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The European Employment Strategy, the European Social Pillar and their Impact on Labour Law Reform in the European Union

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The article provides a critical account of the impact of the European Employment Strategy (EES) on national labour market policies and labour law systems. It gives an overview of the development of the EES from the 1990s until the introduction of the European Social Pillar (ESP) and analyses its impact in the Member States of the European Union. In particular, it highlights the origins of the EES in debates about European Economic and Monetary Union (EMU) and examines the importance and the specific nature of the new governance approach adopted by the EES and its significance for labour law reform in the Member States. The article argues that the latest stage in the development of European social policy, associated with the introduction of the ESP, has not led to a change in direction in European social and employment law and policy. Despite its rights-based approach, the ESP merely constitutes the latest stage in the development of the EES and continues in its attempt to prioritize labour market policy concerns in reforming labour law. However, the article also argues that the ESP has potential to be the platform for a proper Social Union.

Keywords: Labour Law Reform, European Employment Strategy, Labour Market Policy

1 INTRODUCTION

The European Employment Strategy (EES) has been a major if not the prime mover of labour law reform in the European Union since its launch in 1998. It has created both opportunities and tensions for labour law reform in the Member States. It now seems to be an appropriate time to ask critical questions about the direction of labour law reform instigated by the EES.

Despite the many reasons, including political strategies, ideological motives and economic policies, often neoliberal in orientation, that have influenced national labour law reform efforts, implementation of EU law and policy was the dominant source for innovations in labour in the EU in the last two decades. In my view responses to the EES constituted the main factor for labour law reforms.

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Demands for 'labour market reforms' have dominated the debate over the reform of labour law in all Member States of the European Union during this period.

Central to my assessment is the fact that EES-inspired labour law reforms do not respond to intrinsic concerns of labour law. The primary motive of the EES is labour market policy and not labour law reform. The EES has shifted the focus of European social policy from protection to promotion of employment. Labour economics rather than labour law sets the agenda.¹ What has been lost since the introduction of the EES is a genuine appreciation of labour and employment law as the core of European social policy. Such an understanding was the consensus in the so-called 'golden era' of European social policy in the 1970s. In my reflexive labour law perspective, labour law, both at the supranational and the national level in the EU, has lost in autonomy as a result, and demands for its reform are no longer the outcome of the operation of labour law as a subsystem within the legal system.²

This article argues that the latest stage in the development of European social policy, associated with the introduction of the European Social Pillar (ESP), has not changed direction. I intend to demonstrate that labour market policies are still the main concern of the ESP. In fact, the ESP as implemented by the European Commission merely constitutes the latest stage in the development of the EES but has the potential for a redirection of labour law in the European Union.

The argument is developed in three steps. First, developments in the 1970s when European social policy became a separate policy field are briefly reassessed. Second, the article provides an overview of the development of the EES from the 1990s until the introduction of the ESP and critically analyses its impact. It highlights the origins of the EES in debates over European Economic and Monetary Union (EMU) and comments on the importance and the specific forms of the new governance approach adopted by the EES. Third, the article argues in the final part that the ESP, although currently only constituting the latest stage in the development of the EES, bears the potential of being the platform for a proper Social Union which for the sake of stability of the EU as a whole is desperately needed.

2 BRIEF REMARKS ON THE GOLDEN AGE OF EUROPEAN LABOUR LAW IN THE 1970s

The development of European labour law as part of European Social Policy has been incremental.³ The general idea that the regulation of social policy and labour law

¹ See the critical assessment of labour economics and labour law in R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* Ch. 8 (Oxford: Oxford University Press 2014).

² For a system-theoretical analysis of labour law see R. Rogowski, *Reflexive Labour Law in the World Society* (Cheltenham: Elgar 2013; paperback edition 2015).

³ On the origins, meaning and sources of a genuine European labour law see B. Bercusson, *European Labour Law* Ch. 1 (2nd ed., Cambridge: Cambridge University Press 2009).

should remain in the hands of Member States has not changed since the beginning of European integration in the 1950s. However, it is also true that from the beginning there has been a discussion of the need and scope of competences granted to the European Union in these domains. In this connection it is worth remembering that the original Treaties mention as the overarching goal of European integration the improvement of living and working conditions and list a few areas in which the European Union has original legislative competences. These include health and safety legislation and the famous principle of equal pay for equal work.⁴

The deliberate concentration on economic rather than political integration in the 1950s was accompanied by the idea that living and working conditions would automatically improve with a well-functioning common market.⁵ However, this idea can be turned around: improvement of living and working conditions of the citizens of the European Union is the ultimate objective of the common market. The social goal of improving living and working conditions in fact justifies the economic project of introducing the common market through European integration.

It was this line of argumentation that led the European Court of Justice (ECJ, since 2009 the Court of Justice of the EU, CJEU) in its famous second *Defrenne* decision⁶ in 1976 to argue that the European Community has a ‘double aim’ of social and economic objectives and that social integration is of equal importance to economic integration. It argued in Section 10 of this decision that the Community (now EU) ‘is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seeks the constant improvement of the living and working conditions of their people, as is emphasized by the Preamble to the Treaty’.

This proactive stance of the ECJ contributed to the rethinking of social policy in the 1970s.⁷ It started with the Social Action Programme of 1974, responding to the new direction on social policy adopted by the Council in Paris in 1972. The Social Action Programme included more than thirty measures listed under the three headings of (a) attainment of full and better employment, (b) improvement of living and working conditions, and (c) increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.⁸ Following the Social Action Programme the Commission introduced a flurry of legislative proposals that covered core areas of labour law. The lack of

⁴ Art. 119 of the EEC Treaty, which became 141 of the EC Treaty and is now Art. 157 TFEU.

⁵ See the influential Ohlin Report that pushed the idea of automatic social progress as a result of economic integration, discussed in Rogowski, *supra* n. 2, Ch. 8.

⁶ Case 43/75, *Defrenne v. Sabena* [1976] ECR 455.

⁷ L. Cram, *From Integration by Stealth to Good Governance? EU Social Policy in Historical Perspective*, in *Innovative Governance in the European Union: The Politics of Multilevel Policymaking* 87–100 (I. Toemmel & A. Verdun eds, Boulder, CO: Lynne Rienner 2009).

⁸ On Social Action Programmes and their development see <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-action-programme> (accessed 7 Apr. 2019).

competences to introduce such legislation at the supranational level was countered with the assertion that the introduction and expansion of the common market had an impact on company structures (size, cross-border activities and so on) and subsequently on employees. Thus, legislation at the European level was needed to address the consequences of economic integration and the common market.

The areas of the Commission's legislative activities included regulations on employment protection, equal treatment and health and safety. It also included attempts to introduce regulations on employee participation, but these were less successful than introducing European legislation in the traditional areas of individual employment law. What was remarkable about the approach during this era of social policy euphoria was the underlying idea of a new relationship between European social policy and Member State labour law. The new idea was establishing a floor of rights at the supranational level.⁹ This approach culminated in the adoption of the Community Charter of Fundamental Social Rights of Workers in 1989.

There is a close link between the idea of establishing a floor of rights and the concept of a European Social Model (ESM). The ESM emphasizes the important interlinkage of economic integration and social protection. The Commission operated in the 1970s and 1980s with an understanding that the various aspects of its social policy, including coordination of social security systems, free movement of workers, antidiscrimination, equal treatment, and the European Social Dialogue form an integral part of economic policy-making and that the intertwining of economic and social policy characterizes the unique economic policy approach captured by the notion of an ESM. The idea of an ESM was implicit in the common understanding of goals and basic welfare provisions in the EU and the Member and not limited to European Social Policy. During this period EU was in fact proud to conduct an integrated economic policy unlike the Anglo-American path.¹⁰

In the late 1980s and the early 1990s the situation changed and the call to define the core elements of social protection at the European level and to make them explicit could no longer be avoided. A discussion of the meaning of the ESM started in earnest. A number of factors influenced the ESM debate.¹¹ The Commission linked the ESM to the ambitious project of a political European

⁹ P. Teague, *The European Community: The Social Dimension* (Kogan Page 1989).

¹⁰ For further discussion of the European Social Model see R. Rogowski, *The European Social Model and Law and Policy of Transitional Labour Markets in the European Union*, in *The European Social Model and Transitional Labour Markets: Law and Policy* 1–30 (R. Rogowski ed., Aldershot: Ashgate 2008).

¹¹ See P. Pochet, *The Open Method of Coordination and the Construction of Social Europe. A Historical Perspective*, in *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* 37–82 (J. Zeitlin & P. Pochet in collaboration with L. Magnusson eds, Brussels: Peter Lang 2005).

Union capable of coordinating the economic policies as well as the foreign and security policies of the Member States. An important rationale for the elevation of employment and social policy within the canon of European policies was the high unemployment rate within the European Union and its political and economic consequences as well as the effect this fact has on the legitimacy of the entire project of a European Union.

3 ORIGINS AND STAGES IN THE DEVELOPMENT OF THE EES

European employment policies as well as social policies were given a new direction in the context of the introduction of EMU during the 1990s. An economically oriented employment discourse replaced a rights-focused social policy discourse. In White Papers on Growth, Competitiveness and Employment issued in 1993 and on European Social Policy issued in 1994, employment protection and social policy were evaluated in terms of having positive or negative effects on economic processes and on employment rates.¹² The White Papers endorsed policies of combating unemployment through flexibilization of existing laws and policies as well as support for businesses in their hiring efforts.¹³ The idea of a European Social Model in which employment policies belong to the core of economic policies was no longer prevalent.

The elevation of employment as a separate policy field was gradual.¹⁴ Following the Maastricht Treaty of 1992 a new governance approach was adopted for the coordination of economic policies of the candidates for membership in the EMU. A lively debate took place about the convergence criteria which the Commission used in order to monitor economic performance among the candidates.¹⁵ In the end four criteria were adopted: inflation rate, interest rate, budget deficit, and conversion rate. What was not included was the unemployment rate as convergence criterion.

In my interpretation the introduction of the EES should be located in the context of this debate. The introduction of the EMU and the experiment with the new governance mechanism known as the Open Method of Coordination (OMC) in monitoring economic policy performance established the background of efforts

¹² European Commission (1993), White Paper on Growth, Competitiveness and Employment, COM (1993) 700 final and European Commission (1994), White Paper on European Social Policy – A Way Forward for the Union, COM (1994) 333 final.

¹³ K. Schömann, R. Rogowski & T. Kruppe, *Labour Market Efficiency in the European Union. Employment Protection and Fixed-Term Contracts* (Studies in the European Economy 6) (London: Routledge 1998).

¹⁴ See D. Ashiagbor, *EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy'*, 7(3) Eur. L. J. 311–30 (2001) and D. Ashiagbor, *The European Employment Strategy. Labour Market Regulation and new Governance* Ch. 3 (Oxford: Oxford University Press 2005).

¹⁵ See Pochet, *supra* n. 11.

to upgrade employment as a separate policy area at the EU level. The Employment Chapter, introduced into the Treaty at the 1997 Intergovernmental Conference in Amsterdam, was compensation for not including in the EMU the unemployment rate as an official convergence criterion.

The development of the EES can be divided into four stages: 1998–2003, 2003–2008, 2008–2017, and 2017 until the present.

(1) EES Stage 1: 1998–2003

The new Employment Chapter, introduced by the Amsterdam Treaty, introduced for employment policy-making the ‘multilateral surveillance process’ originally set up to monitor Member State economic policies in the run-up to the EMU.¹⁶ At the extraordinary summit on employment in Luxemburg in November 1997, the process envisaged by the new Employment Chapter was launched under the official name of the EES. From then on the European Union embarked on a new approach to labour law by linking it to wider employment policies. The previous focus on employment protection was replaced with a new focus on employment promotion.¹⁷

To overcome fixation with the unemployment rate the new strategy focused on raising the employment rate. The main tool of the new EES was coordination of labour market policies. And, crucially, it experimented with new governance techniques, in particular the OMC.¹⁸

The OMC allows the Commission to monitor labour market policies of the Member States and constitutes an ongoing process of negotiation and adjustment between the Member States and the European institutions. The OMC is a general model used in a number of policy areas and it was clearly designed on the model used to introduce the EMU.¹⁹ Through peer review and exchange of best practices, each Member State is directly presented with the plans and experiences of others, thus acquiring benchmarks by which they can measure their own performance.

The essence of the new governance approach was outlined in the White Paper on Governance that the European Commission issued in 2001.²⁰ In it a new style

¹⁶ D. M. Trubek & J. Mosher, *New Governance, Employment Policy, and the European Social Model*, in *Governing Work and Welfare in a New Economy – European and American Experiments* 33–58 (J. Zeitlin & D. Trubek eds, Oxford: Oxford University Press 2003).

¹⁷ S. Deakin & R. Rogowski, *Reflexive Labour Law, Capabilities and the Future of Social Europe*, in *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability* 229–54 (R. Rogowski, R. Salais & N. Whiteside eds, Cheltenham: Elgar 2011).

¹⁸ *Experimentalist Governance in the European Union: Towards a New Architecture* (C. Sabel & J. Zeitlin eds, Oxford: Oxford University Press 2010).

¹⁹ D. Hodson & I. Maher, *The Open Method as a New Mode of Governance – The Case of Soft Economic Policy Co-ordination*, 39(4) *J. Comm. Mkt. Stud.* 719–46 (2001).

²⁰ European Commission (2001), White Paper on European Governance, COM (2001) 428 final.

of regulation was promoted favouring soft measures of coordination over hard regulation. The OMC distinguishes four steps in the coordination process:

1. setting up of guidelines supplemented by timetables for achieving the goals in the short, medium and long term (the Commission makes proposals on the guidelines);
2. introduction of quantitative and qualitative indicators and benchmarks as a means of comparing best practices (the Commission organizes the exchange of best practices and makes proposals on indicators);
3. translation of the European guidelines into national action plans by setting specific targets and adopting measures, thereby taking into account national and regional characteristics;
4. follow up system: monitoring and evaluating combined with peer review (this provides support to the processes of implementation and peer review). In their review of the national action plans the Commission and the Council regularly provide comments and recommendations that are often based on comparisons with the best performers and create additional benchmarks for each Member State.

In a formal legal sense, the OMC is non-binding and ultimately voluntary in nature: the OMC is meant to be flexible. Its voluntary nature allows Member States to adjust reforms in accordance with the structures of their regimes, institutional networks and specific circumstances.²¹ It enables the wide-ranging participation of social partners.²² However, if a Member State decides not to cooperate or chooses *à la carte* which policies it intends to follow while resisting others, there are no hard sanctions that can be imposed.²³ In the end the effectiveness of OMC depends on the participants' willingness to cooperate or, to use the language of reflexive law, to engage in self-regulation.

The new governance approach was adopted by the EES for employment policies. The EES is designed as a cyclical process in line with the four steps of the OMC.²⁴ It requires the Commission and Council to issue guidelines for Member State policies. While drawing up the guidelines, the Commission consults a number of actors, including the Member States, the European Parliament, the

²¹ *Changing European Employment and Welfare Regimes: The Influence of the Open Method of Coordination on National Reforms* (M. Heidenreich & J. Zeitlin eds, London: Routledge/EUI Studies in the Political Economy of Welfare 2010).

²² *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (E. Barcevičius, J. T. Weishaupt & J. Zeitlin eds, Basingstoke: Palgrave Macmillan 2014).

²³ S. Regent, *The Open Method of Coordination: A New Supranational Form of Governance?*, 9(2) Eur. L.J. 210 (2003).

²⁴ J. Scott & D. M. Trubek, *Mind the Gap. Law and New Approaches to Governance in the European Union*, 8 (1) Eur. L.J. 1–18 (2002).

Employment Committee, the Committee of the Regions, the Economic and Social Committee as well as the relevant social actors, i.e. trade unions and employer associations. The rationale for the guidelines is outlined in the Joint Employment Report which also identifies the indicators for monitoring Member State policies. The Member States were asked in the first EES stage to respond to the guidelines by issuing National Action Plans which created the basis for the design of new guidelines. On an annual basis the Commission monitored and evaluated these National Action Plans. The results of the evaluations were then used as a basis for revisions of the next set of guidelines.

The first set of guidelines, introduced in 1997, became known as the Employment Guidelines 1998. This document contained nineteen separate guidelines, falling under four pillars:

1. Employability: Measures to endorse active labour market policies and to increase skill levels among workers.
2. Entrepreneurship: Support for small, innovative businesses, including tax reform, in order to encourage them to create jobs.
3. Adaptability of Businesses: bridging the need for modernization of work organization and increasing the flexibility of workers through training.
4. Equal Opportunities for Women and Men: Promoting gender equality in employment.

In theory the OMC facilitates a learning process in which Member States are subjected to benchmarking, peer review and evaluation of their progress. However, the results of the 'OMC in action' displayed few examples of successful learning. If anything, there was evidence of learning from negative experience. The outcomes of evaluations and benchmarking led in some cases to open criticism of Member State governments. So-called soft sanctions in the form of 'naming and shaming' had an impact on the reputation of Member States that scored less favourably.²⁵

(2) EES Stage 2: 2003–2008

In response to Member State dissatisfaction, the discussion of reforming the EES soon began. The reform debate took place in the context of the so-called Lisbon strategy, which the EU adopted in 2000. It included a promise to speed up economic growth and employment in the EU by establishing quantitative

²⁵ J. Zeitlin, *The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy*, in *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* 447–503 (J. Zeitlin & P. Pochet in collaboration with L. Magnusson eds, Brussels: Peter Lang 2005).

employment rate targets to be reached by 2010: a 70% overall employment rate, with specific targets of 60% for women and a 50% target for older workers. This reorientation demanded active labour market policies, giving priority to measures that encourage the creation of new jobs while taking steps to ensure that the unemployed would not become dependent on unemployment benefit.

There were also critical academic voices since the inception of the EES that warned against over-optimism on the part of the Commission for revealing a tendency of supporting the creation of unsustainable atypical employment while neglecting job quality.²⁶ This critique aimed at the one-sided, indicator-driven focus on quantitative job growth. The Commission should instead pay attention to supporting the introduction of qualitative jobs. In addition, Member States argued that the annual cycle of revision of employment policies was unrealistic and impractical.²⁷ Labour lawyers were concerned about the impact of the EES on the *acquis communautaire* of labour law.²⁸

Partly in response to these criticisms, an effort was made after the first five years of experimenting with the EES to refine the original guidelines. New objectives and a set of new targets were introduced, marking a shift from 'passive' to 'active' labour market policies. Particular emphasis was placed on the modernization of Member State public employment services. Other refinements of the original strategy which seem to be the result of learning at the European level are the introduction of incentives for individuals aspiring to become entrepreneurs, of efforts to eliminate poverty traps by changing tax and benefit policies, and support for lifelong learning initiatives as well as the improvement of procedures for skills certification.

On the basis of an evaluation of the first five-year EES-cycle, the Barcelona European Council in 2002 called for a reinforced, simplified and streamlined process in order to meet the Lisbon targets. Further improvements were suggested in 2003 by the Commission in its Communication on the Future of the Employment Strategy.²⁹ The new strategy adopted a more focused approach and replaced the four pillars with three overarching objectives that were especially geared to reinforcing the Lisbon agenda: (1) full employment, (2) quality and productivity at work, and (3) cohesion and an inclusive labour market. 'Full employment' called for both demand and supply side policy measures. 'Quality

²⁶ S. Ball, *The European Employment Strategy: The Will But Not the Way?* 30(4) *Indus. L.J.* 353–74 (2001).

²⁷ G. Schmid & S. Kull, *Die Europäische Beschäftigungsstrategie. Perspektiven der Offenen Methode der Koordinierung*, in *Das europäische Sozialmodell. Auf dem Weg zum transnationalen Sozialstaat*. WZB-Jahrbuch 2004, 317–43 (H. Kaelble & G. Schmid eds, Berlin: Sigma 2004).

²⁸ N. Bruun, *The European Employment Strategy and the 'Acquis Communautaire' of Labour Law*, 17(3) *Int'l J. Comp. Lab. L. & Indus. Rel.* 309–24 (2001).

²⁹ European Commission, *Jobs, Jobs, Jobs. Creating More Employment in Europe*, Report of the Employment Taskforce chaired by Wim Kok ('Kok I'), European Commission, Brussels (Nov. 2003).

and productivity at work' reflected the call of the Lisbon agenda for the creation of not only more but also better jobs. 'Cohesion and an inclusive labour market' aimed at reduction of unemployment and promotion of equal access for everyone to the labour market.

The new EES targeted specific sectors of the labour market such as young and older workers, women, minorities, third-country nationals and workers with disabilities. It favoured activation policies that promote training and lifelong learning and support institutional innovations like employment agencies that view themselves as service providers and treat the unemployed as clients. The renewed EES also encouraged mutual 'learning' between the Member States, urging governments and enterprises to see themselves as 'learning units'. An important learning instrument in this context was peer review, which is meant to identify, evaluate and distribute useful active labour market practices that could be transferred between Member States.³⁰ The annual cycle and the National Action Plans were replaced by a three-year cycle and National Reform Programmes.

A further redirection of the EES was introduced in spring 2005 after a thorough evaluation of the OMC and the EES.³¹ The ambitious Lisbon target of creating twenty-two million jobs was reduced to six million and new 'streamlining' efforts were undertaken in order to align economic, employment and social policies. A major innovation was the introduction of joint economic and employment reports. In line with the Lisbon criteria and agenda for a successful competitive European common market, the main concern of employment policy became competitiveness. The Employment Guidelines became a subset of Integrated Broad Economic and Employment Guidelines.³²

In the second phase of the EES, we find implicit and explicit attempts to reform labour law in line with the aims of the EES and broader economic goals. There are implicit demands for labour law and welfare law, including social security law, deriving from the key labour market concept around which the EES is modelled. This is the transitional labour market policy concept that focuses on transitions in and out of the labour market. It entails demands for labour law in two respects: it suggests new labour legislation that supports transitions from education into the labour market, that enables transitions between unpaid family work and employment, while assisting flexible transitions

³⁰ E. Kajtár & R. Rogowski, *The Role of the European Employment Strategy in Activating Hungarian Labour Market Policies: Personalised Services, Educational Reform and Peer Review*, in *Employment and Training Policies in Central and Eastern Europe* 151–67 (J. de Koning ed., Amsterdam: Dutch University Press 2005).

³¹ European Commission, *Facing the Challenge. The Lisbon Strategy for Growth and Employment*, Report from the High-Level Group chaired by Wim Kok ('Kok II'), Luxembourg: Office of the European Communities (Nov. 2004).

³² S. Deroose, D. Hodson & J. Kuhlmann, *The Broad Economic Policy Guidelines: Before and After the Re-launch of the Lisbon Strategy*, 46(4) J. Comm. Mkt. Stud. 827–48 (2008).

into retirement and offering creative solutions for the unemployed to reduce the risk and stigma of unemployment.³³ The transitional labour market concept also recommends that existing labour law should become reflexive by redefining its role as support for transitions and contribution, rather than restriction in finding flexible solutions.³⁴

There were two explicit labour law reform initiatives that were pursued in the second phase of the EES. Both are explicit in the effort to take labour market policy concerns as their starting point in reforming labour law. And both are inspired by the transitional labour market policy concept.³⁵

The first attempt was the Green Paper ‘Modernising labour law to meet the challenges of the 21st century’ published in 2006.³⁶ It flagged out six areas for regulatory reform which prominently start with direct reference to the need to focus on transitions in and out of employment:

1. Employment transitions
2. Uncertainty with regard to the law (employment/self-employment)
3. Three Way Relationships; agency work
4. Organization of working time
5. Mobility of workers (frontier workers)
6. Enforcement issues and undeclared work

The Green Paper makes several references to the second labour law reform initiative which is associated with the concept of flexicurity.³⁷ It identified a ‘need for the adaptation of employment legislation to promote flexibility combined with employment security’ and states that the overarching reform goal should be ‘making the job market more flexible while improving security for workers (the flexicurity approach)’.

The linguistically awkward term flexicurity refers to the combination of labour market flexibility for firms and security for workers.³⁸ It originated from

³³ G. Schmid, *Sharing Risks: On Social Risk Management and the Governance of Labour Market Transitions*, in *The European Social Model and Transitional Labour Markets – Law and Policy* 29–60 (R. Rogowski ed., Aldershot: Ashgate 2008) and G. Schmid, *Transitional Labour Markets and Flexicurity: Managing Social Risks Over the Life Course*, in *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability* 46–70 (R. Rogowski, R. Salais & N. Whiteside eds, Cheltenham: Elgar 2011).

³⁴ R. Rogowski, *Reflexive Regulation of Labour Market Policies*, Ch. 5 in Rogowski, *supra* n. 2.

³⁵ T. Wilthagen & R. Rogowski, *The Legal Regulation of Transitional Labour Markets*, in *The Dynamics of Full Employment. Social Integration through Transitional Labour Markets* 233–73 (G. Schmid & B. Gazier eds, Cheltenham, UK and Brookfield, USA, Edward Elgar 2002).

³⁶ European Commission, Green Paper, *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final.

³⁷ T. Wilthagen & F. Tros, *The Concept of Flexicurity: a New Approach to Regulating Employment and Labour Markets*, 10(2) *Transfer: Eur. Rev. Lab. & Res.* 166–186 (2004).

Danish labour market policy which has been described as a ‘golden triangle’ of (1) flexibility for firms combined with (2) social security and (3) an active labour market policy with rights and obligations for the unemployed.³⁹

The European Commission considers flexicurity as an integrated approach to the reform of labour law. In the Common Principles on Flexicurity⁴⁰ the concept is presented as a strategy to simultaneously enhance flexibility and security in the labour market. Flexicurity is designed and implemented across four policy components: (1) flexible and reliable contractual arrangements; (2) comprehensive lifelong learning strategies; (3) effective active labour market policies; and (4) modern social security systems providing adequate income support during employment transitions.

Flexicurity is still a core concept of the Commission’s employment policy. Since the mid-2000s all Employment Guidelines have referred to this concept. The current Europe 2020 Integrated Guidelines state in guideline 7 that Member States should ‘take into account the flexibility and security principles (“flexicurity principles”):

(3) EES Stage 3: 2008–2017

The situation for the EES changed in 2008. The turning point was the economic and financial crisis of 2007–2008. Despite continuation of efforts on the part of the Commission to introduce employment protection legislation via hard law, in particular regarding non-standard forms of employment, including part-time employment, fixed-term contracts and temporary agency work, which contributed to the mitigating effects both on productivity and growth and on managing job losses through employment protection measures in the EU,⁴¹ the EES had to be redirected. The Commission had to admit that the goals of the Lisbon Strategy could not be achieved. In its evaluation of the Lisbon strategy in 2010⁴² it came to an ambivalent conclusion. It found that ‘the Lisbon Strategy has had a positive impact on the EU even though its main targets (i.e. 70%

³⁸ R. Rogowski, *Flexicurity and Reflexive Coordination of European Social and Employment Policies*, in *Flexicurity and Beyond. Finding a New Agenda for the European Social Model* 131–53 (H. Jørgensen & P. K. Madsen eds, Copenhagen: DJØF Publishing 2007).

³⁹ P. K. Madsen, *The Danish Model of ‘Flexicurity’: Experiences and Lessons*, 10(2) *Transfer: Eur. Rev. Lab. & Res.* 187–207 (2004).

⁴⁰ European Commission, *Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security* (Brussels: Directorate-General for Employment, Social Affairs and Equal Opportunities 2007).

⁴¹ Z. Adams, L. Bishop, S. Deakin, C. Fenwick, S. Martinsson Garzelli & G. Rusconi, *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 158(1) *Int’l Lab. Rev.* 1–35 (20) (2019).

⁴² European Commission, *Lisbon Strategy Evaluation Document*, Brussels (2 Feb. 2010) SEC(2010) 114 final.

employment rate, and 3% of GDP spent on R&D) will not be reached. The EU employment rate reached 66% in 2008 (from 62% in 2000) before it dropped back again as a result of the crisis. However, the EU has failed to close the productivity growth gap with leading industrialized countries: total R&D expenditure in the EU expressed as a percentage of GDP improved only marginally (from 1.82% in 2000 to 1.9% in 2008)'.⁴³

The EES was used as an instrument in efforts to combat the consequences of the crisis. Key elements of the EES were adopted in the European Economic Recovery Plan and in efforts of using the European Globalization Adjustment Fund in assisting workers who faced losing their jobs due to globalization. The European Economic Recovery Plan was adopted at the end of 2008. It promised a fiscal boost of EUR 200 billion (1.5% of EU GDP) from EU and national budgets in order to raise demand, restore economic activity to its upward path, and save and create jobs. The Plan lists key areas of the EES as targets.

A further measure to address the employment consequences of the economic crises was the mobilization of the European Social Fund (ESF) for 'smart investments' that were supposed to yield higher sustainable growth in the longer term. EUR 19 billion were spent to help people to stay in work or move towards new jobs, through upgrading skills, encouraging entrepreneurship and improving public employment services under the ESF. To speed up projects to assist people directly, Member State expenditure was reimbursed at a rate of 100%, which meant that there was no need for national co-funding. Furthermore, the ESF promised five million apprenticeships across the EU for young people facing unemployment and the setting of targets to provide young unemployed with early opportunities for training or work. The ESF also offered support schemes that maintain viable employment through short-time working and training. This was a decisive step in developing a new social cohesion policy.⁴³

A further contextual shift for the EES constituted the crisis-driven initiative known as A Shared Commitment for Employment of June 2009.⁴⁴ This contributed to a reorientation of the EES within the new European economic strategy that became known as Europe 2020. The EES was fully integrated into economic policy coordination and monitoring on a semester basis. The consequence has been that employment and social policy, in comparison to economic and fiscal policies, were downgraded and were given less importance during times of crisis management for avoiding financial and economic disasters.

⁴³ P. Berkowitz, E. Breska, J. Pieńkowski & A. C. Rubianes, *The Impact of the Economic and Financial Crisis on the Reform of Cohesion Policy 2008-2013*, Regional Working Paper WP 03/2015, Brussels (2015).

⁴⁴ European Commission, *A Shared Commitment for Employment* (June 2009) (COM (2009) 257 final).

Europe 2020 is an agenda for growth and jobs for the period 2010–2020. It consists of five areas, three of which are related social policies: (1) Employment, (2) Education and (3) Poverty and Social Exclusion plus (4) Research & Development and (5) Climate Change & Energy. The accompanying Employment Guidelines 2020 currently include four employment guidelines: Boosting demand for labour, Enhancing labour supply, skills and competences, Enhancing the functioning of labour markets, Fostering social inclusion, combatting poverty and promoting equal opportunities (nos. 5 to 8 of the integrated guidelines).

It has been noted that Europe 2020 is an enhanced coordination strategy of the existing EU policies now having a proper legal base. It is ‘an umbrella procedural framework aimed at streamlining and rationalising, through the European Semester Cycle, various policies already established within the Treaty, in particular, the economic, monetary, environmental and employment ones’.⁴⁵ It is in fact a reflexive legal strategy of coordination of coordination.⁴⁶ There have been voices that assess the potential of the Europe 2020 as renewed support for the European Social Model.⁴⁷

(4) EES Stage 4: since 2017

The latest stage in the development of the EES has seen a linkage to the European Pillar of Social Rights or ESP, adopted at the Social Summit in Gothenburg in November 2017. The introduction of the ESP must be interpreted in my assessment in the context of wider criticism of a social deficit of the EU as well as the more specific context of countering CJEU case law and its impact on national labour law and industrial relations: The cases of *Viking* and *Laval*⁴⁸ and subsequent decisions encountered widespread criticism and their aftermath had a lasting negative impact.⁴⁹

The link between the EES and the ESP becomes clear when looking at the policy areas covered by both and the content of the ESP. The ESP is divided into three chapters: Equal opportunities and access to the labour market; Fair working

⁴⁵ E. Ales, *The European Employment Strategy as Enhanced Coordination: A Holistic Approach to the EU Social Commitment*, 8(2) Eur. Lab. L.J. 130 (2017).

⁴⁶ K. A. Armstrong, *The Lisbon Strategy and Europe 2020. From the Governance of Co-ordination to the Co-ordination of Governance*, in *The EU's Lisbon Strategy: Evaluating Success, Understanding Failure* 208–28 (P. Copeland & D. Papadimitriou eds, Basingstoke: Palgrave Macmillan 2012), On coordination of coordination in European social policy see also Rogowski, *supra* n. 2, Ch. 8.

⁴⁷ S. Bekker, *The European Semester Process: Adaptability and Latitude in Support of the European Social Model, in A European Social Union After the Crisis* 251–70 (F. Vandebroucke, C. Barnard & G. De Baere eds, Cambridge: Cambridge University Press 2017).

⁴⁸ *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet & ors* Case C-341/05 and *International Transport Workers' Federation & anor v. Viking Line ABP & anor* Case C-438/05.

⁴⁹ See G. Meardi, *Economic Integration and State Responses: Change in European Industrial Relations since Maastricht*, 56(3) Brit. J. Indus. Rel. 631–55 (2018) and *Viking, Laval and Beyond* (M. R. Freedland & J. Prassl eds, London: Bloomsbury 2015).

conditions; and Social protection and inclusion. The majority of the twenty areas listed under these headings are employment-related and were covered in various ways by Employment Guidelines over the last twenty years. These areas include Training, Gender equality and Equal opportunities, Active support to employment, Secure and adaptable employment, Information about employment conditions and protection in case of dismissals, Work–life balance, Healthy, safe and well-adapted work environment and data protection, Social protection and inclusion, Childcare, and Unemployment benefits.

In administering the ESP, the Commission pays particular attention to the implementation of the ESP rights. Two innovations can be mentioned: The European Labour Authority (ELA) and the Social Scoreboard monitoring Member State responses to the ESP. The ELA was announced in September 2017 and provisionally agreed upon by the Commission, the Parliament and the Council in February 2019. It is expected to be running in 2019 and reaching its full operational capacity by 2023. This institution is officially declared to be ‘part of the roll-out of the European Pillar of Social Rights’.⁵⁰

The role of the ELA so far is limited to providing information and supporting cooperation between EU countries in the cross-border enforcement of relevant EU law, including facilitating joint inspections and assisting in cross-border disputes between national authorities or labour market disruptions. In its current design it blends well into the landscape created by the EES and supports the view that so far the ESP and its implementation is merely a continuation of the EES.

For monitoring achievements in the areas listed in the pillar, the ESP operates with Social Scoreboards.⁵¹ The current scoreboards track trends and performances across EU countries in twelve areas. They are meant to feed into the European Semester of economic policy coordination. The use of scoreboards is in line with the new governance approach and the indicator-based methodology as well as the general direction of monitoring and coordinating employment and economic policies in the EES and the Europe 2020 strategy.

In summary it can be emphasized that the majority of the ESP chapters and the scoreboard areas are employment-related and touch on EES topics. We see a direct alignment of the EES and the ESP. The current Employment Guidelines refer to the principles of the European Pillar of Social Rights, and the Joint Employment Report assesses Member States’ performance in relation to the European Pillar. We can thus conclude that the ESP constitutes the last step in the development of the EES.

⁵⁰ European Commission Employment, *DG: Social Affairs & Inclusion-European Labour Authority*, <https://ec.europa.eu/social/main.jsp?catId=1414&langId=en> (accessed 18 Apr. 2019).

⁵¹ European Commission Employment, *DG: Social Affairs & Inclusion-Social Scoreboards*, <https://ec.europa.eu/social/main.jsp?langId=en&catId=1196&furtherNews=yes&newsId=9163> (accessed 18 Apr. 2019).

4 BEYOND THE EES: A EUROPEAN SOCIAL UNION

The limits of the EES have been identified in many thorough accounts.⁵² For labour lawyers the reliance on soft-law instruments has always been a weakness. And insofar as the labour-market policy drive of employment promotion undermines levels of employment protection labour lawyers have understandable reasons for fear.⁵³

Labour lawyers rightly ask questions about the nature of ESP rights and principles.⁵⁴ The terminology of principles and rights used in the ESP is obscure. What seems clear is that these rights are not judiciable rights.⁵⁵ The idea behind the ESP is not a return to the notion of establishing a new ‘floor of rights’ at the supranational level. If the ESP provides the nucleus of an ‘employment constitution’ in Europe remains to be seen.⁵⁶ The ESP is certainly incomplete in this respect. Collective labour rights, for example the freedom of association and the right to strike are almost completely missing.

In a certain sense the ESP continues the practice of compiling ‘rights’ known from previous European documents such as the European Social Charter 1961, the Community Charter of the Fundamental Social Rights of Workers 1989 and EU Charter of Fundamental Rights 2000. Its approach also resembles international human rights documents, for example the International Covenant for Economic, Social, and Cultural Rights. In a certain sense the ESP fits in with the international economic and social rights agenda as being a rather powerless companion and minimalist rather than egalitarian in nature.⁵⁷

Despite the questions marks which labour lawyers and other lawyers⁵⁸ have about the nature and scope of the ESP, it should be seen in my view as a

⁵² See only H. Jørgensen, *The European Employment Strategy up for Revision – Effective Policy or European Cosmetics?*, in *Employment Policy from different Angles* 23–46 (T. Bredgaard & F. Larsen eds, Copenhagen: DJØF Publishing 2005).

⁵³ S. Sciarra, *The Convergence of European Labour and Social Rights: Opening to the Open Method of Coordination*, in *Law and Governance in an Enlarged European Union* 155–76 (G. Bernmann & K. Pistor eds, Oxford and Portland, OR: Hart 2004).

⁵⁴ K. Lörcher, *Die Europäische Säule Sozialer Rechte – Rechtsfortschritt oder Alibi?*, 10 *Arbeit und Recht* 387 (2017); M. Aimo, R. Buschmann & D. Izzi, *Labour Law Beyond National Borders: Major Debates in 2017*, *Revue de droit comparé du travail et de la sécurité sociale* 192–214 (2018); *Resocialising Europe in a Time of Crisis* (N. Countouris & M. Freedland eds, Cambridge: Cambridge University Press 2013).

⁵⁵ C. Kilpatrick & B. de Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights*. EUI Working Paper LAW Fiesole, 2014/05 (2014). S. Laulom & J. P. Lhernould, *Quelle Europe sociale nous prépare le socle des droits sociaux?* R.D.T. 7–8 *Revue de droit du travail* 455 (2017).

⁵⁶ See Dukes, *supra* n. 1.

⁵⁷ S. Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77(4) *L. & Contemp. Probs.* 147–69 (2015).

⁵⁸ S. Garben, *The European Pillar of Social Rights: Effectively Addressing Displacement?*, 14 *Eur. Const. L. Rev.* 210–30 (2018).

cornerstone and platform that upgrades social and employment policies within the range of policies at the European level. The ESP undoubtedly strengthens the legitimacy of the EU.⁵⁹ It enhances, for example, social mainstreaming and the working of the horizontal social clause of Article 9 TFEU and shields ‘the social’ from ‘the economic’ in EU policy-making.⁶⁰

The debate about the future of the social dimension in Europe offers an opportunity to rethink not only the social but also the economic in Europe. The ESP is a chance to return to the idea of a European Social Model in which social policy is an integral part of economic policy making.⁶¹ It seems the right time to think in broader terms about the future, beyond the concept of the Social Market Economy as Europe’s social model,⁶² and to envisage a proper Social Union.⁶³

Günther Schmid has recently made proposals that can be regarded as cornerstones for a Social Union. He offers the idea of an inclusive growth strategy in which active labour market policy plays a key role.⁶⁴ His assessment of the Europeanization of the labour market is illuminating and his proposal to switch from a system of unemployment benefits to a social insurance approach that guarantees employment looks promising, especially if adopted as strategy at the European level in redesigning the social dimension of European integration. Schmid goes even a step further and endorses a switch from employment to work suggested by Alain Supiot and his colleagues.⁶⁵ He argues that in line with the transitional labour market approach, a paradigm shift is needed in labour law and labour market policy from job security to labour market security. Schmid has

⁵⁹ C. Kilpatrick, E. Muir & S. Garben, *From Austerity Back to Legitimacy? The European Pillar of Social Rights: A Policy Brief* (EU Law Analysis 20 Mar. 2017).

⁶⁰ A. Aranguiz, *Social Mainstreaming Through the European Pillar of Social Rights: Shielding ‘the Social’ from ‘the Economic’ in EU Policymaking*, 20(4) Eur. J. Soc. Sec. 341–65 (2018).

⁶¹ *The Sustainability of the European Social Model. EU Governance, Social Protection and Employment Policies in Europe* (J.-C. Barbier, R. Rogowski & F. Colomb eds, Cheltenham: Elgar 2015).

⁶² C. Joerges & F. Rödl, *The ‘Social Market Economy’ as Europe’s Social Model?* EUI Working Paper Law no. 2004/8, Fiesole (2004) and G. Dale & N. El-Enany, *The Limits of Social Europe: EU Law and the Ordoliberal Agenda*, 14(5) German L.J. 613–50 (2013).

⁶³ F. Vandenbroucke, *The Idea of a European Social Union: A Normative Introduction*, in *A European Social Union After the Crisis* 3–45 (F. Vandenbroucke, C. Barnard & G. De Baere eds, Cambridge: Cambridge University Press 2017). M. Ferrera, *The European Social Union: A Missing but Necessary ‘Political Good’*, in *A European Social Union After the Crisis* 47–67 (F. Vandenbroucke, C. Barnard & G. De Baere eds, Cambridge: Cambridge University Press 2017).

⁶⁴ G. Schmid, *Europa in Arbeit. Plädoyer für eine neue Vollbeschäftigung durch inklusives Wachstum* (Frankfurt, New York: Campus). See also Schmid’s article in this issue of the Int’l J. Comp. Lab. L. & Indus. Rel. (2018).

⁶⁵ A. Supiot, M. E. Casas, J. De Munck, P. Hanau, A. Johansson, P. Meadows, E. Mingione, R. Salais & P. van der Heijden, *Beyond Employment, Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press 2001).

much hope in creative labour law providing new contractual forms that guarantee rights for workers in general, paid or unpaid, employed or self-employed. Schmid views the rights granted in the ESP offering a ‘glimmer of hope’⁶⁶ that European policies move in this direction.

Unfortunately, Schmid offers a less optimistic account of concrete proposals when it comes to granting competences to the European Union. He argues against a strong European welfare agency and opts instead for increased coordination of national institutions. He fears social dumping and lowering of levels of benefit in advanced Member States and points at the danger that EU initiatives like the European labour inspectorate will end up setting a (low) floor of rights and undermine the ability of states to introduce effective measures.⁶⁷

Less timid than Schmid and his colleagues is Sebastian Dullien,⁶⁸ who has made an interesting alternative proposal for a proper European Unemployment Insurance scheme. Although ambitious in its design, it can be argued that the proposed benefit levels in Dullien’s concept are still too low. Schmid is right in his critique of this proposal that it focuses too much on macroeconomic stabilization⁶⁹ and not enough on social security.⁷⁰

It is my conviction that a European-wide unemployment insurance scheme would need a European institution equipped with legislative competences and sufficient financial resources. The new ELA seems a promising step in this direction. It is already designed to be approached directly by EU citizens, albeit only for providing information but not delivering services. In its current format the ELA is far from being prepared for the task of administering unemployment benefits.

A proper ELA should be administering the European minimum wage. Such a task would go beyond the coordination of minimum wage policies.⁷¹ For a successful administration of the minimum wage it would, for example, be necessary for the ELA to establish proper links with the industrial relations representatives, as suggested by the European Trade Union Institute (ETUI).⁷² In addition the ELA should be responsible for further Europeanization of vocational training⁷³

⁶⁶ Schmid, *supra* n. 47 to 64, at 215–18.

⁶⁷ *Ibid.*, Ch. 6.

⁶⁸ S. Dullien, *European Unemployment Insurance*, in *The New Palgrave Dictionary of Economics* 4025–36 (2015). See also L. Andor, *Developing the Social Dimension of a Deep and Genuine Economic and Monetary Union*, European Policy Centre Brief, 13 Sept. 2013 (Brussels 2013).

⁶⁹ The same applies to the CEPS proposal: <https://www.ceps.eu/topics/unemployment-insurance> (accessed 18 Apr. 2019).

⁷⁰ Schmid, *supra* n. 47, at 166–69.

⁷¹ E. Fernández-Macías & C. Vacas-Soriano, *A Coordinated European Union Minimum Wage Policy?*, 22(2) *Eur. J. Indus. Rel.* 97–113 (2016).

⁷² ETUC Position: For A Strong European Labour Authority, <https://www.etuc.org/en/document/etuc-position-strong-european-labour-authority> (accessed 18 Apr. 2019).

⁷³ C. Ante, *The Europeanisation of Vocational Education and Training* (Berlin: Springer 2016).

and for European Employment Services (EURES), the cooperation network designed to facilitate the free movement of workers within the EU twenty-eight countries plus Switzerland, Iceland, Liechtenstein and Norway.

The ELA could also be made responsible for monitoring a bold new European employment guideline (EEG)⁷⁴ that operates with a binding upper limit of 2% unemployment. According to this proposal, the ELA would have the competence to impose on all companies with more than 250 employees a target by which percentage they would have to increase the number of jobs and personnel expenses. The process would be repeated annually until the number of job-seekers had fallen below 2% and thus the fullest possible employment (given inevitable frictional unemployment) is achieved.

For financing the Social Union, existing structural funds need to be reorganized and bolstered. In the first place the ESF would need to restructure, for example to become a European Social and Employment (or Work) Fund, as suggested by Schmid.⁷⁵ A merger of structural funds, for example the ESF and the European Globalization Adjustment Fund, would be a first step.

A real push in improving identification with the EU among its citizens and in strengthening a Social Union would be a European pension. It should be core to a New Deal policy in a Social Union.⁷⁶ In many respects public pension systems are already a major issue for EU institutions. As Filipe Duarte has argued on behalf of Southern European countries in his case study of Portugal:

Sustainability concerns, the higher expenditure on public pensions in southern-European countries and the growing number of precarious jobs – associated with cycles of elevated unemployment – justify a new and comprehensive system of redistribution ... and a unified European pension scheme. It would help to justify “structural reforms” of Portugal’s public pension system and labour-market policies. The transfer of insurance-based redistributive mechanisms, such as pensions and unemployment insurance, to the EU level can also contribute a common and more egalitarian policy framework which is not exposed to cyclical risks of fiscal consolidation, falling tax revenues and higher unemployment, exacerbated by population ageing.⁷⁷

The vision of a Social Union will have to address the difficult redistribution conundrum and it is linked to the idea of ‘sustainable development’. Insofar as its

⁷⁴ B. Baumann, J. Ehrismann & C. Bucheli, *A European Employment Guideline – A New Recipe for Dealing with the Crisis Social Europe* (7 Feb. 2019), <https://www.socialeurope.eu/a-european-employment-guideline> (accessed 18 Apr. 2019).

⁷⁵ Schmid, *supra* n. 47, at 184–92.

⁷⁶ S. Deakin, *What Follows Austerity? From Social Pillar to New Deal*, in *A European Social Union After the Crisis* 192–210 (F. Vandenbroucke, C. Barnard & G. De Baere eds, Cambridge: Cambridge University Press 2017).

⁷⁷ F. Duarte, *The Politics of Austerity and Social Citizenship Rights: A Case Study of the Impact of the 2008 Financial Crisis on the Welfare State in Portugal* (2018), https://www.academia.edu/38172120/The_Politics_of_Austerity_and_Social_Citizenship_Rights_A_Case_Study_of_the_Impact_of_the_2008_Financial_Crisis_on_the_Welfare_State_in_Portugal (accessed 18 Apr. 2019).

aim is to create green jobs it is also linked to the growing debate over a green New Deal. Furthermore, the Social Union is about equal living conditions in the EU. The goal is social cohesion, increasing legitimacy and identification of the citizens with their European Union. But ultimately, I wish to argue, it is a question of social solidarity.

5 CONCLUSION

Is the ESP a Polanyian counter (or double) movement of social protection against marketization⁷⁸ by a one-sided EES that uses new governance techniques to implement neoliberal economic and labour market policies? Or is it just a continuation of the EES in new clothes? The article argued that the ESP has both sides to it, and whether the potential of establishing a Social Union is realized depends on the direction of the implementation of the ESP.

The main aim of the EES is job creation through coordination of employment and unemployment policies. All other policies, including labour laws and their reform are subsumed in the drive to raise the employment rate. The ESP is aligned with the EES and so far it seems that the ESP is at this stage just a continuation in the development of the EES.

What seems clear is that the future of the EES will depend on coordinating its inherent tensions. Experimental policies are needed.⁷⁹ The chequered history of the relation between European law and labour law took a nosedive with the hostility expressed by the CJEU in the *Viking* and *Laval* cases. The way out is a rethinking of the relationship between hard and soft labour law, including a 'hardening' of EU policy coordination.

The Europe 2020 project is driven in different directions by economic and financial objectives of growth and creation of jobs on the one hand and wider employment and social objectives of policy integration and mutual interaction on the other. One can predict in this situation with some certainty an increased demand for reflexive coordination of coordination policies at the European level.

However, the ESP is also an opportunity. With it we seem to have moved beyond an exclusive focus on new governance in conducting employment policies. We witness the return of an interest in the European Social Model and a hope in establishing a (new) floor of rights beyond employment rights. And there is desire for real transformation of European employment policy focusing on

⁷⁸ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2d ed., Boston: Beacon Press 2001).

⁷⁹ C. F. Sabel & J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, 14(3) *ELJ* 278–80 (2008).

transitions and capabilities.⁸⁰ The ESP is a step beyond employment and has the potential of becoming a platform for the development of a proper Social Union.

However, for the ESP not to be just another instantiation of the EES, a broad understanding has to develop that the ESP is the basis for a redirection of labour law. It has the potential for a progressive upgrading of ‘the social within the economic’ in the EU. For this to happen bold steps are needed, not only in terms of legislation but in particular the creation of a properly equipped and financially endowed institutional infrastructure at the supranational level.

The external push for labour law reform will not diminish. However, labour market concerns will not be the only instigator. There are social and ecological challenges that will affect labour law. These challenges will include migration (including labour migration) and integration policies (social inclusion), digitalization of work and climate change and its economic effects. For labour law to be able to meet these challenges it has to become reflexive.

⁸⁰ *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (R. Rogowski, R. Salais & N. Whiteside eds, Cheltenham: Elgar 2011).