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# A New Source for (EU) Labour Law?

Mélanie Schmitt<sup>†</sup> and Marco Rocca<sup>\*</sup>

## Abstract

Looking at the instruments of the EU Economic Governance (Memoranda of Understanding; Country Specific Recommendations) from the perspective of national labour law systems reveals wide differences in their impact. If it is possible to draw a direct link between the demands of a Memorandum and national labour law reforms, the picture is less clear for Country Specific Recommendations. Notably, different Member States show a different degree of ability to “resist” these Recommendations, which appears to be based more on their coherence (or lack thereof) with national political preferences than on the specific situation of the given Member State when it comes to the corrective mechanisms of the EU Economic Governance. From the perspective of labour law, these instruments still show little in the way of a more “social” approach. Taken together these conclusions suggest that the instruments of the EU Economic Governance could hardly provide a productive contribution to the development and enforcement of EU labour law, risking, on the contrary, to lead to its fragmentation due to their uneven impact across Member States.

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## 1. The EU New Economic Governance, 10 years and two crises later

The EU New Economic Governance (NEG) follows an approach which stems from the pre-existing Open Method of Coordination (OMC),<sup>1</sup> although this has been transformed and reinforced by the reforms enacted during the Eurozone crisis.<sup>2</sup> The reforms of the economic governance of the EU, as well as its role during and after the Eurozone crisis, clearly represent a major evolution in the history of European integration.<sup>3</sup> The strengthening of the role of the Commission in the context of economic coordination, notably through the introduction of the reverse qualified majority voting, the introduction of a more credible threat of sanctions, as well as the memory of the far reaching effects of the MoUs impact during the previous crisis, all participate to this finding.

However, the project<sup>4</sup> which led to the present Special Issue started around the Summer 2019, in what can only be described as a different world. The impact of the COVID-19 pandemic on the trajectory of the NEG, and notably the application of the so-called general escape clause<sup>5</sup>, as well as the growing voices that foresee a continued “lenient” application of budgetary rules for the coming year, have heavily impacted our understanding of the role and importance of the NEG for labour law. Indeed, at some point during the current crisis, the functioning of the NEG has faded so much in the background that it was hard to detect. While we consider, together with the other authors of this Special Issue, that such a situation *probably* represents a temporary suspension more than a true path breaking moment, it is undeniable that this perception weighs on our analysis. What is more, as we write these lines, Europe is facing yet another crisis which might well end up having a profound economic impact, leaving aside the even more direct and important humanitarian consequences, for years to come, which could in its turn suggest a further suspension, if not a rethinking, of the NEG.

That being said, the aim of our collective reflection of the impact of the NEG on our shared subject, labour law, was to bring together experts of different national systems who could go beyond the mere formal prescriptions of the NEG documents, such as CSRs, MoUs, but also other preparatory documents, and disentangle what they actually meant for the trajectory

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<sup>1</sup> On the OMC see in general B.t. HAAR, ‘Open Method of Coordination: A New Stepping Stone in the Legal Order of International and European Relations’, *Nordic Journal of International Law*, 77, 3, 2008, 235-251; D. ASHIAGBOR, ‘Soft Harmonisation: The Open Method of Coordination in the European Employment Strategy’, *European Public Law*, 10, no. 2, 2004, 305 – 332.

<sup>2</sup> M. ROCCA, “Introduction: The EU New Economic Governance, Labour Law and Labour Lawyers”, in this Issue.

<sup>3</sup> See for instance F. DE WITTE and M. DAWSON, ‘From Balance to Conflict: A New Constitution for the EU’, *European Law Journal*, Vol. 22, 2015, 204, as well as the literature review in G. MARTINICO, ‘EU Crisis and Constitutional Mutations: A Review Article’, *STALS Research paper*, no. 3, 2014.

<sup>4</sup> LabCoRe – Labour Law as Conditionality and Recommendation, funded by the University of Strasbourg with the IDEX-Attractivité programme.

<sup>5</sup> The clause is regulated by Articles 5(1), 6(3), 9(1) and 10(3) of Regulation (EC) 1466/97 and Articles 3(5) and 5(2) of Regulation (EC) 1467/97. The activation of the clause provides a larger budgetary margin of manoeuvre for Member States in order to deal with periods of severe economic downturn, although it does not change the long-term trajectory that Member States should follow under the SGP. See P. DERMINE and M. MARKAKIS, ‘EU Economic Governance and the COVID-19 Crisis: Between Path-Dependency and Paradigmatic Shift’, *International Journal of Public Law and Policy*, (2020) Vol. 6, no. 4, 333.

of the respective national labour law systems.<sup>6</sup> Recent studies on the NEG have highlighted the importance of a “national” point of view to assess the functioning and effectiveness of its tools, in order to overcome the limitations of using a quantitative approach to the implementation of the NEG prescriptions and take into account domestic idiosyncrasies.<sup>7</sup> A second, sometimes implicit, goal was to take stock of our own perception of the impact of the NEG on our field of study, that is, labour law. This is because, whether it is through CSRs or MoUs, by reading the contributions to this Special Issue, it is abundantly clear that these instruments do cover labour law as a subject as we understand it. It should be noted that this is not surprising. After all, the analyses of the Eurozone crisis have already highlighted how the creation of the European Monetary Union have made it so that labour market policy, including interventions on labour regulations, are left as the only adjustment variable to cope with economic shocks, due to the reduction of Member States’ fiscal and monetary ‘problem-solving capacity’.<sup>8</sup>

The conclusions presented in this article are based on the contributions included in this Special Issue, as well as on the thought-provoking discussions we had when we finally managed to meet in person in Strasbourg for the closing conference of the LabCoRe project.<sup>9</sup> We will organise our conclusions around the three questions presented by Marco Rocca in his Introduction to the present Special Issue. As a reminder these are: a) can a clear enough link be identified between the recommendations or prescriptions of the NEG and legal changes at national level? (Section 2); b) does this change how we as labour lawyer look at these instruments? (Section 3); c) should labour lawyers embrace the instruments of the NEG as a part of their field, and potentially even as a tool to foster changes at national level and improve the enforcement of labour laws? (Section 4).

## 2. The NEG as a legal source

The first question asked in the Introduction dealt with the possibility to identify a clear enough link between a given prescription in a CSR/MoU and its implementation in national law. This was aimed at exploring the legal nature of these prescriptions and to place them in the continuum between “soft” and “hard” law. Beyond this descriptive goal, finding such a link would also have other potential ramifications, in particular as to the role of the EU Charter of Fundamental Rights (EUCFR) in assessing national reforms enacted to “implement” a CSR/MoU, as these could then be seen as “implementing Union law”.<sup>10</sup> When it comes to MoUs, this question has been answered affirmatively by the CJEU, at least

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<sup>6</sup> See for instance D. GOLDEN, I. SZABÓ, R. ERNE, ‘The EU’s New Economic Governance prescriptions for German, Irish, Italian and Romanian public transport and water services from 2009 to 2019’, *Working Paper 21-10*, 2021, ERC Project ‘European Unions’, available at <https://www.erc-europeanunions.eu/working-papers/>, 9: “We therefore determine a prescription’s meaning by drawing on the MoU or CSR documents in their entirety, the Country Reports, and a good knowledge of the four countries and their languages”.

<sup>7</sup> See V. J. D’ERMAN, D.F. SCHULZ, A. VERDUN1, and D. ZAGERMANN, ‘The European Semester in the North and in the South: Domestic Politics and the Salience of EU-Induced Wage Reform in Different Growth Models’, *Journal of Common Market Studies*, Vol. 60, 1, 34.

<sup>8</sup> F.W. SCHARPF, ‘Forced Structural Convergence in the Eurozone – Or a Differentiated European Monetary Community’. *MPIfG Discussion Paper*, no. 15, 2016, 2.

<sup>9</sup> The conference took place on 8 December 2021. The recordings of the presentations are available here <https://www.youtube.com/playlist?list=PLHgigtPLH-ZNpXKcaVWpu8qcUTKBSUUvT>.

<sup>10</sup> Article 51 EUCFR.

for a subset of MoUs, in the context of the *Florescu* case.<sup>11</sup> It is worth noting that the answer had been different when measures adopted to implement the Portuguese MoU had been contested on the basis of the EUCFR.<sup>12</sup> Even when the CJEU did scrutinise, in *Ledra Advertising*, the respect of fundamental rights by the measures implementing a MoU, it did so by applying a proportionality test which pitted said fundamental rights (*in casu*, the right to private property) against ‘the stability of the banking system in the euro area’, giving the impression of the inevitability (in the reasoning of the Court) of austerity measures.<sup>13</sup> That being said, the status of CSRs remains, so far, undecided.

The authors focusing on CSRs in this Special Issue both answered the question negatively. Filip Dorsemont points out that Belgium did not follow CSRs concerning the reform of collective bargaining when these were adopted, and it was instead the political change at national level which led to reforms going in the sense of the NEG prescriptions. Even when these were implemented, no reference was included in said reforms to CSRs. Therefore, while an ideological continuity with the Europlus pact is evident, Dorsemont concludes for the absence of a clear link between the NEG prescriptions and national reforms. In her turn, Konstantina Chatzilaou, writing about France, concludes that the active and regular participation of Member States themselves in the NEG makes it impossible to conceive it as a one-way street which “dictates” national reforms. She also adds that sanctions are not, or rather, would not, be inflicted for the lack of compliance with CSRs, but instead for violations of budgetary or macroeconomic rules. One might also reinforce this conclusion by looking at the studies which have consistently found that implementation of CSRs remains low,<sup>14</sup> or by considering the fact that every Member State (except Estonia and Sweden), has been subject to an excessive deficit procedure, and none of these procedures has ever led to the application of sanctions.<sup>15</sup>

If one compares these conclusions with the ones reached by Catarina Carvalho and Ana Teresa Ribeiro about the Portuguese situation under the MoU, the difference in the degree of intrusiveness of the two sets of instruments emerges quite starkly. This leaves space to imagine a continuum of *sui generis* binding power of the instruments of the NEG and leaves open the question, which could be explored including a larger subset of Member States, of the impact on other forms of sanctions linked to CSRs. This is particularly interesting in the

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<sup>11</sup> CJEU, Case C-258/14, *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others*, 13 June 2017, §48. See C. KILPATRICK, ‘The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality’, *Current Legal Problems*, Vol. 70, no. 1, 2017, 337–363.

<sup>12</sup> CJEU, Case C-128/12, *Sindicato dos Bancários do Norte e.a. contre BPN – Banco Português de Negócios SA*, 7 March 2013. See further on these cases the article by Catarina Carvalho and Ana Teresa Ribeiro in this Issue.

<sup>13</sup> CJEU, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising v Commission and ECB*, 20 September 2016, §74. For a similar conclusion concerning the *Florescu* case, see F. COSTAMAGNA, ‘National social spaces as adjustment variables in the EMU: A critical legal appraisal’, *European Law Journal*, Vol. 24, 2018, 189.

<sup>14</sup> European Court of Auditors, *The European Semester – Country Specific Recommendations address important issues but need better implementation*, 2020; European Parliament, *Country-Specific Recommendations for 2015 and 2016: A Comparison and Overview of Implementation*, 2016, Available at [www.europarl.europa.eu/RegData/etudes/STUD/2016/497766/IPOL\\_STU\(2016\)497766\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/497766/IPOL_STU(2016)497766_EN.pdf).

<sup>15</sup> See F. COSTAMAGNA and A. MIGLIO, ‘Sanctions in the EMU Economic Pillar’, in S. Montaldo, F. Costamagna, and A. Miglio, *EU Law Enforcement – The Evolution of Sanctioning Powers*, Routledge, 2021, 148.

case of conditionalities attached to structural funding,<sup>16</sup> which can be expected to have a strong impact on those Member States who receive an important share of EU structural funds.<sup>17</sup>

In the end, while, as we just mentioned, both Filip Dorsemont and Konstantina Chatzilaou are not convinced by the possibility of finding a direct link between CSRs and national reforms, they also conclude that many of the prescriptions included therein were ultimately adopted in national law once national politics aligned with these. Sometimes (as in the case of France) national reforms went beyond what was requested, a point to which we will come back in the next Section. This still seems to suggest an impact going beyond the formal binding force of CSRs. Therefore, notwithstanding the interim conclusion which differentiates between MoUs and CSRs when it comes to the identification of their ability to directly shape national legislation, the attention for the role of these prescriptions in our field seems warranted. How much this will be confirmed in the future largely depends on the post crisis evolutions of the NEG. In this sense it is worth remembering that ‘addressing all or a significant subset of challenges identified in the relevant country-specific recommendations’ is one of the conditions for national recovery and resilience plans to have access to EU Recovery and Resilience Facility financing.<sup>18</sup> What is more, it seems likely that Member States will emerge from the (double) crisis of the past years with worse public finances indicators, thus allowing for a far-reaching deployment of the corrective instruments of the NEG. In light of these persistent trends, the increasing use of conditionalities requires a constant assessing of the place of labour-law-related CSRs in the soft law / hard law continuum.<sup>19</sup>

### 3. Labour lawyers and the NEG

The answer to the first question leaves us with a duality of NEG instruments which is, to an extent, unsurprising. While the link between MoUs demands and national reforms implementing those appears clear and direct, this is not the case for CSRs, at least in the Member States covered by this Special Issue. The second question deals more directly with the understanding of the NEG instruments by labour lawyers. As such, it remains relevant even in light of the negative answer concerning CSRs.

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<sup>16</sup> J. BACHTLER and C. MENDEZ, ‘Cohesion and the EU Budget: Is Conditionality Undermining Solidarity?’, in R. COMAN, A. CRESPIY, and V.A. SCHMIDT, *Governance and Politics in the Post-crisis European Union*, Cambridge University Press, 2020, 279.

<sup>17</sup> See for instance D. GOLDEN, I. SZABÓ, R. ERNE, ‘The EU’s New Economic Governance prescriptions for German, Irish, Italian and Romanian public transport and water services from 2009 to 2019’, *Working Paper 21-10*, 2021, ERC Project ‘European Unions’, available at <https://www.erc-europeanunions.eu/working-papers/>, 21: “[...] Romania was already told in 2015 to take the commodifying NEG prescriptions on its public transport services seriously. Despite no longer experiencing any excessive deficits or macroeconomic imbalances, EU structural funding was made conditional on following NEG prescriptions”.

<sup>18</sup> Art. 2.2, Annex V, Regulation 2021/241,

<sup>19</sup> See S. Sacchi, ‘Conditionality by Other Means: EU Involvement in Italy’s Structural Reforms in the Sovereign Debt Crisis’, *Comparative European Politics*, Vol. 13, 2015, 89: “The empirical evidence about labour policy reform would seem to point out an extreme case of vertical [...] integration of the policy arena, which goes well beyond what is generally meant by Europeanization, and cannot be captured through multilevel governance heuristics”. On the hybrid nature of the NEG system see S. BEKKER and S. KLOSSE, ‘EU Governance of Economic and Social Policies: Chances and Challenges for Social Europe’, *European Journal of Social Law* 2013, no. 2, 103-108.



The answers to this question across the different contributions are essentially in line with what we, as labour lawyers ourselves, were expecting at the onset of the research project which led to this Special Issue. Indeed, the literature on the policy prescriptions of the NEG has already highlighted the general preference of MoUs for the reduction of employment protection legislation, collective bargaining coverage, and other forms of labour regulations,<sup>20</sup> seen as obstacles to pursuing the internal devaluation strategy which was at the heart of the EU institutions reaction to the Eurozone crisis.<sup>21</sup> Coming to CSRs, more recent analyses call into question a one-dimensional reading of their content, highlighting the return of flexicurity aspects in their prescriptions,<sup>22</sup> as well as the fact that these would include recommendations which are “neutral” when it comes to state intervention<sup>23</sup>, or that the European Semester provides a workable framework to balance economic and social aspects.<sup>24</sup> Other authors have pushed back against these claims, highlighting how a reading of these prescriptions in context still confirm the generally neoliberal and commodifying approach of the NEG.<sup>25</sup> Further, it has been pointed out how these “more socially-oriented” recommendations are still marginal and still “place much emphasis on the principles of formal equality, individual responsibility, and reduced welfare dependency”.<sup>26</sup>

As we pointed out, the contributions in this Special Issue confirm the policy direction of the NEG when it comes to labour law. The Portuguese Memorandum<sup>27</sup> represents, unsurprisingly, the starkest example of this, with its demands of minimum wage freezes, pay cuts in the public sector, working time extension without compensation, weakening of collective bargaining as well as of employment protection legislation. The CSRs addressed to Belgium<sup>28</sup> and France,<sup>29</sup> while necessarily vaguer, appear to go in the very same direction, by recommending the weakening of indexation mechanisms, decentralisation of collective bargaining, as well as the facilitation of dismissals.

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<sup>20</sup> P. COPELAND, and M. DALY, ‘The European Semester and EU Social Policy’, *Journal of Common Market Studies*, Vol. 56, no. 5, 2018, 1001–1018; A. CRESPIY, and P. VANHEUVERZWIJN, ‘What “Brussels” means by structural reforms: empty signifier or constructive ambiguity?’, *Comparative European Politics*, Vol. 17, no. 1, 2019, 92–111. See also in general A. KOUKIADAKI, I. TAVOR, and M. MARTINEZ LUCIO (eds.), *Joint Regulation and Labour Market Policy in Europe during the Crisis*, ETUI, 2016.

<sup>21</sup> See S. DEAKIN et A. KOUKIADAKI (2013), ‘The sovereign debt crisis and the evolution of labour law in Europe’, in N. COUNTOURIS and M. FREEDLAND (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, Cambridge University Press, 163–188.

<sup>22</sup> S. BEKKER, ‘Flexicurity in the European Semester: still a relevant policy concept?’, *Journal of European Public Policy*, 2017, no. 25, 175.

<sup>23</sup> J.S HAAS, V.J. D’ERMAN, D.F. SCHULZ, and A. VERDUN, ‘Economic and Fiscal Policy Coordination after the Crisis: Is the European Semester Promoting More or Less State Intervention?’ *Journal of European Integration*, Vol. 42, no. 3, 2020, 328.

<sup>24</sup> A. Verdun and J. ZEITLIN, ‘Introduction: the European Semester as a new architecture of EU socioeconomic governance in theory and practice’, *Journal of European Public Policy*, 2017, 8.

<sup>25</sup> J. JORDAN, V. MACCARRONE and R. ERNE, ‘Towards a socialization of the EU’s new economic governance regime?’, *British Journal of Industrial Relations*, Vol. 59, no. 1, 2021, 191-213.

<sup>26</sup> F. COSTAMAGNA, ‘National social spaces as adjustment variables in the EMU: A critical legal appraisal’, *European Law Journal*, Vol. 24, 2018, 180.

<sup>27</sup> See C. CARVALHO and A.T. RIBEIRO, ‘The impact of the EU economic governance in Portugal’, in this Issue.

<sup>28</sup> See F. DORSSEMONT, ‘Wages setting and wage Moderation in Belgium, a never ending and already old story in the wake of the ‘new European economic governance’’, in this Issue.

<sup>29</sup> See K. CHATZILAOU, ‘EU Economic Governance and French Social Legislation’, in this Issue.

Can we still speak of EU “labour law” if rules which are at the heart of its functioning, such as the determination of remuneration, the organisation of a collective bargaining system, employment protection legislation, just to name the most evident ones, are managed through instruments which are underpinned by a completely different logic, such as the one of budgetary rules and macroeconomic imbalances? The risk entailed by this shift, or “displacement” is identified by Dawson in the possibility that ‘social voices are themselves captured, or ‘socialised into’ the Semester’s wider logic of competitiveness and market fitness’.<sup>30</sup>

EU labour law has emerged from a different perspective than national labour law, being more often considered as a tool for correcting the market or, at worse, a potential restriction to the functioning of the EU internal market.<sup>31</sup> In this sense, the prescriptions of the NEG follow such an approach focused on the functioning of the market.<sup>32</sup> As such, CSRs concerning childcare, for instance, have the objective of improving labour market participation. In their turn, recommendations concerning atypical contracts are drafted in the language of avoiding the segmentation of the market. Similarly, as also pointed out by the conclusions of the article by Filip Dorssemont in this Issue, the issue of remuneration is apprehended by the NEG exclusively in its role as an adjustment variable to improve the competitiveness of a given Member State, not in its function of ensuring a dignified existence to workers and their families.<sup>33</sup> This is true even for the (rare) CSRs which recommend (targeted) wage increases. For instance, the 2014 CSR addressed to the Netherlands to allow “for more differentiated wage increases” was completed by the consideration that this could be done “without hurting competitiveness”.<sup>34</sup>

It must be said that limiting the point of view to the one of “labour law”, as we did in the context of the present Special Issue, clearly has an impact on the understanding of the said policy direction. It is undeniable that at least some signs of a different approach can be identified, if one looks hard enough, in the more recent cycles of the NEG, notably when it comes to recommendations related to poverty alleviation,<sup>35</sup> and access to public services, childcare, or long-term care.<sup>36</sup> However, no such sign of an, even limited, change of direction can be found in the areas covered by “labour law”, at least for the Member States included in the present Special Issue.

This view is reinforced by the very limited role that the European Pillar of Social Rights (EPSR) has played in the contributions included in this Issue, as well as in our own discussions. The reason for this lack of attention is likely to be twofold. On the one hand, as highlighted by Silvia Rainone, the Pillar has yet to make a visible impact on CSRs, having

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<sup>30</sup> M. DAWSON, ‘New governance and the displacement of Social Europe’, *European Constitutional Law Review*, Vol. 14, 2018, 207.

<sup>31</sup> We refer here to the vast debate following the infamous CJEU decisions in the *Viking* (C-438/05) and *Laval* (C-341/05) cases.

<sup>32</sup> M. DAWSON, ‘New governance and the displacement of Social Europe’, 207.

<sup>33</sup> Cfr. European Social Charter, Article 4(1).

<sup>34</sup> See S. BEKKER, ‘Hardening and softening of country-specific recommendations in the European Semester’, *West European Politics*, Vol. 44, no. 1, 2021, 123-124.

<sup>35</sup> See for instance the CSRs addressed to Hungary (2018, 2019), or Lithuania (2018-2020). See on this point S. RAINONE, ‘An overview of the 2020–2021 country-specific recommendations (CSRs) in the social field’ (2020), *ETUI Background Analysis*, no. 1, 8.

<sup>36</sup> See for instance the CSRs addressed to Ireland (2015), Austria (2017), or Italy (2019).



only being mentioned in a handful of those since its proclamation.<sup>37</sup> On the other, the Pillar itself remains coherent with the “competitiveness” approach to social rights, as it is highlighted by principle 5(b), which states the need to ensure “flexibility” for employers while guaranteeing secure and adaptable employment for workers. This finding is rather depressing when it comes to the assessment of the Pillar itself, considering how its stated objective is to better integrate social rights into the functioning of the NEG. In fact, the Action Plan adopted in 2021 to ‘implement’ the EPSR renews the link between EU funds and the implementation of CSRs, and this both in the context of the Recovery and Resilience Fund (RRF) and the European Social Fund Plus (ESF+).<sup>38</sup> The same Action Plan also places the European Semester as a central tool to monitor national policies implementing the EPSR,<sup>39</sup> while the monitoring of one of the flagship legislative initiative under the Action Plan, the on adequate minimum wages in the European Union, is also to be ensured through the Semester.<sup>40</sup> As such, the risk, to which we will come back in the last Section, is that instead of (or, at the same time as) bringing more “social” considerations in the NEG, the Pillar will bring more NEG into EU social policies.

A further question concerning the policy direction is the one related to the *symmetry* of the NEG prescriptions. Both the contribution related to Portugal<sup>41</sup>, and the one related to France<sup>42</sup> point out how national government sometimes went beyond what was required/recommended by the MoU/CSRs. Since, as we just mentioned, no change of direction in labour-law-related CSRs could be identified, this “overshooting” by national governments did not lead to any recommendation or other prescription by NEG instruments aimed at reining-in the overzealous implementation.<sup>43</sup> Therefore, we conclude that the policy prescriptions of the NEG in the field of labour law issued in the pre-pandemic period, should be read not as specific recommendations, but mostly as policy preferences, nudging national governments to enact reforms going into a given policy direction.

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<sup>37</sup> S. RAINONE, ‘An overview of the 2020–2021 country-specific recommendations (CSRs) in the social field’, 7.

<sup>38</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Pillar of Social Rights Action Plan, 4 March 2021, 28: ‘The Commission encourages [...] Member States to seize the unprecedented opportunity offered by the RRF to implement the relevant country-specific recommendations’.

<sup>39</sup> P. PECINOVSKY, ‘EU economic governance: a tool to promote or threaten social rights? The example of the right to collective bargaining’, in A-C. HARTZÉN, A. IOSSA, and E. Karageorgiou, *Law, Solidarity and the Limits of Social Europe Constitutional Tensions for EU Integration*, Edward Elgar, 2022, 78.

<sup>40</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 11: ‘progress should be monitored in the framework of the process of economic and employment policy coordination at EU level (European Semester)’

<sup>41</sup> See C. CARVALHO and A.T. RIBEIRO, ‘The impact of the EU economic governance in Portugal’, in this Issue: “[m]any of these changes occurred in 2012, with the reform of the Portuguese labour code (which, in some cases, went beyond the demands of the MoU)”.

<sup>42</sup> See K. CHATZILAOU, ‘EU Economic Governance and French Social Legislation’, in this Issue: “since 2017 and the election of Emmanuel Macron, the reforms have gone much further than the European recommendations”.

<sup>43</sup> Cfr. P. PECINOVSKI, ‘EU Economic Governance and the Right to Collective Bargaining: Part 2. From imposed restrictions of the right by EU Member States towards a social economic governance’, *European Labour Law Journal*, 2019, vol. 10, no. 1, 66, who proposes the introduction of ex-post monitoring of the implementation of CSRs (in casu, in order to safeguard the right to collective bargaining).

## 4. The NEG as a labour law instrument

In his contribution to this Special Issue, Filip Dorsemont concludes that the very logic of the NEG is irreconcilable with the aims and essence of labour law. He warns of an “employer oriented” approach which underlines the prescriptions of the NEG which would be irreconcilable with the “genuine human rights discourse focused on dignity” underpinning labour rights. This comment encapsulates perfectly how, whether or not one espouses the thesis of a growing “socialisation” of the NEG, the early years of MoUs and CSRs prescriptions have left a long-lasting impression that these tools are intrinsically antithetic to labour laws in general.

While we do share this concern, the continued existence of the NEG and the fact that, as shown in the Introduction to this Special Issue,<sup>44</sup> its tools often cover areas typically considered as falling into the scope of “labour law”, means that its role, actual or potential, as well as positive or negative, should be fully considered. Indeed, it has been argued that the emergence of the NEG “has turned labour market policy into a field of shared competences between member states and the Union” so that it “can no longer be regarded as a national prerogative in the European Monetary Union (EMU)”.<sup>45</sup> Claire Kilpatrick also urges not to consider the “displacement” of Social Europe as a necessarily negative (or positive) phenomenon, stressing ‘the productive capacity of displacement to destabilise’ and the importance of adopting a broad perspective to explore ‘the wide range of avenues those advocating for a more Social EU can address’.<sup>46</sup>

In this sense, we have highlighted elsewhere the potential and the risks of embracing the NEG as an instrument for the enforcement of EU labour law.<sup>47</sup> To summarise the arguments we developed in that occasion, repurposing the NEG to this end might provide useful tool to address specific areas of enforcement such as non-discrimination and the gender pay gap, as well as the recently proposed Directive on adequate minimum wages in the European Union.<sup>48</sup> It would also entail several important risks, and notably reducing the ability of trade unions and other social actors to engage with the enforcement of EU labour laws, as well as the potential hollowing-out of classical legal instruments (such as Directive and Regulations) in favour of easier-to-adopt CSRs.

Here we would like to advance a further element of potential risk. This builds upon some of the findings of the ‘European Unions’ research project led by Roland Erne.<sup>49</sup> These findings point out how, notwithstanding the optics of a more “Europeanised” coordination

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<sup>44</sup> See M. ROCCA, “Introduction: The EU New Economic Governance, Labour Law and Labour Lawyers”, in this Issue.

<sup>45</sup> C. SCHOLZ-ALVARADO, ‘The Politics of Labour that Underlies European Monetary Integration’. *Journal of Common Market Studies*, Early View, 2021, 2.

<sup>46</sup> C. KILPATRICK, ‘The displacement of Social Europe: a productive lens of inquiry’, *European Constitutional Law Review*, Vol. 14, 2018, 74.

<sup>47</sup> M. SCHMITT and M. ROCCA, ‘Enforcing EU Labour Law in the Context of EU Economic and Monetary Policy’, in Z. Rasnača, A. Koukiadaki, N. Bruun et K. Lörcher (eds.), *Effective Enforcement of EU Labour Law*, Hart Publishing, 2022.

<sup>48</sup> This is because of the more ‘quantifiable’ nature of these issues, which would make it easier for them to be monitored through the work of the NEG and of the Social Scoreboard.

<sup>49</sup> ERC European Unions – Labour Politics and the EU’s New Economic Governance Regime <https://www.erc-europeanunions.eu/>.

mechanism, the tools of the NEG actually “nationalise” conflicts and struggles.<sup>50</sup> They do so because they ‘target particular countries, and, within these, particular social groups, such as teachers or healthcare workers’<sup>51</sup>, and as such they reduce the likelihood of a European mobilisation by trade unions and other actors. This in contrast to the ordinary legislative procedure at EU level, which, because of its greater transparency and democratic input, is ‘more likely to trigger transnational counter-movements’, while also allowing social actors to rely on the debates in the context of the European Parliament to stop or amend the proposed pieces of legislation.<sup>52</sup>

Along the contributions of this Special Issue, we see this conclusion validated at multiple times.

One of the initial hypotheses of the LabCoRe project was that the specific national situation vis-à-vis the instruments of the economic governance would have had a major impact in the ability of a given Member State to ignore CSRs and other prescriptions stemming from said instruments. The idea behind this hypothesis, stemming from the literature on the NEG,<sup>53</sup> was that being subjected to a MoU, or EDP/MIP procedure, would reinforce the binding force of these prescriptions leading to a higher degree of implementation.

This was only partially confirmed by national analyses. On the one hand, the article of Ana Teresa Ribeiro and Catarina Carvalho on the Portuguese situation confirms the far-reaching impact of MoUs and their pervasive influence on national reform programs. This is coherent with the conclusions drawn by authors who have advanced a “scale” of the strength of the various instruments of the NEG.<sup>54</sup> On the other hand, comparing the contributions by Filip Dorssemont on the effect of the NEG on the Belgian system of collective bargaining, and the one by Konstantina Chatzilaou on their impact in France, one is left with the impression that the degree of impact of CSRs is determined more by their coherence (or lack thereof) with national politics than by the economic situation of a given Member State. That is, as long as the Member State in question is not subject to a MoU. Even then, Catarina Carvalho and Ana Teresa Ribeiro highlight how the swift implementation of the MoU demands concerning labour regulations had been paved by the previous existence of ‘deregulation and flexibilization trends’ which were embraced by the, at the time, Portuguese government.

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<sup>50</sup> R. ERNE, ‘A supranational regime that nationalizes social conflict: Explaining European trade unions’ difficulties in politicizing European economic governance’, *Labor History*, 56:3, 2015, 345-368.

<sup>51</sup> *Ibidem*, 358.

<sup>52</sup> D. GOLDEN, I. SZABÓ, R. ERNE, ‘The EU’s New Economic Governance prescriptions for German, Irish, Italian and Romanian public transport and water services from 2009 to 2019’, *Working Paper 21-10*, 2021, ERC Project ‘European Unions’, available at <https://www.erc-europeanunions.eu/working-papers/>, 8 and 21.

<sup>53</sup> S. STAN and R. ERNE, ‘A new methodology for analysing NEG prescriptions on healthcare. From counting CSRs to mapping semantic fields’, *Working Paper 18-03*, 2019, ERC Project ‘European Unions’, available at <https://www.erc-europeanunions.eu/working-papers/>; J. JORDAN, V. MACCARRONE and R. ERNE, ‘Towards a socialization of the EU’s new economic governance regime?’, *British Journal of Industrial Relations*, Vol. 59, no. 1, 2021, 191-213; C. DE LA PORTE and E. HEINS, ‘A new era of European Integration? Governance of labour market and social policy since the sovereign debt crisis’, *Comparative European Politics*, 2015, Vol 13, no. 8, 13.

<sup>54</sup> D. GOLDEN, I. SZABÓ, R. ERNE, ‘The EU’s New Economic Governance prescriptions for German, Irish, Italian and Romanian public transport and water services from 2009 to 2019’, *Working Paper 21-10*, 2021, ERC Project ‘European Unions’, available at <https://www.erc-europeanunions.eu/working-papers/>, 11.

From the specific perspective of the potential role of the NEG to act as an enforcement mechanism for EU labour law, this suggests that such a role would ultimately lead to an uneven enforcement of EU standards. If we take the example of the proposed Directive on adequate minimum wages, the threshold of 70% of workers covered by collective agreements<sup>55</sup> which Member States are encouraged to achieve through the promotion of collective bargaining, could represent a useful indicator to be integrated in the functioning of the NEG. Indeed, progress in the implementation and application of said (proposed) Directive is to be monitored ‘in the framework of the process of economic and employment policy coordination at Union level’, through the use of multilateral surveillance tools ‘such as benchmarking’.<sup>56</sup>

However, leaving aside the fact that this would most likely fall outside the areas where the (theoretical) threat of sanctions can be deployed,<sup>57</sup> it is easy to see how it could end up being enforced in a very different way depending on the situation (and political preferences) of a given Member State. Indeed, the promotion of collective bargaining might clash with the application of the macroeconomic imbalances indicators which focus on the dynamics of the unit labour cost.<sup>58</sup> As such, two Member States, both falling short of the 70% threshold for the coverage by collective agreements, might receive CSRs going in the opposite direction depending on their macroeconomic situation, which then would also be implemented differently depending on their coherence (or lack thereof) with the political preferences of the respective governments and representative institutions. Indeed, recent studies on the implementation of CSRs in the North and the South conclude that this ‘depends on the country setting, the power of the domestic actors, and the circumstances of domestic institutions’.<sup>59</sup>

Such a situation shows why the enforcement through the NEG still appears to us as an ultimately counterproductive tool to advance and enforce EU labour law, notably in contrast with the, although more cumbersome, standard tools of judicial proceedings and infringements procedures in front of the CJEU. We believe that this conclusion has important implications for the assessment of the “socialisation” of the NEG. This does not relate to the usefulness of the socialisation theory as a descriptive tool for understanding the procedural or substantive evolution of the NEG.<sup>60</sup> Instead, what it could call into question is the socialisation of the NEG as a policy objective, which, by offering a seemingly easier pathway to “more” EU intervention in the social sphere, could end up hurting the ultimate

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<sup>55</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Article 4.

<sup>56</sup> *Ibidem*, Recital 25.

<sup>57</sup> See M. ROCCA, ‘Introduction: The EU New Economic Governance, Labour Law and Labour Lawyers’, Section 2, in this Issue.

<sup>58</sup> V. BAVARO, S. BORELLI, and G. ORLANDINI, ‘La proposta di direttiva UE sul salario minimo adeguato’, *Rivista giuridica del lavoro*, Vol. I, no. 1, 2021, 114.

<sup>59</sup> V. J. D’ERMAN, D.F. SCHULZ, A. VERDUN1, and D. ZAGERMANN, ‘The European Semester in the North and in the South: Domestic Politics and the Saliency of EU-Induced Wage Reform in Different Growth Models’, *Journal of Common Market Studies*, Vol. 60, no. 1, 22. In the same vein, the authors state that “We find that country-specific recommendations meet country-specific obstacles” (*ibidem*, 34).

<sup>60</sup> See J. ZEITLIN and B. VANHERCKE, ‘Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond’, *Journal of European Public Policy*, 2017, no. 25, 149-174.

objective of EU labour law, namely the constant improvement *and harmonisation* of living and working conditions.<sup>61</sup>

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<sup>61</sup> Article 151 TFEU.