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The European Social Pillar: A Threat to Welfare and Prosperity?

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Abstract

In November 2017, the European Union proclaimed its fourth pillar, The European Pillar of Social Rights., to promote a "truly pan-European" labour market. A large number of specific social rights are endorsed. This paper investigates the potential short- and long-term consequences of the social pillar on the welfare and prosperity of Europe. Moreover, we discuss its potential effects on the legitimacy of the European Union,

Our conclusions indicate that rather than to "support and complement" the social and labour market policies of the Member States, the European Union is likely to *replace* these policies with the "better" goals of the Union in an effort to fully implement the principles established in the social pillar. The principle of subsidiarity in this case promotes centralisations. There are strong reasons to believe that increased centralisation to EU-level in these areas will reduce preference satisfaction, weaken accountability and decrease efficiency and innovation. In the long run the social pillar therefore is likely to be a threat to welfare and prosperity in Europe, and as a consequence, cause damage to the legitimacy of the European Union.

Keywords: European Integration, Social policy, Labour policy, Subsidiarity, Legitimacy, Prosperity

JEL: F15, H53, I38, J58

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Content

1. Introduction

Ever since its foundation more than 60 years ago, the European Union has been very important to the welfare and prosperity in Europe. For example, according to one estimate Sweden has almost doubled its trade and increased its growth by 3-20 percent since its membership in 1995. Apart from the promotion of peace, this is mainly due to the opening up of the common market with around 500 million people and the successive implementation of the freedom of movement for goods, services, capital and people.[2]

Even so, in the areas of social and labour market policies some Member States have had severe problems, with low labour market participation and high unemployment levels, especially among the young and immigrants.[3] This is an area where the European Union only has been conferred shared and coordinating competences,[4] and hitherto this area primarily has been regulated through soft-law where the EU has developed non-binding strategies through the social dialogue.[5] The defined competences of the EU within the area of social policy and labour market policy are stated in the Treaty on the Functioning of the European Union[6] (TFEU) articles 151-161, stipulating inter alia that the Union shall "support and complement" actions with within the area of social policy in the Member States.[7]

An important reason for this is that the welfare and labour market models of Europe differ considerably,[8] indicating that centralisation may have a high cost in terms of lower preference satisfaction and weaker accountability.

This however could be about to change. When Jean-Claude Juncker, President of the European Commission, held his annual State of the Union address in September 2015 he declared his

[2] Tingvall, Halvarsson, Kokko (2014), pp.9-11.

[3] For a recent analysis, see Djnakow, Åslund (2017), European Commission (2017), pp.8-12, OECD (2016), pp. 17-22, OECD (2017), pp. 64-66.

[4] TFEU, Articles 4-5, 151-161.

[5] For further analysis on these strategies and the social dialogue in the EU see: Chalmers, Davies, Monti (2014), Bernitz, Kjellgren (2014), Scharpf (2002), Bruno, Jacquot, Mandin (2006).

[6] The Treaty of Lisbon consists of two treaties: the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU). In this report the official consolidated version of the treaties has been used.

[7] TFEU, Article 153.

[8] Esping Anderssen (1999), Sapir (2005), Boeri (2002b), Scharpf (2002).

intentions of developing a European Pillar of Social Rights with the ambition of creating a "fair and truly pan-European" labour market.[9] This was fulfilled on the 17th of November 2017, at the EU Social Summit in Gothenburg, Sweden, when the European Union proclaimed its fourth pillar, The European Pillar of Social Rights.[10]

As noted above, historically the EU always has had a social dimension with some conferred powers within the area of social policy.[11] But the social pillar and the recently proposed directives are far more detailed than previously taken measures, leading to questions on whether the social pillar could be regarded as far too interfering with well-functioning national labour-market systems.

In this report, we will investigate the potential short- and long-term consequences of the social pillar on the welfare and prosperity of Europe. Moreover, we will discuss its potential effects on the legitimacy of the European Union, as well as an alternative way forward, namely institutional competition as the method to improve efficiency and innovation along with voter satisfaction in Europe.

2. The social pillar – an ambitious project

The social pillar consists of 20 different principles that have been adopted with the purpose of decreasing social differences concerning labour- and living conditions within the EU-Member States.[12] The 20 key principles are structured around three different categories: *Equal opportunities and access to the labour market; Fair working conditions;* and *Social protection and inclusion.* No doubt, this is a very ambitious project.

The social pillar includes propositions on a number of areas of social policy such as: equality, employment conditions, minimum wage and income, healthcare and housing. A majority of the principles concerns labour market policies.

[9] Commissioner President Jean-Claude Juncker, State of the Union Address, European Parliament, 9 September 2015.

[10] Further referred to as "the social pillar".

[11] TFEU, Articles 4, 151-155.

[12] European Pillar of Social Rights, preamble, SWD (2017) 201 final.

The proclaimed pillar´s ambitious principles are the following:

Chapter I: Equal opportunities and access to the labour market

1. Education, training and life-long learning
2. Gender equality
3. Equal opportunities
4. Active support to employment

Chapter II: Fair working conditions

5. Secure and adaptable employment
6. Wages
7. Information about employment conditions and protection in case of dismissals
8. Social dialogue and involvement of workers
9. Work-life balance
10. Healthy, safe and well-adapted work environment and data protection

Chapter III: Social protection and inclusion

11. Childcare and support to children
12. Social protection
13. Unemployment benefits
14. Minimum income
15. Old age income and pensions
16. Health care
17. Inclusion of people with disabilities
18. Long-term care
19. Housing and assistance for the homeless
20. Access to essential services

Each principle includes quite specific rights that the Member States should strive to guarantee. For example, "everyone" is through the social pillar stated to have the right to quality and inclusive education, training and life-long. The pillar states, among other things, that "everyone" has the right to timely and tailor-made assistance to improve employment or self-employment prospects. Young

people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within 4 months of becoming unemployed or leaving education. The long-term unemployed have the right to an in-depth individual assessment at the latest after 18 months of unemployment. Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. Workers have the right to fair wages that provide for a decent standard of living.

Moreover, workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to have access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation. Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.

Also, parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way. Workers have the right to a high level of protection of their health and safety at work. Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.

In addition, everyone lacking sufficient resources has the right to adequate minimum income benefits, ensuring a life in dignity at all stages of life, and has the right to effective access to enabling goods and services. Workers and the self-employed in retirement have the right to a pension commensurate to their contributions to ensure an adequate income. Everyone has the right to timely access to affordable, preventive and curative health care of good quality. Everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications.

These examples are all direct quotations from the official presentation of the social pillar.[13] The ambition to establish a common European social and labour market policy seems evident.

[13] European Pillar of Social Rights, SWD (2017) 201 final.

The Commission has presented the social pillar as a "non-legislative act" which means that the social pillar is not legally binding for the EU-Member States. Thus, the social pillar should be perceived as "nothing more than a recommendation".[14]

The Commission asserts that the social pillar draws from rights already granted in the European Social Charter (1961), The Community Charter of the Fundamental Social Rights of Workers (1989), The European Charter of Fundamental Rights (2000), the European Code of Social Security of the Council of Europe, as well as case law from the Court of Justice of the European Union. Furthermore, the social pillar is said to recognize relevant conventions and recommendations from ILO (the International Labour Organization) and the United Nations Convention on the Rights of Persons with Disabilities. [15]

The pillar's judicial status as a "non-legislative act" has been discussed both before and after the proclamation, with some meaning that the pillar not being legally binding makes it inefficient and extraneous.[16] Others warned that the creation of the social pillar could be seen as an indication of the Commission wanting to constitute further legislation within social affairs, thus threatening the differing welfare state regimes and labour market models of the Member States,[17] and that potential EU-legislation could risk violating the principle of subsidiarity and proportionality.[18] We will discuss these overlapping issues in turns.

3. Conflicts with welfare state regimes and labour market models?

Today, the European Union consists of 28 (soon to be 27) Member States with varying labour-market traditions and policies. There is not *one* labour market model, or one system of industrial relations, in Europe – the design of welfare- and labour market policy differ greatly among the EU-Member States. A number of labour market scholars have argued that there are three different European

[14] COM (2017) 250 final.

[15] COM (2017) 250 final.

[16] E.g. Crespy *(*2017), Gouvelin, Arvidsson (2017).

[17] E.g. Myrén (2017), Hökmark (2017).

[18] The principle of proportionality acts with the principle of subsidiarity, limiting the European Union from taking un-proportional action on areas where it already has been established that the EU should take action. (See e.g. Chalmers, Davies, Monti (2014), pp. 399-400). The limitations of this paper will unfortunately not leave opportunity to analyse the principle of proportionality further.

models.[19] In fact, although each European country of course has its own singularities, one can distinguish at least four different labour market models in Europe: *The Continental, the Latin, the Scandinavian* and *the Anglo-Saxon* models. [20] These will be further discussed below.

Some would also, as Esping-Andersen,[21] argue that different welfare state regimes and the models of industrial relations are interconnected and clustered together with numerous institutional path dependencies, concerning e.g. labour market regulations, systems of social insurance and the management of unemployment. He thus distinguishes between *liberal, conservative-corporatist* and *social democratic* welfare states. The UK and Ireland are examples of the liberal version, with more selective welfare systems, while Sweden, Denmark and Finland belong to the social democratic category, with universal welfare. Germany, Austria and many central European countries have conservative-corporatist welfare states, which rely more on civil society and mandatory insurance systems. By contrast, the Baltic States and other Eastern European countries do not readily fit into either of these models. Their labour markets often resemble the Anglo-Saxon model, while their systems of welfare are more akin to the conservative-corporatist version.

Nevertheless, these models have evolved over time and are characterised by a number of elements related to how industrial relations and wage-setting systems are organised, and how employment conditions, such as employment protection, are regulated. Not the least do they differ in terms of 'flexicurity', which has become a catchword in the discussion about which labour market reforms are needed to promote welfare and prosperity in Europe.[22] Also the role of the state differs considerably.

The countries belonging to the *Continental model* have been very influential in the legislation of the European Union relating to labour market issues. In this model the role of the state is important and legislation is the most prominent regulatory instrument. Generally, the employers are well organised, while the labour unions have low membership rates. Even so, collective bargaining between the parties and collective agreements are also important regulatory tools in this model. A distinctive feature is thus *tripartism*, meaning that the social partners *and* the state together govern the industrial relations. [23]

[19] Sapir (2000), Boeri (2002a).

[20] Karlson, Lindberg (2008).

[21] Esping-Andersen (1999).

[22] Wilthagen, Tros (2004), Bekker (2018), Muffels, Wilthagen (2013).

[23] Karlson, Lindberg (2012).

In this model, the collective agreements are legally binding for the bargaining parties (unions and employers' organizations) and can be enforced. A mechanism of extension is often part of the system, whereby the collective agreements can be extended by government decree to non-members of both sides. Through this mechanism, the level of coverage of collective agreements is often quite high, even though coverage has been decreasing in, for example, Germany.[24] Countries with this model also tend to have high levels of employment protection legislation (EPL) and co-determination, and these rights are predominantly based on individual employee rights. They are upheld by law through public authorities or works councils, not by the unions. Regarding flexicurity, this group of countries have strict rules on employment protection, generous unemployment benefits and larger amounts of industrial regulation. The need to improve labour market flexibility is often stressed for in this labour market model.[25]

In the *Latin* or *South European model*, as in the Continental model, the role of the state is important, possibly even more so since the bargaining parties have low coverage and are more divided. Common features of the relations between the bargaining parties in these countries are high levels of industrial conflict, strong politicization and internally divided labour unions. The bargaining coverage is upheld by the employers' associations as well as by the legal extension of the collective agreements to non-union workers and firms.[26]

The main characteristics of labour market policies in these countries is a rigid EPL and frequent resorts to early retirement policies as a way to reduce unemployment. Partly because of the rigid EPL, but also because temporary employees are not equally covered by the EPL, labour market segmentation has developed between the protected, often male, prime age and older workers, on the one hand, and the young and predominantly female labour force participants, on the other. The former groups generally experience relatively low unemployment rates and high job stability, while the latter have high unemployment and employment instability.[27] These countries are the furthest away from the flexicurity model, with strong emphasis on employment protection and strict rules on

[24] WSI (2017).

[25] Karlsson, Lindberg (2012).

[26] Karamessini (2007).

[27] Skedinger (2011).

employment termination (dismissals). The welfare systems are commonly not aimed at labour market participation, but instead have an emphasis on early retirement.[28]

The *Nordic* or *Scandinavian model* is characterised by a high degree of self-regulation by the bargaining parties. The role of the state is limited and traditionally the bargaining parties have been given the right to decide over the rules governing the labour market themselves. Legislation only provides a framework for the regulations and rules that are decided within the collective agreement. However, since the 1970´s there has been exceptions to this model. The collective agreements are legally binding for the organisations and their members. Employers are also obliged to apply the collective agreements equally, regardless of union membership. [29]

In this model, the unions and employers´ associations thus play an important role by making and upholding the collective agreements. The unions moreover exercise the rights for the employees on co-determination and employment termination. Therefore, this model rests on a high-level of membership on both sides. To achieve the anticipated level of collective agreement coverage the labour unions have been given extraordinary rights to take industrial action, e.g, through blockades of unorganized firms (including firms without union members). In some countries, this model also has a relatively rigid EPL for *insiders* on the labour market, which in combination with high minimum wages within the collective agreement system generates a segmented labour market with a large stock of unemployed among the young and the immigrant workforce.[30] Flexicurity in this model has been based on active labour market policies, strong safety mechanisms in the welfare systems and flexible collective agreements that are easily adjusted to the needs of different industrial sectors. According to some researchers, the Nordic countries represent something of a benchmark for flexicurity compared to the other models.[31]

The fourth model is the *Anglo-Saxon model,* which has a more market based view of the labour market. The model rests on little government involvement and less comprehensive welfare policies than in northern and continental Europe. Here the coverage of collective agreements is low, just as the levels of membership in unions and employers´ organizations are low. Moreover, the model is based on the system of common law rather than legislation. At the heart of this model, alongside a

[28] Karamessini (2007).

[29] Karlson, Lindberg (2012).

[30] Skedinger (2011).

[31] Hinst (2011), Sapir et al (2003).

small amount of regulation, is the notion of a flexible labour market ruled by the price mechanism. In this model the greater freedom provided to individual employers to hire and fire personnel, and the freedom to set pay and employment terms and conditions, allows for greater business efficiency and higher productivity. In addition, this greater flexibility avoids the problem identified in the other models, with permanent pools of unemployed workers unable to enter a labour market where those already in work are protected by regulations.

All in all, this model is significantly different from the three others in important aspects. The *Anglo-Saxon model* has more of flexibility than security, not least in comparison to the continental and southern European countries where the difference in flexibility is striking. There is also plenty of flexibility in wage-setting in this model, since bargaining has been de-collectivised. According to Eamets, Philips, Alloya and Krillo[32] the liberal Anglo-Saxon labour market model comes close to flexicurity, although with lower compensation rates for unemployment.

From this brief presentation, it should be clear that the welfare and labour market models of Europe differ considerably, indicating that the that the principles of the social pillar and the specific rights that the Member States should strive to guarantee "everyone" are likely to come into conflict with some, if not all, of the models.

In particular, the Scandinavian and Anglo-Saxon models, as well as their respective welfare state models – the social democratic and the liberal ones – are likely to clash with the increased role of the state (in this case the European Union) that the social pillar implies. The self-regulation by the bargaining parties, based on collective agreements, in the Scandinavian model makes, as well as the "voluntarism" and the market mechanisms of the Anglo-Saxon model, are likely to be progressively curtailed when fair working conditions, social protection etc. are enacted by the EU. Notably, even though none of the models are perfect, these two models are also frequently considered the ones that functions the best. According to André Sapir's highly quoted study:

The Nordic and the Anglo-Saxon models are both efficient, but only the former manages to combine equity and efficiency. The Continental and Mediterranean models are inefficient and unsustainable; they must therefore be reformed.[33]

Furthermore, the social pillar's specific rights and regulations listed in the previous section, are also likely to clash with many of the features in the Continental and the Latin labour market models and

[32]Eamets, Philips, Alloya, Krillo (2009).

[33] Sapir (2005). See also Freeman (1998), Blanchard (2006).

their corresponding welfare state systems. How is, for example, the "right to continued education, apprenticeship, traineeship or a job offer of good standing within 4 months of becoming unemployed or leaving education" going to be implemented in countries such as Spain, Italy and Greece, where youth unemployment rates stand between 30-40 percent today?[34] Or how are the emerging welfare states of Eastern Europe going to be able to secure "the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services" and "the right to timely access to affordable, preventive and curative health care of good quality." Alternatively such statements are meaningless, wishful thinking or a call for dramatically increased centralisation to the European level.

In addition, such centralisation may have unintended and unwanted consequences in terms of innovation and legitimacy, issues which we will come back to in a later section. At this point it is enough to state that rather than to "support and complement" the social and labour market policies of the Member States, the European Union is likely to *replace* these policies, also in countries which work comparatively well, with the ambition to implement the principles set in the social pillar in the Member States.

4. The first steps towards centralisation

As will become evident this risk of replacement is quickly materialising. The first steps towards centralisation have already been taken.

In November 2017, barely a month after the proclamation of the social pillar, the Commission presented its proposal on a new directive on *Transparent and predictable working conditions,* which if it were to be endorsed would affect labour-market relations in all Member States.[35] Another already proposed directive presented as a part of the "social pillar package", namely the *Work-life balance directive* [36], will have similar consequences. Furthermore, the Commission recently proposed a new *European Labour Authority* as a step towards implementing the social pillar.

In order to ensure that the "rules on labour mobility should be enforced in a fair, simple and effective way", the Commission proposed the establishment of the new authority as a measure "to strengthen

[34] Statista (2018).

[35] COM (2017) 797 final.

[36] COM (2017)253 final.

cooperation between labour market authorities at all levels and to better manage cross-border situations."[37] The Commission is also evaluating a possible reformation of the working time directive[38] and working towards establishing a social security number to facilitate cross-border employment and social security benefits. All these measures are steps taken towards the realisation of the Social Pillar.[39]

The proposed directive on *Transparent and predictable working conditions* makes direct reference to the social pillar. If it is endorsed by the Council and Parliament, it will replace the already enacted Written-statement directive, which regulates employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.[40] The proposed directive aims to also cover new forms of so called *atypical* employment and includes new substantial rules not found in the older directive, such as a maximum duration for probationary periods and a requirement for minimum predictability of work. It also defines the concept of "worker" and employer based on case law from the European Court of Justice.[41] The directive proposal consists of 25 articles, whilst the original directive on information obligations only consists of 9 articles, indicating that the new directive is far more extensive. Furthermore, the directive proposal also contains procedural rules establishing, amongst other things, a new rule on legal presumptions.[42]

This provision states that if an employer has failed to meet the certain requirements stated in the directive, the worker shall benefit from favourable presumptions to the effect that, inter alia, there is no probationary period, the worker has an open-employment, or the worker has a full-time position. The alternative to implementing favourable presumption is for the Member States to guarantee that the worker is able to submit a complaint to a competent authority. Such a complaint may result in an administrative penalty for the employer, if the employer has failed to comply with the information

[37] COM (2018) 131 final.

[38] Which is currently paused by the Commission, since it possibly overlaps the proposed directive on transparency and predictability.

[39] European Parliament, Legislative train schedule: Deeper and fairer Internal Market with a Strengthened Industrial Base – European Social Security number.

[40] 91/533/EEC , COM (2017) final, provision 1.

[41] COM (2017) 797 final. Se also, C – 66/85 *Lawrie-Blum*, and, C-216/15 *Ruhrlandklinik.*

[42] COM (2017) 797 final, Article 14.

liabilities stated in the directive.[43]All of these requirements are clearly interlinked with many of the principles in the social pillar´s provisions regarding the labour market.[44]

The proposed *Work-life balance directive* is also closely related to the social pillar. It is a minimum harmonisation directive and stipulates rules and rights regarding work-life balance for parents and carers.[45] It aims to reduce the gender gap between men and women in the workforce by stating rules for maternal and paternal leave, as well as rules for leave when there is a need to care for a close relative. The directive declares a new right for fathers to be entitled to at least four months of paternal leave that is not transferrable between the parents as well as a right for workers to be granted leave for care and time off for urgent family reasons.[46]

Both of the proposed directives are based on article 153 TFEU, which gives the Union the possibility to adopt minimum requirement directives within social policy, including propositions on working conditions, protection of workers and gender equality.[47] The condition is that the Commission takes into account the diversity among the Member States national systems. This includes respecting national conditions and technical rules in each member state before acting within the field of social- and labour market policy.[48] The Commission also states that the social pillar is in line with the EU objective that is stated in article 3 TEU, declaring that advocating social wellbeing for the citizens within the EU is one of the main social missions for the Union.[49]

Yet, even if there is a belief that the EU may have a legal right to take action within certain areas, it does not necessarily mean that it should. As shown above, this may be especially relevant for actions within the area of labour and social policy, where EU policy may clash with the diverse labour market models and welfare systems of Europe. The principle of subsidiarity is often thought to set such limits.[50]

[43] COM (2017) 797 final. Article 14.

[44] Namely principle 5 and 7 in the social pillar. See also: COM (2017)797 final. *Explanatory Memorandum.*

[45] COM (2017) 253 final.

[46] COM (2017) 253 final.

[47] TFEU Article 153, COM (2017) 797 final, COM (2017) 253 final.

[48] TFEU, Articles 151, 152, 153:2b.

[49] TEU, Article 3, European Commission, White paper on the future of the Europe.

[50] Melin, Nergelius (2012) pp. 54-55.

5. The elusive concept of subsidiarity

The role of the principle of subsidiarity in the discussion of the social pillar is far from clear. Even when the Economic and Social Committee in the EU discussed the social pillar prior to its proclamation, they requested more clarity regarding the implementation of the pillar, its impact on the roles for the different actors within the EU, and its conformity with the principle of subsidiarity.[51]

This principle of subsidiarity first became binding in the EU through the ratification of the Maastricht-treaty in 1993 where it was introduced to guarantee that *the Union only acted on areas where it was necessary*[52] and *to ensure that decisions were made as close to the citizens as possible*.[53] This was also seen as a measure to ensure minority rights in the EU when majority voting was introduced through the Maastricht-treaty.[54] The essence of the principle as it is formulated in today's Lisbon-treaty is in many ways the same as its original design in the Maastricht-treaty. Worth noticing is that the principle does not only establish the level of decision making between the EU and the Member States, but is also applied to establish decision making competences within the Member States, such as for decision making at municipal level instead of at a governmental level.[55]

In the Lisbon treaty the principle of subsidiarity is established in article 5:3 TEU which states that the principle should restrict the EU from taking measures on issues that are more effectively or suitably regulated by the Member States alone. Further article 5 in TEU states three conditions that needs to be achieved for the Union to be able to act within areas of shared policy:

1. It needs to be on an issue where the EU doesn´t have exclusive competence
2. An established goal or measure cannot be achieved sufficiently on member state level
3. The measures would be more effective if they were enacted on the EU-level.[56]

The principle further entails that the Union should avoid intruding on national, political or cultural-traditions and identities when proposing legislation on shared policy areas. Resulting in a need for

[51] European economic and social committee, SOC/542. European Pillar of Social Rights, p. 20.

[52] Maastricht treaty, Article 3b.

[53] Maastricht treaty, Article 1.

[54] Estella (2002), p. 82, Barber (2005), p. 314.

[55] Melin, Nergelius (2012), p. 55.

[56] TEU, Article 5:3.

the Union to act with caution and respect for the Member States´ diversity when presenting legislation in areas of shared policy.[57]

Since social policy and the matters covered in the social pillar belong to an area where the EU shares competence with the Member States[58] the legislative power on the area is regulated by the principle of subsidiarity. The principle of subsidiarity does not serve to determine if the EU has the legal right to act, but on whether or not the EU *should* act. Therefore, the principle of subsidiarity can only be applied in areas where the Union already has some conferred competences.[59] Hence the principle should not be seen as a principle to be used to confer powers to the Union, but as a principle that can *both* restrict and expand the powers of the EU.[60]

The principle is thus quite elusive,[61] with some scholars arguing that the principle should be seen as a decentralisation principle, favouring actions taken at national level instead of at the Union level.[62] Yet, other scholars have argued that the principle is a principle that favours effectiveness within the EU and therefore endorses further integration and centralisation.[63]

This ambiguity has increased through the prudent approach of the European Court of Justice to evaluate the principle and the lack of case-law in the area. [64] One reason for this, according to Estella, is that the court – whose main task is to interpret the treaties[65] - believes that the principle of subsidiarity stands in conflict with the court´s agenda of further integration.[66] Another reason may be the legal vagueness of the concept.[67]

When the EU proclaimed the social pillar, it set out social goals for the Member States to achieve, established principles for the Member States to follow, and it proclaimed various specific rights that

[57] Chalmers, Damian, Davies (2014) p.394.

[58] TFEU, Article 4.

[59] Estella (2002) p.91

[60] Hettne, Lööw, Bäckman (2014) p.12.

[61] The debate on the principle of subsidiarity is extensive; See e.g. De Búrca (1998) p.218, Kersbergen, Verbeek (1994), pp. 215-234, Martinico (2011) pp. 649-660. Craig (2012) pp.72-87, Schütze (2009).

[62] See e.g. Di Fabio (2002), p. 1294, Davies (2006), pp.63-84, Hettne, Lööw, Bäckman (2014),Pålsson (2013) pp.8-9, COM (2008) 586 final, COM(2010) 547 final.

[63] Davies (2006), Bartl (2015) Di Fabio (2002) pp.1296-1300, Pålsson (2013) pp.43-44, Hettne, Lööw, Bäckman (2013).

[64] Estella (2002), p.139, Chalmers, Davies, Monti (2014) pp.394-399.

[65] Chalmers, Davies, Monti (2014) pp.157-158.

[66] Estella (2002) pp. 177-179.

[67] De Búrca (1998) pp.217-234, Estella (2002) pp. 177-179, Kersbergen, Verbeek (1994) pp. 215-234.

the Member States should strive to guarantee "everyone". This has created an opportunity for the EU to present further legislation within the areas of social policy. In fact, it could be argued that the principle now endorses centralisation.[68]

The reason for this is the effectiveness[69] argument where the Commission estimates that the Member States cannot in an effective way guarantee the goals, principles and rights set out the social pillar by themselves.[70] Consequently, the EU needs to act to effectively achieve the common goals.[71] As Davies concludes in his article on the principle of subsidiarity in EU-law making:

Subsidiarity's weakness is that it assumes the primacy of the central goal, and allows no mechanism for questioning whether or not it is desirable, in the light of other interests, to fully pursue this. Thus subsidiarity could be interpreted as a centralizing, or intolerant concept, which sets out to silence and deny the independent objectives of the lower level.[72]

Once this has occurred, further legislative steps towards centralisation may be taken since the goals set in the pillar and the motivation of efficiency remains, which may motivate the EU to take legislative action. Furthermore based on the primacy of EU-law and the rule of pre-emption, the Member States will lose their ability to present their own legislation once EU-law has been developed on the area, leading to a "creep of competences".[73]

The primacy of EU-law is one of the basic principles underpinning the legal authority of EU-law. The principle of primacy guarantees the effect of EU legislation and restrict the Member States from creating and applying legislation in conflict with EU-law.[74] The rule of pre-emption draws from article 2, clause 2 in the TFEU which states that:

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence… (Article 2, clause 2 TFEU)

[68] European economic and social committee, SOC/542, European Pillar of Social Rights.

[69] For further discussion on the notion of effectiveness see: Accetto, Zleptnig (2005).

[70] Davies (2006) pp.67-70.

[71] Hettne, Lööw, Bäckman (2014) pp. 22-23, COM (2017) 797 final.

[72] Davies (2006) p. 78.

[73] Davies (2008), Pollack (2000).

[74] Established in case-law through: Case 6/64 Costa v ENEL (1964) and Case 106/77 Amminstrazione delle Finanze dello Stato v Simmenthal (1978). See also: Davies (2008).

The provision clearly states that in the areas of shared competences, such as social policy, the Union has primacy for creating legislation. Once the Union have decided to take measure on certain issues, the right for the Member States to adopt legislation on the same issues ceases.

This means that if the EU decides to constitute new legislation in areas that previously were regulated by the Member States, the EU will prevent Member States from adopting national legislation on the same issues. [75]

Since the EU has the power to prevent the Member States from constructing their own legislation in areas where the EU has stipulated rules, the EU has the power to extend its own powers by establishing new goals and using the effectiveness argument to validate the taken actions conformity with the principle of subsidiarity. [76] Slowly previously shared competences will be transferred to the Unions competence. Consequently, the Union also reduces the Member States legislative powers, leading to a centralisation of powers.[77] This is what could be argued to happen with the implementation of the social pillar, if the already proposed legislation is adopted by the Council and Parliament. Even if the proposals were to be rejected by the Council and the Parliament, there is a risk of the European Court of Justice relying on the proclamation of the social pillar when creating case-law and defining general principles of Union law, which in turn could cause indirect legal consequences for the member states.[78]

As presented in the previous sections, the EU already has proposed directives in the area of labour market and social policy with the motivation that the Member States could not achieve the standards set in the social pillar by themselves, and therefore it has been deemed necessary for the EU to take action.[79]

[75] Chalmers, Davies, Monti (2014) pp. 208-209.

[76] Scholten, Scholten (2017), Pålsson (2013) e.g. pp. 32-33, Davies (2006), Davies (2008).

[77] Hettne, Otken Eriksson (2011) pp.79-80.

[78] Council of the European Union, Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights - legal considerations.

[79] COM (2017) 797 final.

In the case of the proposed directive on transparent and predictable working conditions, the conformity with the principle of subsidiarity was tested through a REFIT-evaluation.[80] It showed that legislation at EU-level was deemed necessary to fulfil some of the principles set in the social pillar.[81]

This directive´s conformity with the principle of subsidiarity has recently been evaluated within the Member States, in accordance with the protocol on the application of the principle of subsidiarity and proportionality. [82] On the 15th of February 2018 the Swedish labour market Committee presented their stand, arguing that the directive infringes the principle of subsidiarity, since it would be far to intruding on national well-functioning labour market traditions.[83] This stand has also been carried by the Swedish Parliament, meaning that a reasoned opinion has been sent to the Commission, opposing the proposed directive.[84] If 1/3 or more of the Member States leave reasoned opinions opposing the directive´s conformity with the principle of subsidiarity, it may result in the Commission having to motivate, review or pull-back their proposal.[85]

In the case of the directive on work-life balance no REFIT-evaluation has been performed. Instead the arguments for the Commission's competence to propose a directive on work-life balance has been founded on the argument that the Union already has implemented a directive in the area through "*the revised framework agreement on parental leave"*.[86] Two Member States decided to leave a reasoned opinion opposing this proposal[87] and the directive is currently being treated within the EU-institutions.[88]

As shown by the Swedish labour-Market committee's recommendation to unanimously object the proposed directive, it might be problematic to implement the goals set in the pillar through legislation, because of the great differences within the Member States' welfare systems and labour market models. An important point to make here is that none of the directives associated with the

[80] A Refit evaluation is an analysis made as a part of the Commission's work with developing new legislation and aims to assess potential benefits and cost savings through impact assessments.

[81] COM (2017) 797 final, SWD (2017) 205 final.

[82] TFEU: Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[83] Utterance from the Swedish Labour market committee 2017/18:AU11.

[84] Protokoll 2017/18:77, Riksdagsskrivelse 2017/18:167.

[85] Usually called the Yellow Card, Orange Card and Red Card. TFEU: Protocol (No 2) on the application of the principles of subsidiarity and proportionality**,** Articles 7 and 8.

[86] COM (2017) 253 final, Directive 2010/18/EU.

[87] ST 10767 2017 INIT, (Poland), ST 10781 2017 INIT, (Netherlands).

[88] Procedure 2017/0085/COD.

social pillar have yet been treated in the Council or the Parliament or entered into force. But even if the directives where to be disapproved by the Council and the Parliament, the possibility for the Union to present legislative measures using the goals in the social pillar still remains.[89]

Our conclusion is thus that even though the social pillar has been presented as not legally binding in the short run, in the longer run the principle of subsidiarity, combined with the primacy of EU-law and the rule of pre-emption, may indeed endorse increased legislation on social and labour market policies at the EU level. The concept of subsidiarity is elusive and may even promote centralisation rather than decentralisation, perhaps contrary to the expectations of many involved parties.[90] The first steps towards centralisation have already been taken with the directives on transparent and predictable working conditions, and on work-life balance. Once the EU has set goals that could be argued to be better realised at the EU level, as when the Member States agreed to establish the social pillar, the enables the EU to extend its powers and as a consequence prevent the Member States from taking their own initiatives. This, perhaps unintended power centralisation, may no doubt interfere with the national welfare systems and labour-market models.

6. Institutional competition as a better alternative

According to the analysis presented above, the goals, principles and rights stated in the social pillar are likely, in the long run, to come into conflict with some, if not all, of the labour market models and welfare systems of the Member States. In particular, the Scandinavian and Anglo-Saxon models, as well as their respective welfare state models (the social democratic and the liberal ones) are likely to clash with the increased role of the state (in this case the European Union) that the social pillar entails.

It could be argued that the social pillar fits better with the Continental and South European labour market models and welfare states. It may also be true that these models indeed need direction from above in order to improve.

All the same, the costs of centralisation can risk being high, particular in terms of legitimacy and lack of innovation. The implementation of the goals, principles and rights of the social pillar can be costly

[89] Scholten, Scholten (2017) pp. 926-928.

[90] Davies (2006) pp. 63-84.

in all Member States. Taxes may have to increase, along with an increased regulatory burden for enterprises, which in the end, will be borne by the consumers and voters. [91]

Also, and perhaps most importantly, political accountability at both national and EU levels may decrease when uniform policies are enforced from the EU in areas where national solutions have been the tradition. In the long run the social pillar even might undermine the competitive capabilities of the single market through its agenda of unification. Consequently, the social pillar may indeed constitute a threat to the prosperity and welfare of Europe.

Nevertheless, an alternative way forward exists, namely institutional competition as the method to improve welfare, efficiency and innovation along with voter satisfaction in Europe. In a more pluralistic federal system, institutional competition is a leading method to improve the quality of policies and institutions.[92] This could be a better way forward for the EU in the areas of social and labour market policy.

The EU has been a supranational system with obvious federal elements since the beginning of the 1950s. Yet, federal systems can be very different from one another. Two basic models exist, the pluralistic and the centralistic approaches.[93]

According to the first pluralistic approach, a supranational, federal system is necessary to guarantee economic, civil and political freedoms - which in turn are the requirements for peace and economic growth. The supranational elements are restricted to a limited amount of areas, while other political activities are the responsibility of the Member States. A clear vertical division of powers and institutional competition between the Member States are regarded as positive factors.

According to the other, more centralistic approach, a supranational federal system is necessary to be able to regulate, plan and coordinate the activities that are regarded as being of common interest and in need of integration. No restrictions are imposed on supranational expansion, even if it for pragmatic reasons might be necessary for certain political activities to be the responsibility of the Member States. The social pillar is a typical example of this second approach.

There is extensive theoretical and empirical literature dealing with the economic and democratic

[91] See e.g. Scharpf (1997).

[92] For a comprehensive analysis of "institutional competition", see Bergh, Höijer (2008).

[93] Karlson (2014).

advantages and disadvantages of different forms of federalism.[94] In Table 2, below, we have summarised what we believe are the most important arguments in favour of pluralism and centralism in federal systems as described in this literature:

Table 1: Arguments in favour of pluralism and centralism in federal systems[95]

Arguments for pluralism	Arguments for centralism
1. Increased diversity and higher preference satisfaction	1. Can balance out differences in earnings, social conditions and public services across countries
2. Greater participation, simpler accountability and an increased division of power	2. Increased ability to act and greater impact of decisions on a European level
3. Greater efficiency and innovation as a result of free markets and institutional competition	3. Increased efficiency as a result of a reduction in external effects

The first and most common argument in favour of pluralism is that such systems are better than centralist federal systems at managing national, social, ethnic and religious differences. It is easier to combine diversity and unity if certain common political functions such as fundamental economic, civil and political freedoms and rights are upheld at a central or federal level, while the different directions taken by the Member States and their differing circumstances are allowed to develop and become more pronounced at a local level. This argument applies both to smaller states such as Switzerland, that are divided into several regions, and to very large countries such as the USA. [96]

The equivalent argument has also been expressed in terms of higher preference satisfaction.

[94] See for example: Burgess (1993), Elazar (1987), Dahl (1982) (1994), Frey and Eichenberger (1999), Kasper (2000), Karlson (2001), Kasper and Streit (1998), Lane (1996), McKay (2001), Oates (1991),(1999), Wachendorfer-Schmidt (2000) Vanberg, Kerber (1994), Filippov, Ordeshook, Shvetsova (2004).

[95] Karlson (2014) p. 142.

[96] Karlson (2014).

According to Tiebout a decentralised federal system allows for a higher level of heterogeneity in the design of different types of collective goods. In addition, if citizens can move freely between different local entities, in other words, vote with their feet, they can also find the places where their own preferences for collective goods are best satisfied. [97] It is worth noting that initially there are not necessarily any historical or other types of differences. These occur instead as result of the choices made by the citizens and the local political entities and are therefore regarded as something positive.[98]

The second argument in favour of pluralism concerns the fact that the opportunities for political participation and accountability increase when genuinely common issues can be managed at a central level. At the same time, the size of other political entities can be reduced. This increases the division of power in the democratic system. For example, Dahl argues that smaller political bodies reduce the distance between the electorate and their elected representatives and therefore strengthen democracy.[99] In addition, the opportunities for direct democracy are increased. There is considerable empirical support for this argument, including the fact that it makes people happier (!).[100]

The fact that pluralistic federalism almost by definition leads to an increased division of power in the democratic system is also seen by many people as having a positive effect on democracy. One example is Lijphart who believes that *consensus* or *consociational democracies* (with significant federative elements and a clear division of power[101]) function better than *majoritarian democracies: "… majoritarian democracies do not outperform the consensus democracies on macroeconomic management – in fact, the consensus democracies have the slightly better record – but the consensus democracies do clearly outperform the majoritarian democracies with regard to the quality of democracy and democratic representation." [102]* Moreover, the central protection of civil and political freedoms will benefit democracy also in the Member States.

The third and perhaps the most important argument in favour of pluralism is the increased efficiency

[97] Tiebout (1956).

[98] Note also that "perfect" mobility between different local units is not needed for these effects to occur. It is sufficient for the politicians on the margins to be aware of changes in the tax base and the citizens' political preferences. See Frey, Eichenberger (1999).

[99] Dahl (2000).

[100] Frey, Stutzer (2002).

[101] Lijphart (1999) pp. 28-41.

[102] Lijphart (1999) p. 30.

and innovative ability as a result of free markets and institutional competition. Because this leads to an increased protection of the rule of law, economic freedom and free mobility for goods, services, capital and people, it is reasonable to expect an increase in trade, growth, competition and the economy's ability to innovate. Free trade and larger markets tend to result in greater prosperity.[103]

At the same time, a pluralistic federal system would allow for institutional competition in other important areas, such as social insurance, wage formation, health care, education and social care, i.e. in the area covered by the social pillar. The increase in efficiency will be brought about partly by the fact that it is easier to find reliable information about goals and funding in smaller units and partly because competition between the local units stimulates efficiency. Institutional competition and pluralism will thus promote policy learning. In fact, there is no evidence of "race to the bottom". On the contrary, institutional competition seems to promote policies favoured by the median voters in democratic welfare states.[104]

The increase in the citizens' opportunities to hold politicians to account is also expected to contribute to this. It applies both to public services and, for example, to the business climate. There is significant empirical support for this argument.[105]

The most important arguments in favour of centralist federalism are to a certain extent direct contradictions of the arguments for pluralist federalism. First, there is of course the risk that diversity will lead to differences in earnings, social conditions and public services at a national and regional level. For example, if one member state, for various structural reasons, has a much lower tax base than another member state, it either needs a considerably higher tax rate to finance equivalent services or it must set its ambitions much lower. Differences of this kind is compensated for by central regulations and redistribution and contribution systems.

The second argument assumes that centralist federalism leads to an increased ability to act and a greater impact for common democratic decisions. For example, if the Member States are given the sole responsibility for public education, there will be no opportunity for them to influence European politics in the field of education, regardless of how broad the democratic majority in favour of this type of policy is at a central European level. Of course, the same point applies in areas such as social services, the labour market, business policy, health and safety at work, and pensions.

[103] According to Tingvall et al (2014), Swedish foreign trade has increased by almost 70 percent and prosperity by just over 10 percent as a result of the EU membership from 1995 to 2013.

[104] Karlson et al (2007).

[105] Frey, Stutzer (2002), Oates (1991), (1999), Lane (1996), Lane, Ersson (2000).

The third argument for centralist federalism is that many political issues and collective goods are characterised by the fact that they have what is referred to in the economic literature as 'external effects'.[106] Such externalities relate to the matter that by their very nature many issues cross national borders and necessarily affect a large group of citizens. Therefore, they have either a positive or a negative impact on citizens in other, more national political, areas. These areas include defence, freedoms and rights, the judicial system, law enforcement, transport and environmental protection. Exclusively national provisions of services of this kind would therefore be ineffective and produce less than ideal results.

In the areas covered by the social pillar, namely social and labour market policies, the arguments in favour of pluralistic federalism and institutional competition clearly outweighs the arguments for increased centralisation. It is difficult to see any external effects or public goods at the European level in these areas. The increased ability to act in order to decrease the differences in earnings, social conditions and public services across countries, hardly compensates for the lower diversity and preference satisfaction, weaker participation and accountability, and lower efficiency and innovation rate, which is likely to result from the increased centralisation being proposed with the social pillar.

Instead, institutional competition between different labour market models and welfare systems, within a common federal system, upholds fundamental economic, civil and political freedoms and rights, and is therefore likely to better promote welfare and prosperity in Europe.

7. Conclusions

Many of the principles and rights endorsed in the social pillar are yet to materialise as rules at the EU level. Therefore the impact from the social pillar will not be evident in the closest future. But the tendency is clear: When the EU proclaimed the social pillar, it set "social goals" for the Member States to achieve and established principles for the Member States to follow. This created an opportunity for the EU to present further legislation within the area of labour-market policy. In other words, the Commission now have valid reason to recommend legislation within areas where the principle of subsidiarity otherwise could have curtailed such actions. In fact, the principle now endorses centralisation.

[106] See e.g. Stiglitz (1988) chapter 26.

Rather than to "support and complement" the social and labour market policies of the Member States, the European Union is thus likely to *replace* these policies with the "better" goals of the Union in an effort to fully implement the principles established in the social pillar. [107]

Even though the social pillar may seem to have a non-legislative nature in the short run, in the longer run the principle of subsidiarity, combined with the primacy of EU-law and the rule of pre-emption, may indeed endorse increased legislation on social and labour market policies at EU level. The first steps towards centralisation have already been taken with the proposed directives on transparent and predictable working conditions, and on work-life balance. Once the Union has set goals that could be argued to be more effectively solved at the EU level, as when the Member States agreed to establish the social pillar, the goals make it possible for the EU to extend its powers, and even prevent the Member States from taking their own initiatives. This, perhaps unintended power-centralisation, may no doubt interfere with the national welfare systems and labour-market models.

As shown by the Swedish labour-market committee's recommendation and the Swedish Parliament´s decision to unanimously object the proposed directive, it is problematic to develop legislation based on the social pillar at the EU-level because of the great differences within the Member States. Even if the directives were to be rejected by the Council and the Parliament, the possibility for the EU to present legislative measures and validating them with the principles stated in the social pillar remains intact. [108]

There are strong reasons to believe that increased centralisation to EU-level in these areas will reduce preference satisfaction, weaken accountability and decrease efficiency and innovation. It is hard to see that the arguments in favour of centralisation, i.e. the reduction of external effects or lesser differences in earnings, social conditions and public services across countries, can outweigh these negative consequences in the areas of labour markets and social policy. Institutional competition probably will decrease along with policy learning, in a field that needs this perhaps more than any other.

A better way forward for the EU in the areas of social and labour market policy would be to use institutional competition as the method to improve welfare, efficiency and innovation along with voter satisfaction in Europe.

[107] COM (2017) 797 final, Davies (2008).

[108] Scholten, Scholten (2017).

In the long run the social pillar therefore is likely to be a threat to welfare and prosperity in Europe, and as a consequence, cause damage to the legitimacy of the European Union.

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