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Introduction: The EU New Economic Governance, Labour Law and Labour Lawyers

Marco Rocca*

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

The emergence of the New Economic Governance (NEG) of the European Union (EU) during the tumultuous years of the Great Recession and the Eurozone Crisis, represented a major evolution in the history of European integration. As these evolutions often do, it brought about a new set of terms which became familiar for researchers, stakeholders and, to a greater or lesser extent, the broader public. Indeed, during the year of the previous crisis, Memoranda of Understanding (MoUs) and, for a more restricted public, Country Specific Recommendations (CSRs) became the vehicles to implement what had been identified by the European Commission and the European Central Bank (ECB) as the cure for the economic ails of the EU, namely austerity policies. These constituted a mix of reductions or freezes of public expenditures coupled with the pursuit of external competitiveness through internal devaluation, that is, the reduction of labour costs.¹ As such, the introduction and development of the NEG has led to the asymmetric reinforcement of the top-down coordination of Member States socio-economic policies,² where the strength of this coordination is heavily dependant upon the economic situation of a given Member State. Several studies³ have analysed the new economic governance of the EU, focused mainly on exploring the novelties in terms of EU instruments for the coordination of budgetary and economic policies, and on their interactions with existing EU law. Similarly, other authors have explored the “constitutional mutation” of the EU⁴ stemming from these instruments.

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¹ F. SARACENO and J.P. FITOUSSI, ‘European economic governance: the Berlin–Washington Consensus’, *Cambridge Journal of Economics* 2013, no. 37, 479–496.

² See K. CHATZILAOU, ‘La dimension sociale de la gouvernance économique européenne’, *Revue de droit du travail*, 2018, 233-243.

³ E.g. A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford, Oxford University Press, 2015; P. CRAIG, ‘Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications’, in M. ADAMS, F. FABBRINI and P. LAROUCHE (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford, Hart Publishing, 2014, 19-40.

⁴ See for instance G. MARTINICO, ‘EU Crisis and Constitutional Mutations: A Review Article’, *Revista de Estudios Políticos (nueva época)*, 2014, no. 165, 247-280; B. DE WITTE, ‘Euro Crisis Responses and the EU Legal

Europe (and the world) is now living through a new economic crisis, originating from the impact of the COVID-19 pandemic on all aspects of our societies. As I will discuss later in this article, the way in which the EU economic governance has handled the present crisis is strikingly different from the previous one. The different nature of the COVID-19 crisis explains much of this difference. This time the crisis was highly symmetrical, meaning that it struck all Member States in a similar way,⁵ a situation which made it easier for the EU Member State to agree on a common strategy. From the point of view of the EU economic governance, several instruments were made dormant by this strategy. As it is well known, the general escape clause of the Stability and Growth Pact was triggered,⁶ providing a larger margin of manoeuvre for national economic policies aimed at tackling the impact of COVID-19. On the other hand, CSRs for 2020 were deeply impacted by the crisis situation, and no new CSRs were adopted for 2021. That being said, it remains to be seen whether the arrival of the (hoped) post-pandemic economic recovery will mean the return to the pre-pandemic trajectories of the NEG or a rethinking of the NEG itself inspired by the pandemic experience and other political pressures.⁷

The economic governance of the EU is thus at a crossroad. The main aim of this special issue is to take stock of the past impact of the NEG on four national systems of labour law and to consider the possible future scenarios on the basis of these experiences. In particular, we will consider whether and to what extent the instruments of the NEG should be included among the sources that labour lawyers ought to consider as relevant for their subject.

The first question to be addressed then is: can a clear enough link be identified between the recommendations or prescriptions of the NEG and legal changes at national level? In trying to answer this question one has to leave behind the goal of proving a direct link of causation, as proving the amount of influence that the instruments of the NEG had on domestic policies remains an insurmountable challenge.⁸ The present special issue tries to address this gap by bringing together experts from each of the Member States covered in the following articles. This leads to the second question to be addressed: in the cases where the instruments of the NEG are effective in determining policies (in the area of labour law, for the purposes of the present special issue), does this change how we as labour lawyer look at these instruments? As I will describe in the next Section, the birth of the NEG during the previous crisis brought about a series of changes in the economic governance of the EU which go in the direction of reinforcing the coercive power of its tools.⁹ Therefore, the dichotomy hard

Order: Increased Institutional Variation or Constitutional Mutation?’, *European Constitutional Law Review*, 2015, no. 11, 434–457.

⁵ Although, as it will be pointed out in the next section, the amount of resources devoted to tackling the socio-economic impact of the COVID-19 crisis was by no means the same across Member States.

⁶ 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.

⁷ See for instance the proposal for a “social alert mechanism” put forward by the Spanish and Belgian governments: ‘Belgium and Spain promote a social alert mechanism at a European level’, 2 September 2021, https://europeanunion.diplomatie.belgium.be/sites/default/files/content/download/files/be-es_non_paper_-_porto_social_summit.pdf.

⁸ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, ‘From the European Semester to the Recovery and Resilience Facility. Some social actors are (not) resurfacing’, ETUI Working Paper, 2021, no. 13, 8.

⁹ P. DERMINE, ‘European Economic Governance in a Post-crisis Era – A Conceptual Appraisal’, *European Papers*, 2018, Vol. 3, no. 1, 294.

law / soft law does not feel adequate to capture the nature of these instruments, which indeed authors have described as “not too soft and not too hard”.¹⁰ Finally, and looking to the future: 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? This question is strictly intertwined with the debate on the “socialisation” of the NEG. Some authors have highlighted how “social” actors, such as trade unions but also the DG Employment of the European Commission, have increasingly found their way into the mechanisms of the NEG, leading to an increased attention to social issues.¹¹ This has been countered by other scholars who question the real world impact of the said “socialisation” pointing out at the continued preference of recommendations emanating from the NEG for the reduction of employment protections as well as the retrenchment of the welfare state.¹² Furthermore, the answer to this final question will necessarily be conditional upon the future evolutions of the NEG in the post-pandemic world. After all, as it was mentioned before, the pandemic has frozen much of the workings of the NEG and this might lead to its eventual permanent weakening.

To explore these questions, the Member States covered by the special issue include a variety of sizes (two “smaller” Member States, Portugal and Belgium, and two “larger” Member States, Italy and France), as well as different situations *vis-à-vis* the instruments of the NEG, concerning notably a) the application of a Memorandum of Understanding; b) the opening and closing of excessive deficit procedures; c) the opening and closing of excessive imbalances procedure; d) the absence of ongoing procedures. Recent studies focusing on the “real” effect of the NEG highlight the importance of going beyond the formalistic analysis of the documents adopted at EU level, and to consider these in their relationship with their broader context, at both European and national level, so as to assess their impact.¹³ The special issue aims at translating these insights into legal research, by looking at the impact of the NEG on labour law reforms and social policies in the abovementioned four Member States during the last decade.

To introduce the special issue, this article will describe the NEG and its instruments and highlight their strong correlation with labour laws and social policies (Section 2). It will consider (Section 3) how this relationship impacts national labour law systems and labour law as a field. The conclusions (Section 4) will be devoted to what this means for the evolution of EU labour law. Then, each separate article in the special issue will look at the situation in a specific Member State, to consider if and how the instruments of the NEG had an impact on domestic labour law and social policy. This will cover both the legal changes and the methods chosen for their implementation, as well as the political discourse surrounding these reforms -or lack thereof. The closing article will build upon the findings presented in the previous articles and assess the real impact of the NEG on national labour

¹⁰ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, ‘From the European Semester to the Recovery and Resilience Facility’, p. 8.

¹¹ J. ZEITLIN and B. VANHERCKE, ‘Socializing the European Semester: EU social and economic policy coordination in crisis and beyond’, *Journal of European Public Policy*, 2017, no. 25, 149-174.

¹² J. JORDAN, V. MACARRONE, and R. ERNE, ‘Towards a Socialization of the EU’s New Economic Governance Regime? EU Labour Policy Interventions in Germany, Ireland, Italy and Romania (2009–2019)’, *British Journal of Industrial Relations*, 2020, no. 59, 191-213.

¹³ *Ibidem*, 200.

laws and on the study and understanding of labour law as a legal field. On this basis, it will consider if and to what extent the instruments of the NEG have their place among EU sources of labour law and social policy, and what this means for EU competences and legal remedies in these areas.

2. The EU New Economic Governance

The New Economic Governance includes several instruments, some of which are presently being phased out. The most infamous of these instruments, falling within the aforementioned ‘phasing out’ category, is the Memorandum of Understanding (MoU), examples of which have been signed between the so-called Troika and individual Member States requesting financial assistance during the crisis. These documents include an extensive list of conditionalities, that is, conditions to be fulfilled by the recipient to obtain or maintain access to financial assistance. Due to the far-reaching nature of their contents, and of their effectiveness in influencing national policies, Pecinovsky proposes to define this as the “extreme EU economic governance”¹⁴, while De la Porte and Heins place Memoranda at the highest level of “intrusiveness” among the tools used by the EU to monitor and steer Member States’ economic policies.¹⁵ The analysis of the degree of implementation of conditionalities by the Member States covered by MoUs during the Eurozone crisis has confirmed this theoretical framework by concluding that the Member States analysed (Greece, Portugal, Cyprus, and Ireland) had “by-and-large adopted the fiscal consolidation measures prescribed by the Troika”, even though the picture is less clear for so-called structural reforms.¹⁶ It is important to note that the inclusion of conditionalities in case of financial assistance provided to Member States has been “constitutionalised”¹⁷ in the *Pringle* case, where the Court of Justice found that such an assistance would only be compatible with the so-called “no bailout clause” of Article 125 TFEU if accompanied by “strict conditions” which would “prompt [the recipient Member State] to implement a sound budgetary policy”.¹⁸

The last MoU expired with the end of the Greek adjustment programme. That being said, the history of the MoUs during the past crisis still casts a shadow long enough to cover the present one. Indeed, in the context of the COVID-19 pandemic, no Member State opted to have recourse to the European Stability Mechanism (ESM). This is the permanent structure created by EU Member States via an international treaty during the Eurozone crisis, with the goal to provide financial assistance. However, accessing the financial support from the ESM requires the Member State in question to be subject to strict conditionalities, such as those

¹⁴ P. PECINOVSKY, ‘EU economic governance and the right to collective bargaining. Part 1. Standard and extreme governance and the indicators and limits of the right to collective bargaining’, *European Labour Law Journal*, 2018, vol. 9, no. 4, p. 375.

¹⁵ 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.

¹⁶ A. SAPIR, G. WOLFF, C. DE SOUSA and A. TERZI, *The Troika and Financial Assistance in the Euro Area: Successes and Failures*, Brussels, Bruegel, 2014, 58.

¹⁷ See T. CAPETA, ‘The Role of Courts in Economic Governance in the European Union’, in F.J. CARRERA HERNÁNDEZ (ed.), *Towards a New Government of the Economy in the European Union?*, Aranzadi, Cizur Menor, 2018, 155-190; M. DAWSON and F. DE WITTE, ‘Constitutional Balance in the EU’, *Modern Law Review*, 2013, no. 76, 817-844.

¹⁸ CJEU, Case C-370/12, *Thomas Pringle v Government of Ireland*, 27 November 2012, para. 136-137.

contained in a MoU. In this sense it has been pointed out how the past experience with MoUs and painful (and politically explosive) reforms demanded therein might have dissuaded Member States from requesting the assistance of the ESM.¹⁹ This was made possible by the existence of other forms of financial assistance during the COVID-19 crisis, as well as by the activation of the general escape clause, which I will discuss below. As such, the discussion concerning the Portuguese MoU by Ana Teresa Ribeiro and Catarina Carvalho in this special issue is not just a retrospective analysis but also helps shed some light on the diffidence of Member States towards these instruments, as well as to consider the role of these instruments in the eventuality of their further use in the future.

A second set of instruments, by contrast, outlived the crisis and is now deeply embedded in EU economic governance thanks to the process known as the ‘European Semester’, an annual cycle of surveillance and enforcement of economic policies. Several instruments contribute to the cycle, namely the Country Specific Recommendations (CSRs), the Stability and Growth Pact (SGP), and the Macroeconomic Imbalances Procedure (MIP). The SGP was established in the context of the creation of the Euro, and has the aim to ensure compliance with budgetary rules by the Member States.²⁰ While a detailed explanation of the functioning and evolution of the SGP goes beyond the scope of the present special issue, it suffices to say that the SGP covers the rules concerning the deficits and public debts targets which Member States must strive to achieve. In case of deviations from such a budgetary trajectory, an Excessive Deficit Procedure (EDP) can be initiated against the given Member State, under the corrective arm of the SGP, leading to (so far, only theoretically) potential financial sanctions. The MIP was introduced with the so-called “six pack”,²¹ and it is meant to prevent and correct imbalances in the macroeconomic situation of a given Member State which could have a negative impact on the budgetary or competitive position of said Member State. The assessment is based on a scoreboard which, among fourteen headline indicators, includes “social” ones such as the unemployment and activity rate, as well as the rate of long-term and youth unemployment.

The special issue focuses mainly on Country Specific Recommendations (CSRs), which are annual recommendations drafted by the Commission (in May) and adopted by the Economic and Financial Affairs Council configuration of the Council (in July). The term ‘Recommendation’ is used somewhat loosely in this context, given that failure to comply can theoretically lead to sanctions, although this has never happened so far, at least in some instances. In particular, CSRs related to compliance with the budgetary criteria established by the Stability and Growth Pact or to the Macroeconomic Imbalances Procedure can lead to financial sanctions, which, having been proposed by the Commission, can only be rejected by a qualified majority in the Council. Member States that are part of the Eurozone risk fines

¹⁹ 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.

²⁰ A. VERDUN, ‘The building of economic governance in the European Union’, *Transfer*, 2013, vol. 19, no. 1, 28

²¹ Including five Regulations and a Directive: Regulation (EU) no. 1173/2011, 16 November 2011; Regulation (EU) no. 1174/2011, 16 November 2011; Regulation (EU) no. 1175/2011, 16 November 2011; Regulation (EU) no. 1176/2011, 16 November 2011; Regulation (EU) no. 1177/2011, 8 November 2011; Directive no. 2011/85/EU, 8 November 2011.

equal to 0.2 per cent (SGP) or 0.1 per cent of GDP (MIP),²² which, once proposed by the Commission, can only be reversed by a qualified majority in the Council.²³ Furthermore, since 2014 a Member State risks losing access to EU structural funds if they fail to comply with CSRs.²⁴ One can also discern an appetite to further strengthen the link between ‘EU money’ and compliance with CSRs, further reinforcing sanctions arsenal, in a recent report by the EU Court of Auditors.²⁵ This whole approach is part of what has been deemed a “money for reforms” strategy pursued by the EU Commission.²⁶ Such a strategy has been highlighted in most areas of EU spending, leading to 75% of the EU budget being now accompanied by some form of conditionalities.²⁷

As I mentioned in the introduction, this creates a situation where the usual categories of “soft” and “hard” law might fail to capture the reality of the phenomenon of the NEG and its interaction with national policies. Building on previous literature on this categorisation, Bekker suggests seeing the space between “soft” and “hard” law as a continuum, which can be investigated on the basis the nature and characteristics of the given instruments.²⁸ Notably, these can be placed on said continuum on the basis of the existence and precision of an obligation, the existence and the nature of enforcement mechanisms, as well as the degree of “centralisation” in their drafting.²⁹ While it might be impossible to pinpoint the exact nature of a given instrument or CSR, this framework helps overcoming the limitation of the strict dichotomy between “soft” and “hard” law. In light of the focus of the present special issue on labour law systems, one should also keep in mind how labour lawyers are used to include issues of real-world or economic power in their assessment of legal situations.

To a certain extent, the management of the present crisis by the EU economic governance represents deviation from this pattern. As it was mentioned before, the activation of the general escape clause has suspended much of the instruments related to budgetary of fiscal matters, and this will remain in place as long as it is deemed necessary to enact fiscal measures to fight the COVID-19 pandemic and its effects on the economy. However, it is worth mentioning that several signs point to the fact that this deviation might only be temporary. First, the 2020 CSRs included Recitals pointing to the fact that Member States are still expected to follow the 2019 recommendations when it comes to the areas covered by the

²² Depending on whether the CSR is linked, respectively, to an Excessive Deficit Procedure or to an Excessive Imbalances Procedure.

²³ 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’, 12.

²⁴ V. VIȚĂ, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’, *Cambridge Yearbook of European Legal Studies*, 2017, no. 4, 1-28.

²⁵ European Court of Auditors, *The European Semester – Country Specific Recommendations address important issues but need better implementation*, 2020, 35: “The Commission should strengthen the link between EU funds supporting reform processes in Member States and Country Specific Recommendations. CSRs should be taken into consideration in the different stages of budgetary processes”.

²⁶ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, ‘From the European Semester to the Recovery and Resilience Facility’, 34.

²⁷ V. VIȚĂ, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’, 9.

²⁸ S. BEKKER, ‘Hardening and softening of country-specific recommendations in the European Semester’, *West European Politics*, vol. 44, no. 1, 2021, 118.

²⁹ *Ibidem*. The last criterion (“centralisation”) refers to the ability (or lack thereof) of national level actors to influence the drafting of the CSRs.

general escape clause.³⁰ What is more, the recent Communication from the Commission on national draft budgetary plans,³¹ includes a warning for several Member States (Belgium, France, Greece, Italy, and Spain) to “preserve prudent fiscal policy” when taking budgetary measures to address the socio-economic effect of the COVID-19 pandemic.³² In the same passage, Italy also received a specific recommendation to “limit the growth of nationally financed current expenditure”. This suggests an intention, at least from the Commission, to return to the previous approach to economic governance once the present crisis is over. In preparing this special issue we set out from the assumptions that a) the NEG would therefore remain relevant after the COVID-19 crisis is behind us³³ and b) the trajectory of the NEG, and of CSRs in particular, would follow what was happening before the crisis.

Coming to the actual strategy put in place via the NEG during the crisis, I will only focus on those instruments which are relevant for the special issue. This is to say that the very important role played by the ECB in the initial reaction to the impact of the pandemic, through the provision immediate liquidity³⁴ and the launching of the Pandemic Emergency Purchase Programme (PEPP),³⁵ will fall outside of the scope of this article. More importantly, for the topic of the special issue, the Commission proposed to activate the general escape clause of the SGP on 20 March 2020,³⁶ and this was supported by the Council just a few days later.³⁷ 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.³⁸ While the clause is activated for all Member States, it has been pointed out that the actual measures enacted at national level have been largely asymmetric, due to the different budgetary situation of Member States when they entered the COVID-19 crisis.³⁹ The pandemic saw also the creation of the SURE instrument,⁴⁰ aimed at providing Member States

³⁰ S. RAINONE, ‘An overview of the 2020–2021 country-specific recommendations (CSRs) in the social field’, ETUI Background Analysis, 2020, no. 1., p. 9.

³¹ Communication from the Commission to the European Parliament, the Council, and the European Central Bank on the 2022 Draft Budgetary Plans: Overall Assessment, Brussels, 24.11.2021 COM(2021) 900 final.

³² *Ibidem*, p. 2.

³³ Potentially, even more so since (potentially) many Member States will emerge on a worse budgetary trajectory.

³⁴ Through the launching of additional long-term financing operations (LTROs), see ECB, ‘Monetary policy decisions’ 12 March 2020, <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200312~8d3aec3ff2.en.html>.

³⁵ ECB, ‘ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)’ 18 March 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html

³⁶ European Commission, Communication to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020)123final, 20 March 2020.

³⁷ See Council of the EU, ‘Statement on the Stability and Growth Pact in light of the Covid-19 crisis’ 23 March 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-offinance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>.

³⁸ This is visible in the first paragraph of all 2020 CSRs which reads as follows: For all Member States the first paragraph of the CSRs reads as follows: “Take all necessary measures, in line with the general escape clause of the Stability and Growth Pact, to effectively address the Covid-19 pandemic, sustain the economy and support the ensuing recovery. *When economic conditions allow, pursue fiscal policies aimed at achieving prudent medium-term fiscal positions and ensuring debt sustainability*, while enhancing investment” (the emphasis is mine).

³⁹ See the data compiled by Bruegel and last updated on 24 November 2020 available at <https://www.bruegel.org/publications/datasets/covidnational-dataset/>.

⁴⁰ Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

with a less expensive way to finance temporary unemployment benefits introduced to address the economic crisis brought about by the pandemic.⁴¹ Looking back to the question of conditionalities, this new instrument shows a different approach to the issue, where the respect of Article 125 TFEU is ensured by the fact that the funds provided by SURE can only be allocated to very specific expenditures, that is, temporary unemployment schemes. As such, it does not pose a risk to the no-bailout clause or to the commitment of Member States to pursue a strategy of sound public finances (Article 119 para. 3 TFEU).

The 2020 CSRs were dominated by broader pandemic context. The activation of the general escape clause meant that the macroeconomic recommendations package was substantially reduced and replaced by a standardised formula. On the other hand, many recommendations were aimed at tackling the socio-economic impact of the crisis, such as by ensuring the adequacy of social protection systems and income support mechanisms.⁴² In 2021 no CSRs were drafted, the exercise being essentially absorbed into the functioning of the Recovery and Resilience Facility (RRF)⁴³ which is defined as the “centrepiece” of the Next Generation EU initiative, aimed at tackling the economic consequences of the COVID-19 crisis.⁴⁴ The RRF is a temporary instrument aimed at making financial resources available to Member States to support the post-crisis recovery. More specifically, the RRF makes available to Member States €385.8 billion in loans and €338 billion in grants.⁴⁵ As pointed out by Vanhercke and Verdun, there is an intrinsic link between the functioning of the RRF and the European Semester,⁴⁶ which made the adoption of CSRs for 2021 redundant. In particular, the RRF Regulation explicitly refers to the Semester both in the Recitals and in the legal text, and it states notably that the recovery and resilience plans, which Member States have to draw up to access the financial support from the RRF, “shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as those identified in the most recent Council recommendation on the economic policy of the euro area for Member States whose currency is the euro”.⁴⁷ This approach confirms the abovementioned strategy of “money for reforms” and reinforces the understanding of the present special issue concerning the continuity between the content of the NEG pre- and post-pandemic.

⁴¹ See on this instrument Q. DETIENNE, ‘Zone euro, assurance chômage européenne et instrument SURE : L’effectivité du droit de la sécurité sociale est aussi une question économique’, in *L’effectivité du droit social - Actes de la Biennale 2020 de l’Association belge pour le droit du travail et de la sécurité sociale*, Die Keure/La Charte, Brussels, 2021, 279-308.

⁴² S. RAINONE, ‘An overview of the 2020–2021 country-specific recommendations (CSRs) in the social field’, 8.

⁴³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁴⁴ European Commission, Recovery plan for Europe, https://ec.europa.eu/info/strategy/recovery-plan-europe_en#nextgenerationeu.

⁴⁵ European Commission, The Recovery and Resilience Facility https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en.

⁴⁶ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, ‘From the European Semester to the Recovery and Resilience Facility. Some social actors are (not) resurfacing’.

⁴⁷ Regulation (EU) 2021/241, Article 17(3).

3. Labour law and the NEG

As discussed in the previous section, the NEG was largely built during the Great Recession and the Eurozone crisis, either via the creation of new instruments or by reinforcing existing ones. This fact should be kept in mind when assessing the vision of labour law and social policies in general which stems from the instruments of the NEG. In particular, the diagnosis of the causes of the crisis, under what Fitoussi and Saraceno called the “Berlin-Washington Consensus”,⁴⁸ meant that labour law and social policies reforms were to contribute to internal devaluation,⁴⁹ by bringing about the reduction of labour costs and increasing the downward flexibility of wages in a given Member State. In the words of the Commission, this was aimed at “improving external competitiveness through supporting labour supply and increasing wage flexibility”.⁵⁰ The inertia of this initial trajectory, visible, as I will discuss in a moment, in both MoUs and the early CSRs, had a long-lasting impact on the content of the prescriptions related to these areas under the NEG. This also had an impact on the understanding of labour lawyers of the threat posed by these instruments for the field of labour and social rights, giving the impression that the European Union had opted for what could be called, following Hepple’s categorisation, a competitiveness-based regulation, instead of a rights-based one.⁵¹

The story surrounding the MoUs signed during the Eurozone crisis is relatively well known. What is important for the purposes of the present special issue is that labour and employment matters figured to an important degree among the conditionalities included in these documents.⁵² In particular, in the context of the three MoUs (2010, 2012, 2015) concluded between the Troika and the various Greek governments, the conditionalities focused on wages, collective bargaining and protection against dismissal.⁵³ The Memorandum signed by the Portuguese government in 2011 contained similar labour law conditionalities, with the exception of minimum wage conditionalities, notably in the direction of reducing protection against dismissal and decentralising collective bargaining.⁵⁴ The article by Ana Teresa Ribeiro and Catarina Carvalho in this special issue provides further details on the latter MoU, which confirms the said trajectory of the NEG prescriptions during the Eurozone crisis.

⁴⁸ F. SARACENO and J.P. FITOUSSI, ‘European economic governance: the Berlin–Washington Consensus’.

⁴⁹ 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.

⁵⁰ European Commission (2010), *The Economic Adjustment Programme for Greece, Second Review*, *European Economy-Occasional Paper*, No. 72, 29.

⁵¹ B. HEPPL, *Rights at Work Global, European and British Perspectives*, London, Sweet & Maxwell, 2005.

⁵² A Sapir, G Wolff, C De Sousa and A Terzi, *The Troika and Financial Assistance in the Euro Area: Successes and Failures* (Brussels, Bruegel, 2014).

⁵³ S. THEODOROPOULOU, ‘National social and labour market policy reforms in the shadow of EU bail-out conditionality: The cases of Greece and Portugal’, *Comparative European Politics*, 2015, vol. 13, no. 1, 29-55; E. ACHTSIOGLOU et M. DOHERTY, ‘There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm’, *European Law Journal*, 2014, vol. 20, no. 2, 219-240; E. ACHTSIOGLOU, ‘Greece 2010–2012: labour in the Maelstrom of deregulation’, *Transfer*, 2013, vol. 19, no. 1, 125-127.

⁵⁴ A.T. RIBEIRO, *Crisis and labour law - Recent developments in Portuguese labour law*, *European Labour Law Journal*, 2015, vol. 6, no. 3, 259-281.

Turning to CSRs, a large share of these recommendations is related to labour rights, employment and social policies. This is coherent with the approach we just outlined in the context of MoUs, and it confirms the continuity between the two sets of instruments. A further confirmation of this also comes from the fact that Member States already bound by the MoU in the context of a structural adjustment plan, do not receive CSRs. In particular, research from the European Trade Union Institute shows that between 40 and 63 per cent of CSRs adopted over the past decade (2011–2019) have focused on social aspects.⁵⁵

Focusing on CSRs in the areas of labour law and employment policy, one can identify three main groups of recommendations. The first deals with wages. CSRs in this area, particularly in the years of the second Barroso Commission, focused on the revision of wage indexation mechanisms, with the aim of reducing or eliminating such mechanisms.⁵⁶ The following years marked a modest shift, with CSRs now encouraging Member States to ‘ensure that wages can evolve in line with productivity’.⁵⁷ In this same group we also include CSRs aimed at the decentralisation of collective bargaining systems, that is, requesting a shift from sectoral to company collective bargaining,⁵⁸ which are included in the first years of the CSRs (up to 2014).⁵⁹ This are will be particularly visible through the present special issue since, as the authors note in their respective articles, all Member States covered in the issue were interested, to a greater or lesser extent, by recommendations concerning the organisation of their system of collective bargaining.

A second group of CSRs revolves around employment protection legislation, focusing on rules on dismissal. The relaxation of dismissal rules for open-ended contracts is often the focus of these recommendations, justified either as a measure to combat segmentation of the labour market⁶⁰ or to encourage the hiring of workers with open-ended contracts.⁶¹ The third group of CSRs covers areas related to employment policies, with a specific focus on improving the labour market participation of women,⁶² older⁶³ and younger⁶⁴ workers.

55 S. CLAUWAERT, ‘The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2019–2020’, ETUI Background Analysis, 2019, no. 1, 11; S. CLAUWAERT, ‘The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2017–2018’, ETUI Background Analysis 2017, no. 1, 12.

56 See for instance 2011 and 2012 (BE, CY, ES, LU, MT), 2013 (BE, LU).

57 For instance, in the CSRs rounds between 2016 and 2018, these kinds of CSRs were addressed to 12 to 14 Member States each year.

58 See T. SCHULTEN and T. MÜLLER, ‘A new European interventionism? The impact of the new European economic governance on wages and collective bargaining’, in D. NATALI and B. VANHERCKE (eds.), *Social Developments in the European Union 2012*, ETUI-OSE Publications, Brussels, 2012, 186.

59 See for instance BE (2011–2013), ES (2011), IT (2011). See on this issue 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, 43–68.

60 See for instance FR (2016), SI (2011), IT (2011, 2012).

61 See for instance ES (2017), NL (2017).

62 These cover measures concerning the expansion of childcare and long-term care, and improving employment services. See for instance HU (2011), SK (2012), IE (2015), AT (2017), IT (2019).

63 These cover measures concerning lifelong learning, active labour market policies, and vocational education. See for instance BE (2012), LT (2014), FI (2016), DE (2018).

64 Covering measures such as the improvement of apprenticeship and vocational education, the introduction of a youth guarantee, and the improvement of the quality of education. See for instance DK (2011), PL (2014), CY (2017).

This short overview shows why the NEG matters for labour law and labour lawyers. Large and important areas of labour regulations and practices are directly influenced by instruments whose ability to influence national policies goes beyond the one of mere “soft law” instruments without being formalised in a binding legal instrument, leading to difficulties in exerting judicial control, for instance when it comes to respecting fundamental social rights.⁶⁵ The same can be said for social actors, such as national trade unions, who can find it difficult to mobilise their power resources, often anchored in national practices and institutions, to influence the outcomes of New Economic Governance and its impact on national labour laws.⁶⁶

This is not the first time labour lawyers have been confronted with ‘soft law’ instruments in relation to EU social policy. Indeed, the Open Method of Coordination (OMC) received significant attention in the first decade of the new millennium.⁶⁷ It is also not the first time that labour laws are assessed through their impact on competitiveness, such as in the experience of the Doing Business index of the World Bank.⁶⁸ The integration of these aspects in the much more penetrating machinery of economic governance, however, and the ever present (if, so far, theoretical) threat of sanctions, constitute a marked difference with existing instruments. As I pointed out before, this threat is dependent upon the legal basis which underpins the given CSRs. Notably, only CSRs based on the SGP or the MIP can lead to financial sanctions. That being said, looking at the 2013 cycle of CSRs, Bekker has concluded that 39 of 78 CSRs linked to employment and social policies were based on these two instruments. This confirms the “proximity” of many areas of labour law and social security with budgetary rules (for instance, the financing of the welfare state) and with the macroeconomic, and notably external, position of a Member State (wage dynamics).

The increased focus on social aspects has led some authors to conclude that we are witnessing a ‘socialisation’ of New Economic Governance, balancing social retrenchment with social investment, and rediscovering the ‘flexicurity’ approach.⁶⁹ In purely quantitative terms, the number and scope of socially orientated CSRs have been reinforced from 2011 to 2014, while during the period 2017–2020, CSRs dedicated to, or at least linked with, social aspects represent more than the half of all CSRs addressed to Member States.⁷⁰ This was saluted by the European Trade Union Confederation (ETUC) which, in its Action Programme 2019–2023, asserted that ‘a process of making the European Semester more social has started’, all the while lamenting the enduring primacy of “restrictive macroeconomic policy” and the “liberal market bias” of New Economic Governance.⁷¹

⁶⁵ C. KILPATRICK, ‘Are the bailouts immune to EU social challenge because they are not EU law?’, *European Constitutional Law Review*, 2014, vol 10, no. 3, 393.

⁶⁶ P. COPELAND and M. DALY, ‘The European Semester and EU Social Policy’, *Journal of Common Market Studies*, 2018, no. 1, 13.

⁶⁷ D. ASHIAGBOR, ‘Soft Harmonisation: The Open Method of Coordination in the European Employment Strategy’, *European Public Law*, 2004, no. 10, 305.

⁶⁸ See on this use Z. ADAMS and S. DEAKIN, ‘Quantitative Labour Law’, in A. LUDLOW and A. BLACKHAM (eds.), *New Frontiers in Empirical Labour Law Research*, Hart Publishing, Oxford, 2015, pp. 31-50.

⁶⁹ S. BEKKER, ‘Flexicurity in the European Semester: still a relevant policy concept?’, *Journal of European Public Policy*, 2017, no. 25, 175; J. ZEITLIN and B. VANHERCKE, ‘Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond’, 149.

⁷⁰ See also B. HACKER, ‘A European Social Semester? The European Pillar of Social Rights in practice’, *ETUI Working Paper*, 2019, no.5, 1.

⁷¹ ETUC, *ETUC Action Programme 2019–2023*, Vienna, 2019, 23.

Indeed, this re-orientation was accompanied by a reductionist vision of social objectives and rights, henceforth centred on the idea of a floor of rights for the most vulnerable categories of workers (and citizens).

These parallel trends are confirmed by studies dealing with more recent cycles of the Semester.⁷² Other authors have criticised the ‘socialisation’ conclusion, reaffirming the need to go beyond the simple categorisation of CSRs as ‘social’ on the basis of their literal context, to read them in light of their accompanying documents, different level of (potential) sanctions, and impact on the national environment.⁷³ In one example, this approach made it possible to determine that a seemingly “neutral” prescription on the need to improve “transparency” in the setting of minimum wages was instead meant to create obstacles to the unilateral increase of the minimum wage proposed by a centre-left government.⁷⁴ Another important element to keep in mind when considering the ‘socialisation’ of the semester is that, even in the face of an unprecedented economic and social crisis, the 2020 CSRs maintained that Member States would still be expected to implement the recommendations adopted in 2019.⁷⁵

Finally, the ‘socialisation’ of New Economic Governance also covers the increased participation of social partners in the process.⁷⁶ In 2016, a quadripartite statement on a ‘New Start for Social Dialogue’ was signed, with the aim of improving said participation.⁷⁷ This included a commitment of EU institutions (notably, the Council and the Commission) to enhance the involvement of Union level social partners in New Economic Governance, as well as the involvement of social partners at national level in the relevant steps of the European Semester, such as the process of drafting national reform plans and implementing CSRs. This followed a period (2011–2013) in which said participation was considered to be inadequate by social partners and academic observers.⁷⁸ A more recent study by Eurofound, however, focusing on participation in the 2017 round of CSRs, found that social partners in a large number of Member States still lamented insufficient involvement in the implementation of policy reforms at national level in the context of the Semester.⁷⁹ These criticisms generally point to a merely formal process of consultation, so that claims of ‘socialisation’ based on the mere ‘involvement’ of social partners at some point of the process should be considered carefully. Also, the procedural aspect of socialisation can sometimes

⁷² S. CLAUWAERT, ‘The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2019–2020’.

⁷³ J. JORDAN, V. MACARRONE, and R. ERNE, ‘Towards a Socialization of the EU’s New Economic Governance Regime?’, 9.

⁷⁴ *Ibid.*

⁷⁵ In 2020, CSRs all featured a common recital stating that 2019 CSRS ‘remain pertinent and will continue to be monitored throughout next year’s European Semester annual cycle’. See S. RAINONE, ‘An overview of the 2020-2021 country-specific recommendations’, 9.

⁷⁶ J. ZEITLIN and B. VANHERCKE, ‘Socializing the European Semester: EU social and economic policy coordination in crisis and beyond’, 19.

⁷⁷ A New Start for Social Dialogue, Statement of the Presidency of Council of the European Union, the European Commission and the European Social Partners, 2016.

⁷⁸ For an overview of these criticisms see S. SABATO, B. VANHERCKE, S. SPASOVA, ‘Listened to, but not heard? Social Partners’ multilevel involvement in the European Semester’, 35 OSE Paper Series, 2017, vol. 35, no. 1, 9.

⁷⁹ Eurofound, *Involvement of the national social partners in the European Semester 2017: Social dialogue practices*, Luxembourg, Eurofound, 2018.

be used to the detriment of the substantive one. For instance, Bekker highlights how, in reaction to a 2014 CSR directed to the Netherlands and recommending to increase wages, the Dutch government pointed out that the area was a competence of social partners. The Commission simply accepted this argument and did not issue that CSR again in the following years.⁸⁰

That being said, some measure of a more ‘social’ approach can be found when looking at some areas of social security. These CSRs often focus on the establishment/improvement of a minimum level of protection aimed at poverty alleviation.⁸¹ In what can be assumed to be a reaction to the specific situation of the COVID-19 crisis, a more visible focus on these instruments can be identified in the 2020 round of CSRs.⁸² On the other hand, in the area of pensions, CSRs from pre-pandemic years have continued to be inspired by the logic of austerity, recommending in particular to increase the pension age, reduce or eliminate possibilities for early retirement, and ensure the (financial) sustainability of pension systems.⁸³

Coming to the present days, as discussed in the previous section, CSRs for 2021 have been absorbed into the RRF. Research from the European Social Observatory highlights how the absence of quantitative social targets (as opposed to the case of green and digital policies) has accentuated the importance of pre-pandemic CSRs.⁸⁴ A delegated regulation adopted by the Commission in September 2021 provides a methodology to identify social expenditures in national plans presented under the RRF, with a special flagging for initiatives focusing on gender equality, children and the youth.⁸⁵ However, early analyses of national plans show that social investment and reforms in the areas of labour and social policies do not occupy an important place in these plans, leaving aside those related to healthcare which are clearly related to the pandemic context.⁸⁶

4. The EU New Economic Governance: a chapter or a footnote for EU Labour Law

In the previous section I have (hopefully) demonstrated why the NEG matters for labour law and labour lawyers. This leaves two further questions to be addressed.

The first is related to the actual effectiveness of the instruments of the NEG. To address this it might be helpful to consider separately MoUs and CSRs. This is because the effectiveness

⁸⁰ S. BEKKER, ‘Hardening and softening of country-specific recommendations in the European Semester’, 123-124.

⁸¹ See for instance HR (2018, 2019), LT (2018-2020).

⁸² S. RAINONE, ‘An overview of the 2020–2021 country-specific recommendations (CSRs) in the social field’, 8.

⁸³ S. CLAUWAERT, ‘The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2019–2020’, 10.

⁸⁴ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, ‘From the European Semester to the Recovery and Resilience Facility’, 24.

⁸⁵ Commission delegated regulation, supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by defining a methodology for reporting social expenditure (28 September 2021).

⁸⁶ F. CORTI and J. NÚÑEZ FERRER, ‘Steering and Monitoring the Recovery and Resilience Plans’, CEPS, 26 April 2021, <https://www.ceps.eu/ceps-publications/steeringand-monitoring/>.

of MoUs in modifying national policies stems from the specific position of weakness of the recipient Member States. Therefore, for this set of instruments it is relatively easy to conclude that they do have a potentially profound impact on national policies,⁸⁷ an impact that sometimes outlasts even the duration of the adjustment programme itself.⁸⁸

On the other hand, the research on the effective implementation of CSRs provides a picture which is much less clear. As observed by Bekker in the context of the strengthening of the NEG, “stricter rules do not necessarily mean automatic changes in national policy responses”.⁸⁹ Indeed, the dataset compiled by Efstathiou and Wolff, covering CSRs from 2013 to 2017, suggests that on average the Commission reported “limited progress” or “some progress” (thus, falling short of “substantial progress”, let alone “full implementation”) for the implementation of CSRs.⁹⁰ The authors also point to a relatively higher degree of implementation when taking into account a longer time frame, which still, on average, falls short of showing a “substantial progress”. Interestingly, for the present special issue, the same research finds a higher degree of implementation for CSRs related to employment laws and labour markets than those concerning pensions and unemployment benefits. These results were essentially replicated by Clauwaert and Al-Kadi, who only focused on “social” CSRs.⁹¹ The 2020 Report from the Court of Auditors, which looks at CSRs between 2011 and 2018, reaches similar conclusions.⁹² Importantly, looking at the whole period the report indicates that only 9% of CSRs have been “fully implemented” while 17% fall into the “substantial progress” category.

This relatively low level of implementation seems to suggest that the impact of CSRs is limited. As such, the machinery we have sketched in the previous sections might indeed hold little interest for labour lawyers. On this background, the contributions in this special issue focusing on specific national experiences will provide a different approach, based on case studies of specific contexts and recommendations instead of quantified global evaluations. Furthermore, the analysis we have seen so far are, by necessity, retrospective. It remains to be seen whether the continued pursuit of a “money for reforms” strategy might increase the effectiveness of CSRs once the general escape clause will not be applicable, while a large number of Member States might be emerging from the COVID-19 crisis in a worse budgetary situation. As pointed out by Vanhercke and Verdun, increasing the link between EU funding and CSRs, the RRF being the last example of this trajectory, might create a

⁸⁷ See also the article by A.T. RIBEIRO and C. CARVALHO in this issue.

⁸⁸ See C. MOURY, D. CARDOSO and A. GAGO, ‘When the Lenders Leave Town: Veto Players, Electoral Calculations and Vested Interests as Determinants of Policy Reversals in Spain and Portugal’, *South European Society And Politics*, 2019, vol. 24, no. 2, 177–204.

⁸⁹ S. BEKKER, ‘European socioeconomic governance in action: coordinating social policies in the third European Semester’, *OSE Research Paper*, 2015, no. 19, 5.

⁹⁰ K. EFSTATHIOU and G. WOLFF, ‘Is the European Semester effective and useful?’, *Policy Contribution*, 2018, no. 09, Brussels, Bruegel. http://bruegel.org/wp-content/uploads/2018/06/PC-09_2018_2.pdf.

⁹¹ S. CLAUWAERT and R. AL-KADI, ‘Socialising the European Semester? Measuring Member States’ implementation of country-specific recommendations in the social policy field’, *ETUI Working Paper*, 2019, no. 08.

⁹² European Court of Auditors, *The European Semester – Country Specific Recommendations address important issues but need better implementation*, Special Report, Luxembourg, 2020.

'harder mode of soft governance'.⁹³ Together with Mélanie Schmitt, we come back to this in the closing contribution of this special issue.

The second question is related to the role of the NEG in the context of EU labour law. Is the impact of EU policies on national labour law systems conveyed more and more by the instruments of the NEG instead of the classic legal instruments (mainly, Directives)? This is the "displacement" effect described by Kilpatrick,⁹⁴ in its meaning of "moved elsewhere". Of course the answer to this question must take into account the relative effectiveness of CSRs we just highlighted. However, the role of the NEG has institutional aspects which remain relevant even in light of a low implementation rate of its prescriptions at national level. One of these aspects is related to the fact that, as I described in section 2 while presenting the main topics covered by CSRs, through the instruments of the NEG, EU institutions routinely intervene in areas which fall outside of the competences established by the Treaties. Wages are the best example of this situation and are also particularly interesting as all Member States which will be analysed in this special issue were covered by CSRs in this area. The "temptation", in particular for the EU Commission, to use the instruments of the NEG to implement its labour policies also stems from the fact that CSRs are easier to adopt than standard binding instruments. Finally, the impact of the displacement might also be amplified by the low rate of implementation that was just discussed. This risk is particularly visible in the context of the European Pillar of Social Rights. Indeed, the implementation of the principles of the Pillar is intrinsically linked to the European Semester, the former being conceived as the "social" counterbalance to the strictly economic approach of the latter.⁹⁵ As Clauwaert and Al-Kadi have pointed out, this connection makes it so that the weak implementation of CSRs calls into question the added value of the Semester for the protection of the fundamental rights embedded in the Pillar.⁹⁶ By exploring the actual impact of the NEG on national labour law systems, the present special issue will thus contribute to our understanding of the potential of the NEG both in its ability to shape labour and social rights and in its potential role to promote them.

⁹³ B. VANHERCKE, A. VERDUN, A. ATANASOVA, S. SPASOVA and M. THOMSON, 'From the European Semester to the Recovery and Resilience Facility', p. 37

⁹⁴ C. KILPATRICK, 'The displacement of Social Europe: a productive lens of inquiry', *European Constitutional Law Review*, 2018, no. 14, 62–74.

⁹⁵ See European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Monitoring the implementation of the European Pillar of Social Rights, COM (2018) 130 final, 13 March 2018.

⁹⁶ S. CLAUWAERT and R. AL-KADI, 'Socialising the European Semester?', 20.