The European Pillar Of Social Rights Is One Year Old. Which Implications For Eu Labour Law?

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On the 17th November 2017 the European Pillar of Social Right (EPSR) was officially adopted through an interinstitutional proclamation. Is this first birthday of the Pillar something to be celebrated? In other words, has the proclamation of the Pillar provided the EU with an effective opportunity to strengthen its social and labour dimension?
In this contribution, the potential impact of the EPSR on the social dimension of European integration is analysed, at first through a focus on the structure, content, and envisaged implementation of the Pillar and, then, by looking into the legislative process concerning the Directive on Transparent and Predictable Working Conditions - one of the outputs of the Pillar.

I. The structure, the content and the implementation of the Pillar

As different authors have recently noticed,[1] the structure of the EPSR recalls the outline of a bill of rights. The 20 principles are concise, formulated in terms of rights, and seem intended to provide interpretative guidance. This looks promising, as solemnity appears to be a good step towards the emancipation of social and labour rights and, under this aspect, there are similarities with the Charter on the Fundamental Social Rights of Workers and the Charter of Fundamental Rights of the EU.
On a less positive note, it was observed that the order of the three Chapters in which the principles are divided reflects a conception of labour and social policies as directed at achieving 'access justice', rather than substantial or material justice.[2] In other words, by placing 'Equal Opportunities and Access to the Labour Market' in Chapter I, 'Fair Working Conditions' in Chapter II, and 'Social Protection and Inclusion' in Chapter III, the impression is that labour market inclusiveness prevails over the enhancement of the terms and conditions of work.

Turning now at the content of the Pillar, the reflection is twofold.
On the one hand, the Union adopts a holistic approach towards social matters. The Pillar enunciates rights that range from non-discrimination and fair wages to childcare, social security, unemployment benefits, support to individuals with disabilities and pensions. Such a wide scope can be welcomed as a positive acknowledgment of the necessity to intervene on multiple fronts in order to re-balance the process of European integration and to attain the objective of a 'social market economy', stated in Article 3 TEU.
On the other hand, it is important to note that Chapter II on "Fair Working Conditions" portrays a conception of labour law as deeply intertwined with economic policies. Indeed, while Chapter II addresses important aspects for a sound labour policy, the absence of references to the necessity to increase the protective standards for workers is striking. In other words, the Pillar does not seem to contemplate measures that substantially interfere with the employers' contractual freedom. Rather, the principles point towards the direction of flexicurity, an approach to labour law that priorities adaptability over stability and over protection of the weaker contracting party.

As for the possible ways in which the Pillar could find implementation, neither the Commission Recommendation nor the interinstitutional proclamation have binding effect. Therefore, one may wonder how

[1] S. Giubboni, "*Appunti e disappunti sul pilastro europeo dei diritti sociali*", in Quaderni costituzionali / a. XXXVII, n. 4, December 2017, pp. 953; and F. Bonciu, "the European Pillar of Social Rights: too little, too late?", in Romanian Journal of European Affairs, Vol. 18, n. 1, June 2018, pp. 60.
[2] Giubboni, *ibidem*.

the Pillar could help the EU to attain its objectives, namely to create a fairer Economic and Monetary Union and to reach a "social triple A" status.
Despite its non-binding nature, it has been argued that the Pillar could steer the definition of labour and social policies across Europe in the framework of the EU governance mechanisms. In particular, the Pillar could be used to define more socially aware indicators to guide the cycle of economic and fiscal policy coordination within the European Semester.[3] However, the Scoreboard that the Commission has adopted to monitor the implementation of the Pillar through governance mechanisms[4] does not appear particularly different from the social indicators that were already in force.[5]
Moreover, the 20 principles of the Pillar could contribute to the definition of the EU social dimension by triggering a wave of legislative proposals, as well as by influencing the content of such legislation.[6] However, it is important to note that a considerable part of the principles falls outside EU competences. For instance, Principle n. 6 on fair wages cannot be addressed by EU law, as "pay" is a matter that is explicitly excluded from the sphere of action of the EU (Article 153(5) TFEU).

II. Directive on Transparent and Predictable Working Conditions

So far, the Pillar predominantly reflects a conception of labour policy that is closely related to the attainment of economic goals and, under this perspective, it does not constitute a substantial development for the social dimension of the EU.
However, when looking at the legislative works on the Directive on Transparent and Predictable Working Conditions, there seems to be room for labour standards that pursue an emancipatory function with respect to the weaker party of the labour relation. The outcome of the negotiations between the Council and the European Parliament (acting with equal weight, in the context of the co-decision process) will be decisive in that regard.

The European Commission adopted its proposal in December 2017, with the intention to establish certain standards of protection for those who, regardless of the national definitions of "worker" or "employee", fall within the Court of Justice's definition of worker as *'a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration'*.[7] This implies that the Directive would also apply to atypical workers with flexible working arrangements, such as those with a zero-hours contract or platform workers.
According to the Commission's proposal, those with this "EU worker status" have the right to receive by their employer, in the first day of employment, information on the terms and conditions of their contract and on their rights vis-à-vis the termination of the contract.
The Commission intends also to ensure a minimum level of predictability for workers with irregular working patterns. With that purpose, the proposal establishes a maximum duration of six months for probationary periods and states that, when the working schedule is variable, the employer has to notify the periods (hours and days) where the worker may be required to work. The employer is also compelled to provide a minimum advance notice, intended as the period of time between the moment a worker is informed about a new work assignment and the moment the assignment starts.
Moreover, the Commission's proposal includes the right for workers to request to their employer a more stable form of employment, and to receive a motivated answer.
What results from this proposal is that the Commission does not intend to embark in a decisive advancement of EU labour standards, but nevertheless shows the willingness to expand the notion of 'worker' beyond

[3] F. Hendrickx, "*The European Social Pillar: A first evaluation*", in ELLJ, 2018, Vol. 9(1), pp. 3-6. .
[4] https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/
[5] Reference is made to the indicators that guided the cycles of policy coordination in the context of the Open Method of Coordination (https://ec.europa.eu/social/main.jsp?catId=756&langId=en) and of the Europe 2020 Strategy (http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf).
[6] Z. Rasnača, "*Bridging the gaps or falling shoprt? The European Pillar of Social Rights and what it can bring to EU-level policymaking*", ETUI Working Paper, 2017.
[7] Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, ECLI:EU:C:1986:284.

national legislative categories, so to provide a broad scope of application to the rules established in the Directive.

The Council has adopted its position in June 2018, and the differences in the approaches with the Commission's approach is evident. First of all, the Council has rejected the EU notion of "worker", and has re-formulated the scope of application of the Directive as only including those workers who are in an employment relationship, as defined by national law. Contrary to the Commission's proposal, this would not have a significant harmonizing effect across the EU (for instance, a worker who is identified as an employee in the Netherlands may be identified as quasi self-employed or self-employed in Italy).
Moreover, the Council advocates for re-drafting the Directive in a way which results more conciliating vis-á-vis business interests. In the view of the Council, the employer should have either a week or one month of time since the first day of employment to communicate the worker the information concerning his terms and conditions of employment, depending on the type of information. Moreover, the Council recommends to provide the employer with a margin to arrange probationary periods which are longer than six months. In a similar vein, the Council suggests to impose on the employer the duty to give the worker a minimum advance notice on the work assignments only in cases where "the work pattern is entirely or mostly unpredictable". It should be noted that it is rather difficult to define when a pattern of work is 'unpredictable', and that the formulation proposed by the Commission, which uses the notion of 'variable working schedule', provides a more solid term of reference. Finally, the Council's position states that Member States should be able to limit the amount of requests that a worker can address to the employer concerning the transition to more stable forms of employment.

Less than a month ago, the European Parliament adopted its Resolution on the Commission's proposal, with an approach that appears to be radically different from that of the Council. Indeed, the Parliament's position goes beyond the Commission's proposal insomuch as it promotes an effective upwards convergence of national labour standards.
Taking some examples, the Parliament endorses the adoption of an EU-notion of worker and proposes the following definition: '*a natural persons who, for a certain period, performs services for and under the direction of another person in return for remuneration in the case of dependency or subordination between the former and the latter*'. It is interesting to note that the reference to the conditions of dependency and subordination have the effect to further specify the Court of Justice's definition, referred to in the Commission's proposal. In particular, the Parliament's Resolution explicitly indicates that the Directive applies also to workers who are not in an employment relationship (and therefore who are not in a condition of subordination with respect to their employer), but that are in a condition of (economic) dependency. When meeting those criteria, platform workers, intermittent workers, voucher based-workers, freelancers, trainees and apprentices can all benefit from the rights established in the Directive.
Moreover, the Parliament strengthens the importance to prevent abuses raising from the use of on-demand contracts and similar forms of employment relationships. For instance, the Resolution indicates that Member States should ensure that employers determine an average of the numbers of hours in which the worker is asked to provide his/her services and which can be considered 'normal', and that these hours should constitute the minimum guaranteed number of paid hours. Similarly, when the pattern of work is variable, not only the employer is requested to give the worker a minimum of notice before requesting his/her service, but should also observe a minimum notice period to cancel a work assignment after the worker has accepted it. In case of late cancelation by the employer, the worker should retain his/her right to remuneration for the work assignment.
In addition, the Parliament aims at expanding the rights conferred by the Directive, by including the right of all workers (that fall within the scope of application of the Directive) to access social protection and safety and health protection.

Concluding considerations:

While it is still early to comment on the Pillar's effective ability to improve the social dimension of the EU, it is possible to formulate a couple of remarks.

The first remark is that, in consideration of its non-binding nature and of its possible role within the cycle of policy coordination, the Pillar appears more oriented at influencing labour and social policies at the national level rather than at exercising an impact on EU law-making.[8]
The second remark is that the 20 principles established in the Pillar reflect an understanding of labour and social matters as closely intertwined with objectives of economic nature. Therefore, it is hard to imagine that a more autonomous - and emancipatory - conception of labour policy could stem from the Pillar.
The last remark is connected to the first one, and concerns the potential of the Pillar to influence new EU legislation. The analysis of the legislative works behind the drafting of the Directive on Transparent and Predictable Working Conditions shows that whether the Directive will reflect a weak or a rather strong protective function of labour law depends more on how the three legislative institutions are going to accommodate their different stances rather than on the relevance of the principles of the Pillar itself.

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[8] Rasnač, Z., (n. 7)