitutions. They asked the Commission repeatedly to revisit the issue. Criticisms were raised also by the Member States that in the political arena normally favoured the market liberalisation these rulings delivered. The UK and a number of Central European countries protested against the judgments claiming that the Court had unacceptably overridden the political consensus struck between Member States on these matters (Höpner and Schäfer 2012, 25). The Parliament and the trade unions asked the Commission to confirm that economic freedoms are not superior to fundamental social rights and that it recognised that trade unions have the right to defend workers (Martinsen 2015, 199).

The political consolidation of the jurisprudence's widely criticised developments was attempted a few years after by the Commission when it presented a proposal for an enforcement directive on the posting of workers. The proposal basically confirmed the principle laid down in *Viking* and *Laval* (European Commission 2012a). Interestingly, the Commission made another proposal at the same time concerning the adoption of a regulation on the right to take collective action, the so-called Monti II regulation (European Commission 2012b). The Commission's plan was received with considerable hostility by the Member States which were anxious to

[18] Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:291, paragraph 99.

[19] Ibid. paragraphs 79–85.

[20] Judgment of 3 April 2008, *Dirk Rüffert v Land Niedersachsen,* C-346/06, EU:C:2008:189, paragraph 39.

protect locally regulated social rights from the influence of the fundamental freedoms. They applied, for the first time of the history of the EU, the subsidiarity early warning mechanism provided in the Lisbon Treaty to national parliaments. Twelve national parliaments, the Danish, Finnish, Swedish, Latvian, Portuguese, Luxembourgian, Maltese, Polish, French, Belgian, British and the Dutch, submitted reasoned opinions forcing the Commission to withdraw the proposal.

With this background, it is understandable that during the renegotiation of the PWD the revisiting of the social aspects was politically impracticable. The Member States focused merely on the enforcement technicalities of the directive aiming to improve its implementation and application at the national level. The two main areas addressed were the administrative and control measures available to the Member States to adopt and the regulation of liability between contractors and subcontractors. The compromise achieved in Directive 2014/67/EU[21] demonstrates that Member States may indeed be willing reach higher than the lowest common denominator and agree on common arrangements affecting national social policy. The non-exhaustiveness of the list of control measures drafted and the voluntary nature of the principle of joint and several liability for subcontractors do confirm, however, that there are obvious limitations to such agreements among the Member States. Twenty-five Member States voted in favour of the compromise solutions enacted in the Enforcement Directive, including countries which had formerly opposed them, such as the UK and Poland, while Hungary, Latvia, and Estonia, anxious to protect regulatory autonomy and, with that, the competitiveness of local labour markets, rejected it.

Because of the tensions caused at the local level and between Member States, the revision of the PWD remained on the agenda even after 2014. Changes were proposed especially in the area of the remuneration of posted workers as well as concerning subcontracting, temporary agency work and long-term posting. During the public consultation period, the Commission received two joint letters from national governments.[22] The letter signed by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden urged the modernisation of the PWD and raised, among others, that the principle of "equal pay for equal work in the same workplace" needs to be introduced as a basis of participation in national labour markets. They also suggested that the provisions regarding working and social conditions, most notably remuneration, applicable to posted workers should be amended and widened and that the establishment of a maximum temporal limit to postings should be reconsidered. The other letter was signed by Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Romania and Slovakia. As driven by their particular local (economic) interests, they argued that the revision of the PWD was premature and should be postponed until the Enforcement Directive's effects are carefully evaluated and assessed. They also reminded the Commission that the principle of "equal pay for equal work in the same workplace" may be incompatible with the Single Market as pay rate differences play a significant role in the competition among service providers. Furthermore, they claimed that posted workers need to remain under the legislation of the sending Member State for purposes of social security.

The Commission's response to these diametrically opposing national positions raised considerable controversies. Observing its own political mandate, the Commission considered that the

[21] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28.5.2014, p. 11–31.

[22] Briefing EU Legislation in Progress Posting of Workers Directive, European Parliamentary Research Service, Monika Kiss, Members' Research Service, PE 582.043. 10 May, 2016.

principle of "equal work for equal pay in the same workplace" is a cornerstone of the "social pillar" of European market integration and stressed that the Single Market must provide fairer conditions for workers and companies (European Commission 2016a). Its legislative proposal (European Commission 2016b) clearly favoured the strengthening of the social rights of posted workers and, to his effect, the autonomy of the hosting country to enforce its regulatory standards. It proposed, in particular, that the remuneration and allowances payable in the hosting Member States would not only include the minimum rates of pay, but also other elements, such as bonuses or allowances, if applicable. The Commission also proposed allowing the Member States make rules set out in law or in universally applicable collective agreements to become mandatory for posted workers in all sectors and introduce obligations on national and cross-border subcontractors to grant their workers the same pay as the main contractor. The proposal also contained provisions granting more favourable conditions for workers hired out by temporary agencies and those whose posting lasts longer than 24 months.

Frustrated by the Commission's proposal, the Member States yet again resorted to the subsidiarity control mechanism. Eleven national parliaments, those in Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia submitted reasoned opinions. Some of the criticisms were formal, others were substantive. As a main substantive hiatus, the Czech Republic and Estonia raised that the introduction of an "equal pay for equal work" principle setting out that posted workers will generally benefit from the same rules governing pay and working conditions as local workers could cause competitive disadvantages for workers and service providers from the newer Member States where labour cost is generally lower, as pay rate differences constitute one legitimate element of competitive advantage for service providers. Slovakia asked for a more balanced approach which takes into account the different levels of development in and the specific characteristics of the newer Member States. Denmark claimed that while the current directive holds explicitly that pay and working conditions should be regulated at national level, the proposed revision contains no such provision. Other, perhaps less

+relevant substantive demands included that subcontractors from other Member States should be required as a general principle to observe requirements laid down in legislation, regulatory instruments and collective agreements in the Member State concerned and that the Member States should be confined in their right to decide whether posted workers employed by temporary work agencies must meet the requirements specified in Directive 2008/104/EC on temporary agency work.[23]

The proposal, which was declared by the Commission as compatible with the principle of subsidiarity and was left unchanged, proceeded to the Council. There, the Member States agreed on the key principle of "equal pay for equal work in the same workplace" and they also accepted that all terms and conditions relating to employment in the host country should apply in the case of postings exceeding 12 months (which timeframe can be extended to 18 months). In reaching its decision, the Council presumably paid close attention to the circumstance that pay levels and employment protection as well as production costs vary greatly among the Member

23 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; OJ L 327, 5.12.2008, p. 9–14.

States and will continue to be different. The differences between production costs in the different Member States follow from local factors, such as the means and techniques of production, or the skills and training level of employees. This proved to be controversial as commentators argued that differences in wages and the level of employment protection between the "old" and the "new" Member States no longer bear such political relevance as a result of pay levels rising sharply in Central and Eastern Europe in the first decades of the 21st century (see Bernaciak 2014). It is difficult to contest, however, that there remain Member States, such as the United Kingdom, Ireland and Luxembourg that derive considerable competitive advantages from their flexible labour market and the connected weak system of employment protection and low fiscal burdens on employment, where economic stakeholders (employers) actively support legal arrangements which enable them to exploit differences in pay levels within the Single Market. In parallel, the Member States with labour shortages in the national economy have become increasingly wary of the ability of other Member States to deprive them of their badly needed workforce. Any move, especially legislative developments at the EU level aiming to introduce common institutions which would enhance the protection of workers in cross-border situations, therefore, continue to be eyed with suspicion fearing that reductions in the heterogeneity of local institutions would diminish the competitive advantages of national economies. In such a policy environment characterised by closely observed powerful national interests and equally powerful legal obligations, as imposed by EU law and interpreted by the EU Court of Justice, it is rather doubtful that initiatives for the protection of the social rights of workers, such as the EPSR, will be able to make a meaningful impact, unless their "fundamental" nature is taken seriously by decision-makers as well as stakeholders in the national economy.

3.2 The regulation of working time

Regulating working time at the European level, which again lies at the intersection of competing objectives brought by the Member States to the EU policy framework, is another field where institutional differences in the Member States manifesting in very different national economic interests had an impact on the common solutions achievable. As a specificity of the concrete regulatory domain, the EU has rather explicit competences to support and complement the activities of the Member States concerning the health and safety of workers (Article 137 TFEU). As a further fundamental legal provision, Article 31(2) EUCFR holds that every worker has the right to limited maximum working hours, daily and weekly rest periods and an annual period of paid leave, providing a general rights-based frame for the EU's policy activities.[24] The different interests held by the Member States have, nevertheless, led to a dynamic and controversial development of activities at the EU level characterised by frequent conflicts between law and politics as delivered by the EU institutions and the different Member States (Nowak 2008, 448). The troubled history of the harmonisation of working time in the EU might have impacted the EPSR which carefully avoids mentioning working time specifically despite its general objective of guaranteeing fair conditions in labour markets.

[24] Ironically, the EPSR refers only to Article 31(2) EUCFR concerning the right of workers to working conditions which respect his or her health, safety and dignity.

The Working Time Directive (WTD), as a major piece of EU social legislation, managed, despite strong opposition from the Member States, to introduce fairly significant common standards for national labour laws. The general aim of the original 1993 directive[25] was to improve the health and safety of workers by setting minimum standards for the organisation of working time. It gave a right to workers to a minimum daily rest period of eleven consecutive hours in a twenty-four hour period, a rest break if the working day exceeds six hours, and – in addition to the eleven hour daily rest – a minimum uninterrupted rest period of twenty-four hours in each seven-day period, which, in principle, include Sunday. It restricted the maximum weekly working time to an average of forty-eight hours and provided for a maximum paid annual leave of four weeks. It regulated the possibility that weekly working time can be extended beyond 48 hours with the consent of the individual worker. The reference period for the calculation of the average weekly working time was set at the rate of not more than four months. The WTD also regulated night work, shift work and patterns of work. It gave a legislative definition of work ("any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national law and/or practice") and rest period ("any period which is not working time").

In the course of its adoption, the Member States had to address disagreements on three major regulatory issues. These were the legal basis available for the adoption of the directive, the definitions of working time and the possibility of individual Member State opt-outs from the provisions of the directive. Concerning the issue of the legal basis, the source of conflict among the Member States emerged from the introduction of former Article 118/A TEC (now Article 153(1) TFEU by the Single European Act, which provided that measures aiming to improve health and safety at work can be adopted by qualified majority voting in the Council preventing that individual Member States, such as the UK holding particularly strong interests in the domain, block decision-making. It was, in fact, the UK which made use of the political opportunities to increase the flexibility of the directive's rules, for example by introducing the opt-out from the provision on the maximum 48 hour workweek allowing that workers and employers make an agreement that that rules does not apply to them (Article 18(b)(1)). A further opt-out concerned the exemption of specific sectors from the scope of the directive, which was delimited in time and subjected to a review after seven years.[26]

The political rationale for introducing flexible arrangements was to secure the support of every Member State for the directive and to be able to hammer out agreements among them on the lowest common denominator in regulation (Martinsen 2015, 106). Nevertheless, the UK decided not to give its approval to the final directive and abstained from the final vote in the Council (see Beach 2001, 156). It immediately brought a legal challenge to the Court of Justice in an action for annulment claiming that the directive was adopted using an incorrect legal

[25] Council Directive 93/104/EC, OJ. It was replaced by Directive of the European Parliament and of the Council 2003/88/EC, OJ L 299, 18.11.2003, p. 9–19

[26] Exempted sectors included air, road, rail, sea, inland waterway and lake transportation, sea fishing, other work at sea, and the activities of doctors in training (Article 1(3)).

basis.[27] The Court did not share the British concerns and held that the directive was valid.[28] It did accept, however, that the provision on including Sunday in the weekly rest period (Article 5) cannot be connected to health and safety protection.

Concerning the definition of work, the conflict between the common institutional arrangements and the particular interests of the Member States materialised only after the Court of Justice interpreted, rather expansively, the directive's relevant provision in its judgment in *SiMAP*.[29] The Court not only established that doctors, despite Article 2(2) of the directive allowing the exemption of public service activities necessary to maintain public order and security, were covered by the directive, but it also held that on-call time spent at a healthcare institution, as opposed to on-call duty during which the doctor was not required to be at the healthcare institution, constituted working time. The judgment caused a political uproar in the Member States which reacted to it without hesitation. Germany refused to acknowledge that the judgment delivered in a Spanish case had a general legal effect. In its official communication, the Ministry of Labour stated that the ruling did not apply to Germany even though the applicable Spanish and German regulations were quite similar (Nowak 2008, 456). In a joint letter sent to the Commission, the health ministers of the UK, Denmark, Sweden and the Netherlands raised their political concerns about the impact of the ruling (Martinsen 2015, 110). Also, there was considerable confusion as to whether the judgment applied only to the medical sector, or the principle laid down covered other sectors as well, such as the fire service, the fishing industry, boarding schools, the police, the defence sector etc. (European Commission 2010b). The German government released a calculation demonstrating that implementing the Court's interpretation would increase the staffing requirement in German hospitals by 24 per cent and would lead to an additional cost of roughly EUR 1.75 billion (European Commission 2003).

From the perspective of the political opportunities available to the Member States to protect the institutional setup of the national economy, the Court's interpretation seemed to overrule the compromise institutional solution secured in the directive. This worry was not, however, shared by the Commission which in its evaluation report on the WTD refused to deal with the issue (European Commission 2000). Arguably, the Commission wanted to avoid using the *SiMAP* ruling with the potential effect of challenging the Member States which were concerned about the market-limiting effect of the directive (Martinsen 2015, 110). Contrary to expectations, the revised directive did not tackle policy and legal uncertainty caused by the judgment and the new legislative text (Directive 2003/88/EC) omitted to make a reference to the Court's interpretation. It seems that the Member States finally accepted that the judgment offered a valid reading of the directive's provisions and the intent of the EU legislator.

In the meantime, the Court of Justice not only confirmed in subsequent case law the confirmed the principles laid down in *SiMAP*,[30] but offered further controversial interpretation of the directive contradicting in law the political positions held by the Member States, including the

[27] The UK argued that working time is not a health and safety, but an employment issue. Therefore, the legal basis used should have been either Article 100 (now Article 114 TFEU) or Article 235 TEC (now Article 352 TFEU), both of requiring unanimity in the Council.

[28] Judgment of 12 November 1996, *United Kingdom v Council*, C-84/94, EU:C:1996:431.

[29] Judgment of 3 October 2000, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98, EU:C:2000:528.

[30] Order of 3 July 2001, *Confederación Intersindical Galega (CIG) v Servicio Galego de Saúde (Sergas)*, C-241/99, EU:C:2001:371.

most powerful (Martinsen 2015, 104). In the British trade union case *BECTU*, it held that workers on short-term contracts are entitled to paid annual leave under the directive.[31] In *Jaeger*, it became evident that the Court's interpretation of working time applies in every labour market in the EU. In regards the specific legal issue whether whether time spent on call, but spent inactively, was considered working time, even though the employer (here, a doctor) was able to rest during that period, it ruled that on-call time was generally working time for the reason that the employee had to be at the disposal of the employer.[32] This had significant impact in national health care systems as many employees were considered to be employed over 48 hours in a week, addressing which – as predicted earlier by the German government – had serious financial implications.

The third issue raising political controversies among the Member States concerning the opt-outs available the Member States was also linked to the interpretation given in *SiMAP*. The judgment was ignored by many Member States which failed to implement it into national law (Martinsen 2015, 113). Threatened with procedures for non-compliance, the Member States decided to rely on the opt-out offered in the directive enabling national governments to protect the competitiveness of the national economy by enabling employers to organise working time flexibly and, thus, control wage expenditures.[33] The use of the opt-out attracted considerable political attention in Europe as it had the effect of splitting the political space and putting Member States with different economic interests on a collision course (Martinsen 2015, 107). The liberal market economies in the EU regarded the WTD and its implementation as obstacles to economic growth and as unjustifiably interfering with the untrammelled operation of the market where the freedom of employers to make choices must be preserved (see Copeland 2012). In contrast, Member States with regulated market economies held the position that regulating working hours will the effect of creating more employment and guaranteeing the physical and mental health of the workforce. In their view, it is the responsibility of the government to ensure through regulatory intervention that employees earn sufficient income without working excessively long hours (see Copeland 2012).

The open rebellion of the Member States against a core provision of the directive and the political schism revealed by the related use of the opt-out provided convinced the Commission, driven mainly by its worries that the realisation of important EU policy objectives will be jeopardised, that the Member States need to be invited to renegotiate their obligations as affected by the jurisprudence of the Court (Martinsen 2015, 117). The Member States in the Council supported the Commission's decision. The political deal reversing legal developments was, however, undermined by the intervention of the European Parliament which entered the political arena as an actor committed to strengthen the protection of social rights. It was in favour of

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[31] Judgment of 26 June 2001, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, C-173/99, EU:C:2001:356.

[32] Judgment of 9 September 2003, *Landeshauptstadt Kiel v Norbert Jaeger*, C-151/02, EU:C:2003:437, paragraph 48.

[33] Member States where opt out may be used in any/all sectors of the economy are Bulgaria, Cyprus, Estonia, Malta and UK; Member States where the opt-out may be used only in certain sectors or by certain occupations are Belgium, Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and Spain.

keeping the Court's interpretation and codifying it into EU legislation. The involvement of social partners in the negotiation process by the Commission also proved to be problematic as their interests quite plainly contradicted each other. The European Trade Union Confederation (ETUC) firmly opposed the prolongation of the opt-outs and argued for modifying the directive of the basis of the Court's case law. The ETUC rejected the compromise solution emerging from the negotiations and decided, finally, to refuse to respond to the Commission's calls. With the review of the directive stalled, the Commission was subjected to strong criticism for not responding in time to the new situation arising after *SiMAP*, failing to understand the depth of the political divisions in Europe on this matter, and, finally, for disregarding the political position taken up by the European Parliament (Martinsen 2015, 131).

The national reactions to the *SiMAP* ruling demonstrated with clarity the obstacles to economic and social integration in the EU. As a matter of the regulation of working time, national labour markets remain deeply divided by substantive differences (see Eurofund 2015). One of the key division is between the "old" and the "new" Member States. While in most of the pre-2004 Member States the main working time standards were created together with social partners at sectoral or at company level, in the newer Member States, with the exception of Cyprus, the rules were developed in a top-down legislative process without resorting to the largely dysfunctional tool of collective bargaining (see Eurofund 2016; Eurofund 2017). The opt-out enabling employers and employees to agree on longer working hours was preferred by national economies interested in maintaining labour market flexibility and high productivity. Other national economies preferred solutions which ensured productivity through innovation and new forms of work organisation, and aimed to guarantee high standards of health and safety at the workplace and a work-life balance for workers (see Eurofund 2015; European Commission 2010). As a further consequence of the attempt to harmonise the regulation of working time in Europe, relevant for future initiatives for regulating social rights at the EU level, that the extensive opt-out framework allowed so as to enable agreement among the Member States created a set of rules that "nobody follows", undermining fundamentally the credibility of European Union measures and expectations of effectiveness from rule-based governance in the EU (Martinsen 2015, 131).

The regulation of work-life balance, affecting working time and leaves from work, revealed largely similar tensions among the Member States.[34] Apart from raw national economic interests relating to competitiveness, growth and productivity, a range of other factors, such as social attitudes and workplace culture affected the position taken by national governments. It was noted in connection with the first maternity leave directive that its implementation, even though the overall economic impact in terms of costs was rather modest, led to considerable adaptation pressure in different Member States. While the misfit in coordinated market economies and in the Mediterranean countries was not extreme, adaptation requirements in liberal market economies were considerable (see Falkner et al 2002). Some of the Member States were rather reluctant to reshape their already existing systems of parental leave which use significantly different rules in determining entitlement on the basis of the age of the child or enabling the individualisation of entitlements and their transferability (European Parliament, 2015). It was hardly surprising that the Council, due to the lack of agreement among the Member States, blocked the Commission's proposal to modify the directive on maternity leave. The proposal submitted under the EPSR for a work-life balance directive seems to have learned from the past

[34] Council Directive 92/85/EEC (Maternity Leave Directive), protecting pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1–7 and Council Directive 2010/18/EU (Parental Leave Directive), establishing the leave conditions for male and female workers, OJ L 68, 18.3.2010, p. 13–20.

and, in principle, commits to respecting the different interests and the different institutional arrangements of individual Member States. Its fairly ambitious provisions, which also touch upon issues of social security, may, however, raise objections from the Member States,[35] questioning again the ability of Europe to integrate under the social rights it aims to provide to its workers.

4 Conclusion

Social integration is an area of politics and law in the European Union where the interests held by the Member States as well as their differences play an obvious and extremely influential role. This is evidenced in the politics leading to the adoption of EU measures in the social domain, in the individual provisions of the measures adopted, and in Member State approaches to the implementation of those measures in the national territory. The different national economies, including national labour markets, tolerate the introduction of common institutions at the European level differently, which has an impact on the prospects of adopting European rules as well as on the preparedness of the Member States to alter local institutional setups under their EU obligations. EU policy-making, therefore, navigates in a very difficult terrain where it is required to reconcile multiple factors, which may often be in a contradictory relationship with each other, such as the agenda of market integration, the EU's complex economic policy agenda, its political and legal commitment to protecting social rights, and the legitimate demands from national governments to be able to maintain the competitiveness of the national economy. The compromise solutions achievable in such an environment are unlikely to meet expectations and may lead to further conflicts, or accentuate existing ones, among the different actors.

This is the political and legal domain in which the Commission proposed to develop and implement a European Pillar of Social Rights. While at the level of high politics the EPSR, which demonstratively made deference to national competences and local policy and institutional diversity and incorporated the principle of subsidiarity, managed to gather support from the Member States and other actors, its implementation in legal measures containing detailed rules will very likely attract serious opposition, especially from the national governments the economic policy interests of which those measures jeopardise. The divisions are likely to arise between liberal and regulated market economies as well as between national economies which aim to ensure productivity and competitiveness through flexible labour markets and which want to guarantee the same whilst guaranteeing a higher standard of protection to the social rights of workers. As shown by previous examples, introducing flexibility into the EPSR framework so as to accommodate such differences may have the consequence of jeopardising the attainment of its objectives. Also, the using of a rights-language may not prove to be as effective as expected in overcoming the political impasse among the Member States and the relevant social partners. Unless their "fundamental" nature is recognised and given effect, the protection of

[35] The most debated areas of the Commission's proposal are the transferability and the remuneration to be paid.

social rights in a separate pillar will be unsuccessful in challenging the current policy/political status quo defining EU market integration.

References

Barnard, Catherine. "Social Dumping or Dumping Socialism?" *The Cambridge Law Journal 67(2)*, 2008: 262–264.

Barnard, Catherine. "Solidarity and the Commission's 'Renewed Social Agenda'." In *Promoting Solidarity in the European Union*, by Malcolm Ross and Yuri Borgmann-Prebil, 73-105. Oxford: Oxford University Press, 2010.

Beach, Derek. *Between Law and Politics: The Relationship between the European Court of Justice and EU Member States.* DJOF Publishing, 2001.

Bernaciak, Magdalena. *Social dumping and the EU integration process.* ETUI Working Paper 2014.06, Brussels: ETUI, 2014.

Cabrita, Jorge. *Opting out of the European Working Time Directive, Publications Office of the European Union,* Luxembourg: Eurofound, 2015.

Christiansen, T, T Jorgensen, and A Wiener. *The Social Construction of Europe.* London: Sage, 1999.

Copeland, Paul. "EU enlargement, the clash of capitalism and the European social model." *Journal of Comparative European Politics 10 (4)*, 2012: 476-504.

Davies, Anne C. L. "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ." *Industrial Law Journal 37 (2)*, 2008: 126-148.

Davies, Paul. "The Posted Workers Directive and the EC Treaty." *Industrial Law Journal 31 (3)*, 2002: 298-306.

de Vries, Sybe A. "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice." *Utrecht Law Review 9 (1)*, 2013: 169-192.

Deakin, Simon. "From Social Pillar to New Deal." In *A European Social Union after the Crisis*, edited by Frank Vandenbroucke, Catherine Barnard and Geert de Baere, 194-211. Cambridge: Cambridge University Press, 2017.

Eigmüller, Monika. "Beyond the crisis: The societal effects of the European transformation." *European Law Journal*, 2017: 23:350-360.

Eurofund Eurofound (2015), Opting out of the European Working Time Directive, Publications Office of the European Union, Luxembourg

Eurofound (2017), Work–life balance and flexible working arrangements in the European Union, Eurofound, Dublin; Eurofound (2016), Working time developments in the 21st century: Work duration and its regulation in the EU, Publications Office of the European Union, Luxembourg, p. 56.

European Union (2016). State of the Union 2016. Luxembourg: Publications Office.

European Commission (1985). Commission of the European communities COM(85) 310 final, Completing the Internal Market. White Paper from the Commission to the European Council. Brussels, 14 June 1985.

European Commission (2000). Report from the Commission - State of implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ("Working Time Directive"), COM (2000) 787.

European Commission (2003). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions and the social partners at Community level in relation with the re-exam of Directive 93/104/EC concerning certain aspects of the organisation of working time, COM (2003) 843. January 15, 2004.

European Commission (2010a). European Commission DG for Employment, Social Affairs and Equal Opportunities Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation, Final report, 21 December 2010.

European Commission (2010b) SEC(2010) 1611 final, Commission Staff Working Paper, Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, December 21, 2010.

European Commission (2012a). COM (2012) 131, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

European Commission (2012b). COM (2012) 130, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services).

European Commission (2014). Speech of President-elect Jean-Claude Juncker on 22 October 2014 “Time for Action”—Statement in the European Parliament plenary session.

European Commission (2016a). Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market, European Commission Press release, Strasbourg, 8 March 2016.

European Commission (2016b). Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. COM/2016/0128 final, procedure file 2016/0070 (COD).

European Commission (2017a). 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/2017/0250 final

European Commission (2017b). Commission Staff Working Document SWD(2017)201

European Commission (2017c). White Paper on the Future of Europe (White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025, 1.3.2017, COM 2017(2025) final

European Parliament, Council and Commission (2017). Interinstitutional Proclamation on the European Pillar of Social Rights ST-13129-2017-INIT

European Parliament (2015). Gender equality in employment and occupation Directive 2006/54/EC, European Implementation Assessment, PE 547.546.

Falkner, Gerda, Miriam Hartlapp, Simone Leiber, and Olivier Treib. "Transforming Social Policy in Europe? The EC's Parental Leave Directive and Misfit in 15 Member States." *MPIfG Working Paper 02/11*, October 2002.

Farkas, Beáta. *Models of Capitalism in the European Union.* London: Palgrave Macmillan, 2016.

Giubboni, Stefano. *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective.* Cambridge: Cambridge University Press, 2006.

Haas, Ernst Bernard. *The Uniting of Europe: Political, Social, and Economic Forces 1950–1957.* Original ed 1958. IN: University of Notre Dame Press, 1968.

Hall, Peter A, and David Soskice. "An Introduction to Varieties of Capitalism." In *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, by A Peter Hall and David Soskice. Oxford: Oxford University Press, 2001.

Hatzopoulos, Vassilis. "From Hard to Soft: Governance in the EU Internal Market." In *Cambridge Yearbook of European Legal Studies Volume 15*, edited by Catherine Barnard, Albertina Albors Llorens and Marcus Gehring , 101-138. London: Bloomsbury Collections, 2012-2013.

Höpner, Martin, and Armin Schäfer. "Integration among Unequals - How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU." *MPiFG Working Papers 12/5*, 2012.

Jepsen, Maria, and Amparo Serrano Pascual. "The European Social Model: an exercise in deconstruction." *Journal of European Social Ploicy 15 (3)*, 2005: 231-245.

Kenner, Jeff. "Economic and Social Rights in the EU Legal Order: The Mirage of Indivsibility." In *Economic and Social Rights under the EU Charter of Fundamnetal Rights - A Legal Prespective*, edited by Tamara K Hervey and Jeff Kenner, 1-26. London: Hart Publishing, 2003.

Leino, Paivi. "Sovereignty and Subordination: On the Limits of EU Economic Policy Coordination." *European Law Review 42(2)*, 2017: 166-176.

Liebert, Ulrike. "Reconciling market with Social Europe? The EU undert the Lisbon Treaty." In *European Economic and Social Constitutionalism after the Treaty of Lisbon*, edited by Dagmar Schiek, Ulrike Liebert and Hildegard Schneider, 47-74. Cambridge et al: Cambridge University Press, 2011.

Martinsen, Dorte Sindbjerg. *Battles on Working Time: Rejecting Court Influence.* Oxford: Oxford University Press, 2015.

Moravcsik, Andrew. "Preferences and Power in the European Community: A Liberal Intergovermentalist Approach." *Journal of Common Market Studies 31(4)*, 1993: 473.

Moravcsik, Andrew, and F Schimmelfenning. "Liberal intergovernmentalism." In *European Integration Theory*, by A Weiner. Oxford: Oxford University Press, 2009.

Nowak, Tobias. "The Working Time Directive and the European Court of Justice." *Maastricht Journal of European and Comparative Law 15*, 2008: 447-471.

Piris, Jean-Claude. *The Lisbon Treaty: A Legal and Political Analysis.* Cambridge: Cambridge University Press, 2010.

Schiek, Dagmar. "Re-embedding economic and social constitualism." In *Europan Economic and Social Constitutionalism after the Treaty of Lisbon*, edited by Dagmar Schiek, Ulrike Liebert and Hildegard Schneider, 24. Cambridge et al: Cambridge University Press, 2011.

Schiek, Dagmar. "Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market." *European Constitutional Law Review 13*, 2017: 611-640.

Sciarra, Silvana. "Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU." *Cambridge Yearbook of European Legal Studies 10*, 2008: 563-580.

Supiot, Alain. "Europe won over to the "communist market"." *Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights – where does the balance lie? Debate organised by Notre Europe and the European Trade Union Institution* (Jacques Delors Institute), 2008: 1-7.

Verschueren, Herwig. "The European Internal Market and the Competition between Workers." *European Labour Law Journal 6 (2)*, 2015: 128-151.