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The legal effect of the EPSR*

Summary: **1.** The way to the Pillar of Social Rights. **2.** Content and legal character. **3.** The Pillar as a political compass. **4.** The legal effects. **5.** Conclusion.

1. *The way to the Pillar of Social Rights*

The European Pillar of Social Rights was adopted at the Gothenburg Social Summit on 17 November 2017. It took the form of a Commission recommendation on the one hand¹, and an institutional proclamation by European Parliament, Commission and Council on the other². It is declared to be a compass for a renewed convergence process towards better working and living conditions. As such, it is at the same time a response to Europe's deep political crisis in the second decade of this millennium³.

The idea of the Pillar of Social Rights has its roots in Commission President Juncker's State of the Union Address to the European Parliament of 9 September 2015⁴. It was intended to reflect and complement what had been

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¹ Commission Recommendation (EU) 2017/761 of 26 April 2017, OJ L 113/56 .

² Interinstitutional Proclamation on the European Pillar of Social Rights, 2017/C-428/09.

³ See DEINERT, *cit.*, with further reference.

⁴ In parts printed in: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching a consultation on a European Pillar of Social Rights, COM (2016) 127 final, COM (2016) 127 final, p. 2.

achieved to protect workers under the changed realities of society and the labour world. It was initially conceived for the Euro area, but should not close off the possibility for other Member States to join in. In March 2016 the Commission launched a public consultation in which it presented a first proposal for a European Pillar of Social Rights⁵. In the opinion of the Commission this instrument seemed to be necessary to cope with the crisis on the one hand, and to pass over to a deeper and fairer Economic and Monetary Union (EMU) on the other⁶. It should create a framework for performance screening in the fields of employment and social affairs. The Commission stressed the concept of “flexicurity” for the European labour markets and the necessity to develop ways for the transposition of the concept in praxis⁷.

On 19 January 2017 the European Parliament adopted a resolution to the draft⁸.

After the consultation, on 26 April 2017 the Commission presented the communication “Establishing a European Pillar of Social Rights”⁹. Like in the consultation, it stressed the economic policy context. It was meant as guidance for Member States. The Commission admitted that the principles and rights were not directly applicable and needed to be transposed at the appropriate levels¹⁰. It emphasized the responsibility of all institutions to safeguard the principles and rights of the Pillar. Many of the instruments were to be used by national authorities and social partners but the Union could show the proper direction¹¹. Additionally, the Commission highlighted a need for better enforcement of existing rights, *inter alia* by promoting better awareness¹².

The communication was linked to a draft Commission recommendation. At the same time, the Commission proposed an inter-institutional proclamation¹³. Besides, it presented a working document with explanations

⁵ Ivi.

⁶ Ivi, pp. 2 and 9.

⁷ Ivi, p. 5.

⁸ European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), 2018/C 242/05.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights, COM (2017) 250 final.

¹⁰ Ivi, p. 8.

¹¹ Ivi, pp. 2–3.

¹² Ivi, p. 10.

¹³ Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, COM (2017) 251 final.

for all principles and rights describing the legal *acquis Communautaire* including the EU's competences and explaining the envisaged transposition measures and the possibilities and necessities for transposition at the Member State's level¹⁴. Additionally, a social scoreboard was implemented, with an aim of converging into political guidance for coordination of economic policy in connection with the European Semester¹⁵.

In 2018 the Commission adopted the communication "Monitoring the implementation of the European Pillar of Social Rights"¹⁶ with a focus on considering this data in the European Semester with the help of the social scoreboard.

At the beginning of 2020, the Commission again launched a wide-range consultation¹⁷. Based on the results of it, the Commission adopted in 2021 an Action Plan¹⁸ which highlights three goals for 2030: at least 78% of people between 20 and 64 years old in employment, at least 60% of adults participating in training every year and the reduction by at least 15 million of the number of people with risk of poverty or social exclusion.

2. *Content and legal character*

The European Pillar of Social Rights has been established in a bi-directional manner. It is a dual form of legal source¹⁹. Firstly, the Commission

¹⁴ Commission Staff Working Document Accompanying the document 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, SWD (2017) 201 final.

¹⁵ Commission Staff Working Document Social Scoreboard Accompanying the document 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, SWD (2017) 200 final.

¹⁶ Commission Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Monitoring the implementation of the European Pillar of Social Rights, COM (2018) 130 final.

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Strong Social Europe For Just Transitions, COM (2020) 14 final.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty the European Pillar of Social Rights Action Plan, COM (2021) 102 final.

¹⁹ LAULOM, *Quelle Europe sociale nous prépare le socle des droits sociaux?*, in *RDT*, 2017, p. 455 ff.

adopted a recommendation²⁰. Secondly, the Commission, the Council and the European Parliament commonly adopted a solemn inter-institutional proclamation. The Commission recommendation follows the idea of an instrument promoting stability in EMU and, therefore, is directed towards the Euro-area without excluding other Member States from voluntary participation²¹. The restriction on its application to the EMU was from the very beginning not understandable²² and it is perhaps explicable in the light of the political wish not to create further influence on the Brexit referendum²³. On the other hand, the inter-institutional proclamation is still not formally restricted to the Euro-area and addresses every Member State, although it is designed for the Euro-Member States²⁴. This seems to be the biggest difference between both instruments. Although there exist some further minor verbal differences between the texts the Commission has – as far as can be seen – not yet adjusted to the younger proclamation text as foreseen in the recommendation²⁵.

The Pillar shall give Member States guidance to promote social rights through concrete legal enactments²⁶. Recital (18) stresses that this will not lead to an expansion of EU competences, and rather the implementation has to take place within the existing competences of EU and the Member States. Furthermore, the Pillar highlights the crucial role of social partners for implementing its rights “in accordance with their autonomy and the right to collective action”²⁷.

The principles and rights of the Pillar are inspired by EU primary law like the EU-Treaty, Treaty of the Functioning of the EU, Charter of Fundamental Rights, the 1989 Community Charter of Fundamental Social Rights of Workers, the case law of the CJEU, international instruments like the European Social Charter and ILO recommendations. By nature, it is an instru-

²⁰ 2017/C 428/09.

²¹ Recital (13).

²² KINGREEN, *Ein Sockel für die Europäische Säule sozialer Rechte: zur Zuständigkeit der EU für einen verbindlichen Rechtsrahmen für soziale Grundsicherungssysteme in den Mitgliedstaaten*, in SR, 2018, p. 2.

²³ BRAMESHUBER, PRASSL, *Die “europäische Säule sozialer Rechte”*, in KIESER, LENDFERS (eds.), *Jahrbuch Sozialversicherungsrecht*, Dike Verlag, 2017, pp. 85 and 92.

²⁴ Cf. Recital (13).

²⁵ COM (2017) 250 final, p. 9. See DEINERT, *cit.*, pp. 282 and 285.

²⁶ Recital (12).

²⁷ Recital (20).

ment of enabling enforcement rather than a mere recognition of social rights. Furthermore, the Pillar does not restrict itself to the existing *acquis*. It goes beyond in a spirit of modernizing, deepening and expansion. Moreover, the social *acquis* is not covered completely as, e.g., the right to working time limitation according to Article 31 (2) of the Charter of Fundamental Rights does not appear²⁸.

As far as it goes beyond existing social rights, the Pillar depends on implementation through EU legislation within the existing competences and on harmonized national legislation. It does not entitle people to transfer benefits. Moreover, the Pillar shall exclude affection of the equilibriums of social security systems in the Member States.

The Pillar is composed of three chapters: “Equal opportunities and access to the labour market”, “Fair working conditions”, “Social protection and inclusion”. The first chapter focusses on equality and education/training. The second includes the core of working conditions like fair wages, dismissal protection, health and safety, data protection or questions of work family balance and aims at balancing the flexibility interests of employers with the security interests of employees, namely those under atypical labour contracts. The third chapter contains a wide range of social protection rights like poverty protection for children, unemployment benefits or minimum income and promises, moreover, access to housing or housing assistance and to essential services “of good quality”.

The Pillar considers minimum rights and does not prohibit Member States from guaranteeing better social rights. Additionally, it shall not be interpreted as restricting or adversely affecting social rights by EU or international law.

3. *The Pillar as a political compass*

Although the text changed from the first draft and shifted towards a formulation of enforceable rights²⁹, the Pillar cannot and does not guarantee social rights and it as such is not a pillar in the sense of the word as it is used

²⁸ LÖRCHER, *Die Europäische Säule sozialer Rechte - Rechtsfortschritt oder Alibi?*, in *AuR*, 2017, pp. 387–388.

²⁹ Cf. BECKER, *Die Europäische Säule sozialer Rechte*, in *ZöR*, 2018, 73, pp. 525 and 529–530.

in the EU legal system. It is rather a pillar for the social rights guaranteed therein. Social rights are not realized by the mere fact of being written down. Anyone may enjoy freedom of religion by the mere text of a fundamental right because authorities have to respect this freedom. For social rights it is different: e.g. children are not protected against poverty by a mere legal text. The public authorities must implement such rights because otherwise those rights will be worthless. The Commission, Council and European Parliament promise to implement the rights set out in the Pillar. This may happen by EU legislation or by national legal measures.

This shows that the Pillar does not create social rights, but rather that it strengthens such rights. The emphasis on the compliance with the Treaty's competence order makes this clear. This makes sense also for those rights that are not yet part of the social *acquis* and which will be shaped by the Pillar: it may give rise to new social rights or specifications of existing rights through implementation measures by the Union, Member States and/or social partners of all levels.

Social policy secondary law instruments and drafts of the last few years show how the Commission understands the Pillar as a compass for the renewed convergence³⁰. The Commission draft for a regulation establishing a European Labour Authority³¹ was presented on the same day as the monitoring communication from 2018³² and it highlights, like the later adopted regulation itself³³, its importance for the implementation of the Pillar of Social Rights. The same is true for the draft of a Council recommendation from the same date on access to social protection for workers and the self-employed³⁴ in which the Pillar, in particular the right to adequate social protection, is envisaged several times.

³⁰ Cf. GARBEN, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, in CYBELS, 2019, 21, pp. 101 and 116 ff.; ROBIN-OLIVIER, *Chronique Politique sociale de l'UE - Un nouveau départ pour la politique sociale de l'Union: premier bilan des effets du socle européen des droits sociaux*, in RTDE, 2018, p. 403; HENDRICKX, *The European Pillar of Social Rights: prospects for the future of labour law*, in FUNK, MELZER-ADANLO (eds.), *Arbeiten in Würde, liber amicorum Walter Löschnigg*, 2019, pp. 503 and 514 ff.

³¹ Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM (2018) 131 final.

³² COM (2020) 14 final.

³³ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, recital (3).

³⁴ COM (2018) 132 final.

The work–life balance principle (9) of the Pillar of Social Rights reads as a blueprint of the Work–Life Balance Directive³⁵. The latter refers in its recital (9) to this principle as to the Pillar principle (2) of equal opportunities irrespective of sex.

Similarly, the Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union³⁶ is to be understood as a transposition of Pillar principle (5) on secure and adaptable employment. This principle includes promotion of transition into open-ended forms of employment, facilitation of professional mobility and reasonable duration of probation periods. The directive takes these goals into account by regulating probationary periods in Article 8, parallel employment in Article 9 and transition to another form of employment in Article 12. Information rights as envisaged in principle (7) of the Pillar are adapted in the new directive in the sense of enforcing under the new conditions of a changed labour world in Articles 4 et seq. of the directive.

Similarly, the principles in no. 6 concerning wages may be understood as a forecast for the proposal for the Minimum Wages Directive³⁷. The justification of the proposal as well as recital (4) refers to the Pillar of Social Rights. The proposed directive shall oblige the Member States to ensure adequate minimum wages and to promote collective bargaining on wages. Quite interestingly, the proposal claims for effective access and right to redress and protection just like the Pillar aims at improving enforcement of social rights.

In the same way the proposed Platform Work Directive³⁸ must be seen in the light of principal no. 5 of the Pillar on secure and adaptable employment. The proposal aims at guaranteeing fair and equal treatment with concern to the working conditions and social protection and training while ensuring flexibility for employers.

To summarise, the proposals of the Commission in the field of social law refer to the Pillar of Social Rights. The Pillar must, therefore, be under-

³⁵ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU.

³⁶ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

³⁷ COM (2020) 682 final.

³⁸ Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM (2021) 762 final.

stood as a political agenda³⁹. It may strengthen primary and secondary law and serve as a blueprint for new secondary law⁴⁰. Moreover, it may be a self-commitment to prevent the Commission from disregarding social rights when using its influence in the coordination of Member States' economic and budgetary policy during the European Semester⁴¹. It will safeguard social rights *vis-a-vis* economic governance⁴². The Pillar encourages the Commission furthermore to claim for realisation of social rights towards the Member States⁴³.

4. *The legal effects*

According to article 288 (5) TFEU a recommendation has no binding effects. Neither it has binding effects for the Member States, nor for the Commission. But this does not mean that a recommendation has no legal effect at all. The CJEU has established that courts in the Member States have to consider recommendations in their decisions, especially when interpreting national transposition measures or supplementary law⁴⁴. In the same way the Pillar must be used as an interpretive guide for national law⁴⁵. But it follows from the fact that the Pillar intends to invoke a renewed convergence that it must be considered only in the case that national law is subject to EU-coordination or -harmonisation and not in cases without any reference to the implementation of EU law⁴⁶. According to article 267 TFEU, the Court of Justice has jurisdiction on EU law and may therefore, *e.g.* when invoked by a preliminary ruling, interpret the recommendation but the Court has no

³⁹ LAULOM, *cit.*, p. 455 ff.; see also RASNACA, *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-Level policymaking*, 2017, p. 19 ff.

⁴⁰ BECKER, *cit.*, pp. 525 and 530.

⁴¹ SEIKEL, *WSI Policy Brief*, November 2017, pp. 8-9.

⁴² GARBEN, *cit.*, pp. 101-102.

⁴³ Cf. ROBIN-OLIVIER, *cit.*, p. 403.

⁴⁴ CJEU of 13 December 1989, *Salvatore Grimaldi v Fonds des maladies professionnelles*, Case C-322/88, ECLI:EU:1989:64; CJEU of 18 March 2010, *Rosalba Alassini v Telecom Italia SpA*, Case C-317/08 and others, ECLI:EU:2010:146.

⁴⁵ BRAMESHUBER, *Die Europäische Säule sozialer Rechte, oder: Zur Konstitutionalisierung von Sozialen Rechten*, in AUER-MAYER, FELTEN, MOSLER, SCHRATTBAUER (eds.), *Liber amicorum Walter Pfeil*, pp. 307 and 312; DEINERT, *cit.*, pp. 283 and 291.

⁴⁶ DEINERT, *cit.*, pp. 283 and 291.

competence to interpret Member States' laws by considering the Pillar of Social Rights.

It seems a bit more complicated to define the legal effects of the inter-institutional proclamation. According to article 295, 2 TFEU inter-institutional agreements may have binding effects although those are normally meant to be not binding on third parties like Member States or private persons. This follows normally already from the content. And the same is true for the proclamation of the Pillar of Social Rights. The institutions assumed that the pillar will not create directly enforceable rights⁴⁷. Therefore, it is of no further significance that the terms of “rights” and “principles” are used like they are in the Charter of fundamental rights (cf. article 52) and seem to use the word “principle” especially in the case of new positions which actually have a need for implementation⁴⁸.

This leads to the question if binding effects may exist between the involved institutions, *i.e.* the Commission, European Parliament and Member States. One could think that the self-binding nature of the Pillar of Social Rights may restrict the political discretion of the parties in the lawmaking process. To a certain degree it would seem to be contradictory if the Member States would promise to foster work-life balance in the Council on the one hand, and reject any proposal for a work-life balance directive on the other, although it would not be contradictory if the dispute arises on the details of such a proposal. Nevertheless, a binding effect does not exist for the simple reason that, otherwise, the Pillar would prejudice the vote of Member States in the Council, even in cases of unanimity according to article 153 (2) subsection 3 TFEU⁴⁹. Furthermore, a binding effect in fields of competence of Member States leverage the competition structure. Therefore, in addition, the restricted competence in the field of social policy according to articles 153 *et seq.* excludes binding effects of the Pillar⁵⁰. This seems to be in line with the Commission's opinion that the rights and principles of the Pillar should be implemented in diverse ways⁵¹.

It follows from the self-binding effect of the interinstitutional procla-

⁴⁷ Cf. LHERNOULD, *Quelle Europe sociale nous prépare le socle des droits sociaux?*, in *RDT*, 2017, p. 455 ff.; HENDRICKX, *cit.*, pp. 503, 504.

⁴⁸ Cf. recital (14); for the differentiation between rights and principles insofar BECKER, *cit.*, pp. 525 and 536–537.

⁴⁹ DEINERT, *cit.*, pp. 283 and 289–290.

⁵⁰ BECKER, *cit.*, pp. 525 and 535.

⁵¹ COM (2017) 250 final, p. 4.

mation of the Pillar of Social Rights that secondary law which refers to the Pillar must be interpreted in the light of the Pillar rights and principles⁵². Furthermore, the Pillar wants to be a benchmark for promoting social rights. The institutions should take it into account whenever they create legal rules. This leads to the conclusion that considering the Pillar when interpreting secondary legislation is not excluded for acts which, like *e.g.* the Revised Posting Directive⁵³, do not refer to the Pillar⁵⁴. Moreover, the Pillar is a political compass which goes beyond the field of social law⁵⁵. It aims at effectuating social rights without restriction to certain fields of policy. This becomes clear when looking on the importance for economic and budgetary policy during the European Semester. Therefore, interpreting in the light of the Pillar is obligatory for application of laws beyond social policy.

Because the need for interpreting in the light of the Pillar follows from the self-binding effect of it, the interpretation of secondary law from before the solemn proclamation of the Pillar cannot refer to it. The institutions could not want to implement a Pillar which was unknown to them when they adopted acts in earlier days. And the institutions cannot change what happened in the past through the Pillar. The only way to give the Pillar's rights and principles effect also for older acts would be to amend such acts. But this did not happen. On the other hand, the CJEU was not involved in the proclamation of the Pillar. It can, therefore, not be an instrument for revision of case law of the Court of Justice in the sense of a social protocol as claimed for by the European Parliament⁵⁶ or in the sense of a social progress protocol as proposed by the European Trade Union Confederation⁵⁷.

However, the Pillar may give rise to more social sensitivity for social rights in the case of balancing these economic rights and freedoms by judges⁵⁸. More-

⁵² Cf. GARBEN, *cit.*, pp. 101 and 105; BRAMESHUBER, *Die Europäische Säule*, *cit.*, pp. 307, 309 and 312.

⁵³ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

⁵⁴ Cf. for possible reasons for the missing references in the Directive GARBEN, *cit.*, pp. 101 and 109–110.

⁵⁵ RASNACA, *cit.*, pp. 29 ff.

⁵⁶ OJ C 2018 242/24, no. 31.

⁵⁷ Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress, <https://www.etuc.org/en/proposal-social-progress-protocol>.

⁵⁸ Cf. BECKER, *cit.*, pp. 525 and 541.

over, it may have the function to underline an interpretation found by other means, *i.e.* the pillar may be a legal interpretation source like the CJEU referred to the Charter of Fundamental Rights in the *Viking case* in times when the Charter was not yet part of primary law but only a mere solemn proclamation⁵⁹.

5. Conclusion

The Pillar of Social Rights is no additional Charter of fundamental rights in the sense of social rights. It is rather an instrument for effective implementation of social rights. This follows from the fact that the European institutions discovered that social rights will not find realisation by a mere proclamation in the Official Journal, but rather need implementation in EU and Member State's law. The Pillar is the instrument to invoke effective implementation of social rights⁶⁰. As demonstrated before, it is a political program and a promise to the people of Europe. But the new start-up for a social Europe will fail without enough efforts for implementing the Pillar's rights and principles. The European Parliament was definitely right when claiming for a solid Pillar as instrumental for the strengthening of social rights⁶¹. If the involved institutions overcome this challenge, the Pillar will get added value by overcoming frictions through divided competences between EU and the Member States⁶². A weak point of the Pillar is the lack of judicial accompaniment. If it is on the political agenda to strengthen social rights this may not exclude jurisprudence. Insofar as this is true, the Pillar of Social Rights has a white spot.

⁵⁹ CJEU of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, ECLI:EU:C:2007:772.

⁶⁰ Cf. ALES, *The European Pillar of Social Rights: an ambitious 'soft-law guide' to efficient employment and social outcomes*, in SINGER, BAZZANI (eds.), *European Employment Policies: Current Challenges*, 2017, pp. 43 and 51 ff.

⁶¹ OJ 2018 C 242/24, no. 1.

⁶² HENDRICKX, *cit.*, pp. 503 ff.

Abstract

In the article the Author discovers that the European Pillar of Social Rights is an instrument for effective implementation of social rights as laid down in several instruments of primary and secondary law, as set out in the pillar itself for future legislation at union level as well as at national level. The pillar includes a political program and promise to the people of Europe and intends to overcome insofar frictions through divided competences between the Union and the Member States. A “white spot” is that it cannot bind jurisprudence.

Keywords

Pillar of Social Rights, social rights, social policy, soft law instrument, interpretation of EU law.