2013

*Euro Zone Crisis Management and the New Social Europe*

Philomila Tsoukala  
*Georgetown University Law Center, pt96@law.georgetown.edu*

This paper can be downloaded free of charge from:  
https://scholarship.law.georgetown.edu/facpub/1316  
http://ssrn.com/abstract=2392336

20 Colum. J. Eur. L. 31-76 (2013)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub  
Part of the Comparative and Foreign Law Commons, International Law Commons, Political Economy Commons, and the Public Economics Commons
EURO ZONE CRISIS MANAGEMENT AND THE NEW SOCIAL EUROPE

Philomila Tsoukala*

This Article analyzes the changes in European governance since the beginning of the euro crisis in relation to the project of constructing Social Europe. The Article tracks the incorporation of a structural reform agenda originally designed as bailout conditionality for countries on the verge of default into EU economic governance as a strategy for growth. Beyond the contestable grounds of this reform agenda, its adoption by the EU in the mode of crisis management poses serious questions of legitimacy. The new enhanced economic coordination process includes obligatory guidelines in domains under the legislative competence of Member States, such as labor regulation and taxation, under the guise of a technocratic imperative. The Article also shows that despite the intensely neoliberal character of the proposed structural reforms, the Commission has foregrounded the protection of Europe’s welfare regimes as a key reason for reform. In reality, such reforms would dramatically alter welfare regimes, emptying out traditional welfarist goals such as the decommodification of labor without appropriate political processes. This Article argues that these developments are likely to challenge the already weakened legitimacy of the European Union.

I. INTRODUCTION ........................................................................................................... 32
II. RE-CHARACTERIZING THE CRISIS: ANTS, GRASSHOPPERS AND REFORM LAGGARDS ......................................................................................................................... 36
   A. A Tale of Ants and Grasshoppers ........................................................................... 37
   B. The Commission’s Version: Lagging Reformers .................................................... 41
   C. Post-Crisis Normal: Structural Reforms in Defense of Social Europe .................. 42
III. THE PRE-CRI$$S SOCIAL EUROPE ............................................................................ 44
   A. The Open Method of Coordination and the Lisbon agenda: Social Europe’s Maastricht? .................................................................................................................. 45
   B. The Relaunching of Lisbon and Markets as Welfare .............................................. 47
   C. The Pre-Crisis Emergence of Technocratic Social Europe .................................. 48
IV. CRISIS MANAGEMENT AND THE NEW SOCIAL EUROPE ........................................ 51

* Associate Professor of Law, Georgetown Law Center, S.J.D. Harvard Law School, D.E.A. Paris II Panthéon-Assas, LL.B. Aristotle University. I would like to thank Bill Alford, Gabriella Blum, Grainne de Burca, Daniela Caruso, Janet Halley, Nan Hunter, David Kennedy, Duncan Kennedy, Don Langevoort, Miguel Maduro, Mitt Regan, Álvaro Santos and Robin West for invaluable conversations, comments and suggestions. The article profited from presentations at the Georgetown Law Center Faculty Workshop, the Harvard Institute of Global Law and Policy’s conference on The European Legal Project: New Approaches, and the Fall 2013 International Law Workshop at Harvard Law School.
I. INTRODUCTION

The euro zone crisis has cast a dark cloud over Europe. By May 2010, Greece, the black sheep of the euro zone, had already signed a first loan agreement with members of the euro zone and the International Monetary Fund (IMF). Shortly after, German Chancellor Angela Merkel was quoted as saying, “We’re right to tell the Greeks: you have to save money, you have to be candid and you have to work on your honesty, otherwise we can’t help you.” In June 2011, Chancellor Merkel chided citizens of countries like Greece, Portugal, and Spain for allegedly taking long vacations and retiring too early. She was quoted as saying, “We can’t have a common currency where some get lots of vacation time and others very little. That won’t work in the long term.” As German newspaper Der Spiegel noted, this was a more formal way of saying that Southern Europeans do not “exert” themselves enough. Greek politicians, journalists, and citizens have returned the favor by

1 Greece obtained a first loan of €80 billion from other euro zone countries. In addition, the IMF contributed €30 billion. The loan was accompanied by strict conditionalities that included austerity measures in addition to structural reforms in labor markets and the public sector. See The Economic Adjustment Programme for Greece, at 21–22, 79–80, Directorate-General for Econ. & Fin. Aff., Occasional Papers 61 (May 2010) [hereinafter EAPGr1]. The European Commission (EC) jointly with the European Central Bank (ECB) supervise the implementation of the program’s conditionalities on behalf of the euro zone creditor countries, along with the IMF. The EC/ECB/IMF are often referred to as the “troika” of creditors, even though the funding does not come directly from these institutions. See e.g., Memorandum, Eur. Comm’n, Statement of the Troika on the Review of the Greek Programme (Oct. 17, 2012), http://europa.eu/rapid/press-release_MEMO-12–789_en.htm.


4 Id. Similarly, the German Finance Minister was quoted as saying: “Greece needs to do its own homework to become competitive . . . . We’re happy to help but we shouldn’t give others the feeling that they don’t have work [sic] hard themselves. Every country is responsible for itself.” Erik Kirschbaum, Schaeuble Warns Greek Promises No Longer Sufficient, REUTERS (Feb. 12, 2012), http://www.reuters.com

Despite the political tensions, the European Union (EU) initiated an ongoing crisis management scheme, establishing loan facilities for euro zone countries with liquidity problems\footnote{Ireland asked and received a bailout in 2010, Portugal in 2011, and Greece a second time in 2011. By the time Ireland requested financial support, the EU had set up two temporary special purpose vehicles for financing euro zone countries in financial distress: the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM). Both funds will be replaced by what was designed as a permanent financing mechanism, the European Stability Mechanism (ESM). Ireland’s loan is co-financed by the EFSF, the EFSM, and the IMF for a total of up to €85 billion, €17.5 billion of which will be contributed by Ireland itself. See European Commission, Economic Adjustment Programme for Ireland, http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm. The Portuguese loan agreement was also financed jointly by the EFSF, EFSM, and IMF and managed by the troika. The Portuguese government agreed to receive financial assistance of up to €78 billion. See European Commission, Programme for Portugal, http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm. In March 2012, Greece obtained a second loan of up to €130 billion jointly from euro zone countries and the IMF. The second loan to Greece by euro zone creditors was not funded bilaterally, but rather through the EFSF that had become operational shortly after Greece signed its first loan in August 2010. See European Commission, Financial Assistance to Greece, http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm; see also The Second Economic Adjustment Programme for Greece, at \[hereinafter EAPGr2\].} and, more importantly, reinforcing fiscal and macro-economic governance at the EU level.\footnote{Despite the political tensions, the European Union (EU) initiated an ongoing crisis management scheme, establishing loan facilities for euro zone countries with liquidity problems and, more importantly, reinforcing fiscal and macro-economic governance at the EU level. The conditions of the loans to debtor countries included dramatic austerity measures, coupled with structural reforms relying heavily on the flexibilization of labor markets as a recipe for growth. More surprisingly, the new, reinforced economic governance for every euro zone member required austerity all.} The conditions of the loans to debtor countries included dramatic austerity measures, coupled with structural reforms relying heavily on the flexibilization of labor markets as a recipe for growth. More surprisingly, the new, reinforced economic governance for every euro zone member required austerity all.

\footnote{Ireland asked and received a bailout in 2010, Portugal in 2011, and Greece a second time in 2011. By the time Ireland requested financial support, the EU had set up two temporary special purpose vehicles for financing euro zone countries in financial distress: the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM). Both funds will be replaced by what was designed as a permanent financing mechanism, the European Stability Mechanism (ESM). Ireland’s loan is co-financed by the EFSF, the EFSM, and the IMF for a total of up to €85 billion, €17.5 billion of which will be contributed by Ireland itself. See European Commission, Economic Adjustment Programme for Ireland, http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm. The Portuguese loan agreement was also financed jointly by the EFSF, EFSM, and IMF and managed by the troika. The Portuguese government agreed to receive financial assistance of up to €78 billion. See European Commission, Programme for Portugal, http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm. In March 2012, Greece obtained a second loan of up to €130 billion jointly from euro zone countries and the IMF. The second loan to Greece by euro zone creditors was not funded bilaterally, but rather through the EFSF that had become operational shortly after Greece signed its first loan in August 2010. See European Commission, Financial Assistance to Greece, http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm; see also The Second Economic Adjustment Programme for Greece, at \[hereinafter EAPGr2\].}
around, coupled with structural reforms, or what the European Commission (“the Commission”) has euphemistically called “differentiated, growth-friendly fiscal consolidation.”

This Article tracks the transformation of what began as specific loan conditionality for over-indebted euro zone members in need of a bailout into an EU endorsed vision for the “profound restructuring” of European economies. It argues that the overall reform agenda emerging from the Commission’s crisis management measures bears remarkable similarities to reform proposals originated in international development institutions during the 1990s, and relies heavily on the flexibilization of labor markets and welfare regimes. When checked against the actual, fragile state of our knowledge about recipes for growth, especially in the post-crisis world of destabilized economic theory, the Commission’s seeming confidence gives one pause. Various aspects of the structural reform agenda endorsed by the Commission are highly contested in theory and have proven dubious in practice.

---


9 See Growth Survey 2013, supra note 8, at 1.

10 I am referring to neoliberalism to denote the types of policies recommended to developing countries known as the Washington Consensus. See John Williamson, What Should the World Bank Think About the Washington Consensus?, 15 WORLD BANK RES. OBSERVER 251 (2000).

11 See infra notes 115–17.
to labor and welfare reform, have been highly contested in Member States’ own democratic processes.\textsuperscript{12}

The emergence of this reform agenda as the centerpiece of EU macro-economic governance poses serious questions of democratic legitimacy. Despite efforts by the Commission to push certain reforms even before the crisis through the process of social policy coordination, Member States were not cooperating due to domestic political resistance. Without the legislative capacity needed in social policy to force their hand, there was very little that the Commission could do. This Article shows that the crisis presented a new opportunity for the entrenchment of specific ideas about necessary social policy reform, which the Commission grasped. In its own words, “[t]he on-going economic and financial crisis in the EU has been a catalyst for deep change.”\textsuperscript{13} Social policy reform has now been fully embedded into economic governance, and economic governance further collapsed into neoliberal reform.\textsuperscript{14} Both trends were present before the crisis, although the Commission has arguably pushed the content of desirable reforms further and closer to neoliberal policy than was previously possible. It has also insinuated itself into Member State social policy in what can be described as the latest significant episode of competence creep.\textsuperscript{15}

Paradoxically, the project of constructing Social Europe has come center stage. This Article argues that the Commission has promoted the idea that safeguarding Europe’s welfare regimes is one of the most important \textit{raisons d’être} for the proposed reforms. In fact, such reforms, if and when applied, would amount to a dramatic transformation of the very same welfarism they are supposed to safeguard. More specifically, the new Social Europe emerging from EU crisis management entails a complete abandonment of decommodification of labor—the idea that workers should enjoy access to certain basic goods before they need to sell their labor in the market—as an acceptable social policy goal.\textsuperscript{16} Perhaps this would not be such a problematic move had it resulted from democratically legitimate processes involving widespread citizen consent. Instead, it has arrived “through the back


\textsuperscript{13} Growth Survey 2013, supra note 8, at 1.

\textsuperscript{14} In this sense, this Article departs from Deakin and Rogowski’s observation that the management of the crisis is risking marginalization of social policy at the EU level. Rather, it is risking the collapse of social policy into economic governance. See Simon Deakin & Ralf Rogowski, \textit{Reflective Labour Law, Capabilities and the Future of Social Europe} 24, 27 (Univ. of Warwick Sch. of Law, Research Paper No. 2011/04, 2011). Catharine Barnard underlines that the EU, once seen as a “bastion against deregulation,” is now driving the deregulation it resisted for many years. Catharine Barnard, \textit{The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective}, 41 INDUS. L.J. 98, 113 (2012). The view of the EU as resisting deregulation is plausible from the point of view of the UK labor market.


door”17 in the guise of a result dictated by technocratic imperatives, worked out through a combination of a decade long expert consultation through the Open Method of Coordination (OMC), coupled with emergency measures for crisis management.

Thus, the dark cloud over Europe is not only casting its shadow over Europe’s finances, it is also casting a cloud over the future of democratic governance in the European integration project. The question of the future of Social Europe might be the same as the question of the future of its democratic governance.

The rest of the Article is divided in four sections. Section II provides background on the euro crisis by analyzing accounts of the crisis that have been politically salient in the crisis management process. The Article suggests that the Commission has adopted a distinct version of a misguided morality tale as its basic account of the crisis. This story centers on Member States’ slow pace of policy reform before the crisis as the main explanation for the crisis, implying that acceleration of reform pace is needed for crisis resolution. Section III reviews the development of EU social policy prior to the crisis, analyzing the Commission’s shift towards neoliberal policy in the OMC process and Member State reform reluctance. Section IV describes in detail the transformation of what started out as loan conditionality for borrowing states into a structural reform agenda for every euro zone country through the annual process of economic policy coordination (“the European Semester”). Finally, Section V considers some of the implications of this turn for the future of democratic governance in the European integration project.

II. RE-CHARACTERIZING THE CRISIS: ANTS, GRASSHOPPERS AND REFORM LAGGARDS

Finding solutions to a crisis requires an account of the causes. This section analyzes two distinct types of narratives purporting to account for the causes of the euro crisis. The first, a moral tale, attributes the crisis to the profligacy of southern European states and sees the solution in austerity measures and fiscal prudence. This narrative, which is misleading in attribution of cause and effect, has been adopted by many European politicians in the North and the South. It is currently making resolution of the crisis politically difficult. The second type of narrative focuses instead on the structural reasons that led to the outbreak of the crisis, some of which have to do with the trade dynamics created by the euro. The structural accounts are more plausible and suggest the need for structural solutions such as fiscal, banking, or even political union, or, in the alternative, euro exit.

The section then turns to the European Commission’s understanding of the crisis, noting that the Commission embraced fiscal austerity as an opportunity for deepening reforms in euro zone countries previously failing in reforming their welfare regimes. It relied on another implicit form of a morality tale; one of corrupt states resisting necessary and technocratically justified reforms, to pursue a reform agenda previously contested and well outside the EU’s legislative purview.

---

17 Ha-Joon Chang, The Root of Europe’s Riots, GUARDIAN (Sept. 28, 2012), http://www.guardian.co.uk/commentisfree/2012/sep/28/europe-riots-root-imf-austerity (arguing that there is a rewriting of the social contract through the back door at play in Europe).
A. A Tale of Ants and Grasshoppers

Chancellor Merkel’s quotes in the Introduction illustrate a type of narrative that politicians in creditor countries employed as an explanation of the crisis. Politicians in their domestic sphere trying to score points with disgruntled, bailout weary northern European voters have mostly touted this narrative. Its bottom line is a morality tale that attributes the euro zone malaise to lazy southern grasshoppers begging for money from the productive, disciplined, ant-like northerners—and ultimately wasting it. Holding laziness and profligacy as the root causes of the crisis, the ant/grasshopper tale suggests an obvious solution: cut-down on the profligacy and all shall be well.

18 See, e.g., Diane Francis, Greece Is Not a Country, It’s a Party, HUFFINGTON POST (June 8, 2011), http://www.huffingtonpost.com/diane-francis/greece-is-not-a-country-1_b_871296.html (stating that Greeks retired, on average, at only 53 years of age); Walter Loeb, Retirement in Germany May Rise to Age 69 While Greece Is at Age 58, FORBES (June 17, 2012), http://www.forbes.com/sites/walterloeb/2012/06/17/retirement-in-germany-may-rise-to-age-69-while-greece-is-at-age-58/ (comparing retirement ages in various European countries and highlighting that Greece is among the lowest). However, these accounts are not accurate. The average age of labor force exit for Greek women was 62.4 and 60.9 for men in 2009. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], SOCIETY AT A GLANCE 2009: OECD SOCIAL INDICATORS 83 tbl. SS6.1 (5th ed. 2009) [hereinafter Society at a Glance], available at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/society-at-a-glance-2009_soc_glance-2009–en#page3. Greek women retire, on average, slightly later than German women, and Greek men slightly earlier than German men. Id. German and Greek workers both retired at ages slightly below the OECD average. Id. The official retirement age in 2008 was 65 for both men and women. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], Greece, in PENSIONS AT A GLANCE 2011: RETIREMENT-INCOME SYSTEMS IN OECD COUNTRIES 1 (2011), available at http://www.oecd.org/greece/47272439.pdf (“The normal pension age is 65 for both men and women.”). In addition, Greek workers work much longer hours than the OECD average and certainly much more than the average German. In 2008 Greeks reached an annual average of 1950 working hours, compared to the German average of 1422. ORG. FOR ECON. CO-OPERATION & DEV., STATEXTRACTS, Average Annual Hours Actually Worked Per Worker (Sept. 27, 2013), available at http://stats.oecd.org/Index.aspx?Data.setCode=ANHRS. From a fiscal perspective, however, Greece’s pension expenditures were significant even before the crisis and had long been the cause of major concern. The size of its pension expenditures is partly due to the fact that the Greek state was making up for meager social transfers, such as housing and unemployment benefits, through inefficient pension transfers. See Manos Matsaganis, The Welfare State and the Crisis: The Case of Greece, 21 J. EUR. SOC. POL’Y 501, 503 (2011). The other part of the explanation is the clientelist nature of the Greek state, which resulted in a hugely fragmented pension system. It lacked truly universal coverage and provided radically distinct benefits for different groups of workers. It benefited the self-employed over the salaried, public over private sector workers, the middle-aged over the young, and men over women. Id. at 504–05. Some politicians in the European South charged with implementing harsh conditionality have also employed variations of the same narrative. For example, Theodoros Pangalos, Vice-President of the Greek government in 2009 and a very influential politician in the post-dictatorship period, famously attributed collective responsibility for the public debt problem to the average Greek by proclaiming that Greeks had “eaten” the money together by accumulating debt to finance a system of public sector employment. See, e.g., Tony Barber, Greece Plays the Ethical Blame Game, FIN. TIMES (June 21, 2011), http://www.ft.com/intl/cms/s/0/42d88b20–9c1f-11e0-acbc-00144fcaedc0.html.


But the causal link between abiding by the fiscal terms of the Treaties and avoiding this crisis suggested by the ants/grasshoppers tale is not warranted. In fact, characterizing the crisis as a sovereign debt and therefore sovereign profligacy crisis at all is highly misleading. Greece had high public debt levels, which started looking unsustainable given the slump in growth following the 2008 crisis. However, many peripheral countries like Spain and Ireland had in fact decreased their public debts to levels even below some of the supposed ants. Ireland was the Celtic Tiger doing everything by the book, but decided to turn private bank debts into public debts in 2008. Spain, which also enjoyed low sovereign debt levels before the crisis, had to save its banks and saw its debt rise as well.

Structural explanations of the crisis are more convincing. Several have to do with the structure of the euro itself. As early as April 2010, economist Martin Feldstein, former Chief Economic Advisor to President Reagan, pointed out that Greece would not have borrowed as much money between 2000−2009 but for the mispricing of Greek bonds in international bond markets due to the euro. Several academics foresaw significant structural problems ahead of time.

---

21 See Guide to EU Fiscal Governance, supra note 7.
23 In the words of Hendrik Van den Berg, “The problem was the single currency: a permanently fixed exchange rate limits a country’s response to high unemployment to fiscal stimulus. But, as Greece found out, if government debt grows too large, further borrowing is no longer possible. In this case, the government is left with no macro-economic policy with which to increase employment.” HENDRIK VAN DEN BERG, INTERNATIONAL FINANCE AND OPEN-ECONOMY MACROECONOMICS: THEORY, HISTORY, AND POLICY 664 (2010). In the case of Greece, a fixed exchange rate at levels that were inflationary for Greece contributed to further loss of competitiveness, which led to ballooning unemployment that Greece tried to control through public sector employment financed through borrowing.
24 Martin Feldstein, Why Greece Will Default, PROJECT SYNDICATE (Apr. 28, 2010), http://www.project-syndicate.org/commentary/why-greece-will-default (noting that to get Greece back to the prescribed “debt-to-GDP ratio [of] 60% level” would mean reducing the budget deficit by 10% of its current GDP) [hereinafter Why Greece Will Default]. Feldstein noted that this reduction would not only be politically difficult, but would also lead to either an “enormous cut in government spending or a dramatic rise in tax revenue, or both.” Several academics foresaw significant structural problems ahead of time.
Moreover, he warned that the austerity measures demanded of Greece in the context of the 2010 loan conditionality, without the possibility of currency devaluation, would likely lead to further contraction, the missing of fiscal targets, and possibly political upheaval. The lesson from his position was that there were structural reasons for Greece’s woes besides the state’s profligacy, which had to do with the design of the euro itself. This was evident from the common problems facing countries throughout what began to be referred to as the European periphery, or less respectfully, the P.I.I.G.S. (Portugal, Ireland, Italy, Greece, and Spain).

The structural problem was even deeper than the mispricing of bonds. Economist Paul De Grauwe has argued that the structure of the common currency contributed to what was essentially a currency crisis of the sort developing countries experienced in the 1980s. A country like Spain, despite having lower deficit and debt levels than the UK before the crisis, could not force its central bank to buy its debt, and depended on the ECB for liquidity, which was not subject to its control. As De Grauwe notes, the relevant parallel for euro zone countries is countries using a foreign currency. The vulnerability of such countries to financial market speculation when their budget deficits deteriorate is significant, because using deficit spending to deal with a crisis leads to a destabilizing dynamic rather than the equilibrating dynamic of depreciation and adjustment. As de Grauwe explains, this can set off the self-fulfilling prophecy of country insolvency through fear of country insolvency. Thus, the 2009 Europe-wide crisis is more appropriately characterized as a crisis of the euro as a currency, triggered by the worsening of deficits and debt after the 2008 crisis. The currency crisis was exacerbated by the hesitancy shown by some even claimed that those problems would lead to a likely euro breakup. See e.g., Hal S. Scott, *When the Euro Falls Apart*, 1 Int’l Fin. 207 (1998). Similarly, Martin Feldstein famously predicted that the euro was likely to lead to increased conflict within Europe. Martin Feldstein, *EMU and International Conflict*, Foreign Aff., Nov.–Dec. 1997, at 60. For a more typically Keynesian take on the euro’s structural problems, see Joseph E. Stiglitz, *Can the Euro be Saved?*, PROJECT SYNDICATE (May 5, 2010), http://www.project-syndicate.org/commentary/can-the-euro-be-saved.

27 See *Why Greece Will Default*, supra note 26; see also Charles Wyplosz, *And Now? A Dark Scenario*, Vox Blog (May 3, 2010), http://www.voxeu.org/article/greek-package-eurozone-rescue-or-seeds-unravelled-monetary-union (“The drop in public spending . . . will provoke a profound recession that will deepen the deficit. This, along with the social and political impact of the crisis, will undoubtedly prevent the Greek government from delivering on its commitments.”).

28 See Stiglitz, supra note 26 (noting structural problems in the euro zone, such as the fixed exchange rate and Germany’s trade surplus, which essentially puts the rest of the euro zone at a deficit).

29 See Nouriel Roubini, *Teaching PIIGS to Fly*, Project Syndicate (Feb. 15, 2010), http://www.project-syndicate.org/commentary/teaching-piigs-to-fly (referring to the group of countries as “the PIIGS economies” in a discussion of possible tactics for dealing with the euro zone’s financial problems); see also Shira Ovide, *PIIGS to the Slaughterhouse. Meet GIIPS*, Wall St. J. Deals Blog (July 15, 2011), http://blogs.wsj.com/deals/2011/07/15/piigs-to-the-slaughterhouse-meet-giips/ (discussing how political correctness has led many commentators to reverse the acronym so that the indebted European periphery is referred to as GIIPS).

30 See De Grauwe, supra note 24.

31 Id. at 260.

32 Id. This is because countries in a monetary union do not have the economic boost of depreciation and of inflation when their bonds are massively sold off. The massive sell off of Greek bonds did not provoke a depreciation of the euro and its subsequent adjustment. This makes bond markets judge the sustainability of their debts much more harshly because these countries would need to enforce harsher deficit cuts to attain sustainable debt levels.

33 Id. at 262.
the ECB and European politicians to backstop the speculation by showing willingness to help the liquidity problems of distressed euro zone members.34

The European crisis is also a current accounts crisis within the euro zone. Even though the euro zone’s trade balance vis-à-vis the rest of the world was almost entirely zero, there were tremendous trade imbalances within the euro zone. In fact, the trade surpluses of Germany were almost the mirror images of the trade deficits of the South.35 In other words, even though not all southern states had huge public debts, all of them had a deteriorating trade balance in relation to the European North; Southerners were importing from the European North more than they were exporting. Germany’s touted trade surpluses until 2010, which all euro zone members are supposed to emulate, were posted mostly in relation to the rest of the euro zone, and not the rest of the world.36 This means that it was an impossibility for Germany to have a trade surplus with the rest of the euro zone and for the rest of the euro zone to also be simultaneously running trade surpluses, the moral suggested by the ants/grasshoppers tale. Someone within the euro zone had to run deficits.

If peripheral European countries were to sustain trade deficits with Germany, they needed to fund their deficits by borrowing money in the international financial markets, thus contributing to the debt problem.37 In different euro zone countries, the problem manifested itself in different ways, because in each country, a different sector was responsible for the trade imbalance. In Spain, there was a real estate bubble. In Greece, the government borrowed money to buy more arms from Germany and France and sustained an inefficient public sector, but, equally problematically, the Greek banking sector financed a consumer-spending spree.38 Much of this credit boom though, to the public or private sector, was fuelled by Germany’s liberal refunneling of its trade surpluses to the South in the form of bank loans.39 This is why when Greece almost defaulted in April 2010, much of that debt was found in the hands of German and French banks and the entire European

34 Id.
36 Gros, supra note 35.
37 Prior to the question of deficits, of course, comes the question of what happens to the productive base of a country when it opens up its markets without a comparative advantage in its main productive sectors. The entire European periphery has shifted to services since joining the European Economic Community, while at the same time shifting away from agriculture and manufacturing, and has become largely dependent on imports from the North for its industrial products.
38 Since Greece’s entry into the euro, Greek household indebtedness had been growing at 30% per year. Despite this rapid credit expansion before the crisis, Greek household indebtedness remained below the euro area average. European Central Bank, Survey Data on Household Finance and Consumption, Occasional Paper Series No. 100, January 2009, http://ssrn.com/abstract_id= 1144504, at 19; Portugal And Ireland’s Private Debt Levels Are Far Worse Than Even Greece, BUSINESS INSIDER (Nov. 29, 2010, 6:10 AM), http://www.businessinsider.com/portugal-irelands-household-and-corporate-debt-levels-are-far-worse-than-ever-greece-2010–11?ixzz2iwWjWjw36O (chart showing business and household indebtedness in Greece below every country in the European periphery and comparable to Germany).
banking system shook. The sudden stop of generous lending from North to South is the proximate cause that detonated the European crisis in 2009.

B. The Commission’s Version: Lagging Reformers

The European Commission, as manager of the various loans to Ireland, Greece, and Portugal, has acknowledged the trade imbalance problem but has mostly attributed it to the increasing gap in unit labor costs between North and South. This idea posits that the excessive rise in wages after the adoption of the euro led to a loss in competitiveness for the European South and especially Greece, which meant a worsening trade balance vis-à-vis the European North. This story is compatible with the ants/grasshoppers tale, but the grasshoppers here are the states that did not sufficiently control their unit labor costs. Of course, this is a reading of the Commission’s version of the crisis. But it is a reading based on the fact that the Commission’s account fails as a structural account.

More specifically, while there is truth in the idea that there was a widening gap in unit labor costs, the idea that generous wages were what caused the problem is misleading. To begin with, total exports for the European South remained at more or less stable levels between 2000–2008. In other words, the image of countries losing market shares to its more wage competitive neighbors is misleading. Greece’s export sectors—most of which do not compete with the industrial North anyway—were not characterized by excessive wages, but by wide profit margins. The problem was rather that the wide availability of credit led to a boost in domestic demand, which led to a disproportionate increase of imports from the European North. While workers in the public sector did see their wages increase, workers in the private sector had to complement their salaries by borrowing. Both contributed to the boost in demand that led to the trade imbalance with the European core.

Thus, the European Commission’s version of the ants and grasshoppers tale targets reform at lazy states. Such states succumbed to group pressure from special

40 EAPGr1, supra note 1, at 3 (“The . . . increase in ULC (unit labour costs) eroded external competitiveness, not least with respect to the rest of the euro area . . . . [D]eteriorating external competitiveness translated into a rapid worsening of the current account deficit, which peaked at 14 percent of GDP in 2008.”); The Second Economic Adjustment Programme for Greece: First Review, at 14–15, Directorate-General for Econ. & Fin. Aff., Occasional Papers 123 (Dec. 2012), supra note 6, at 14 (“[W]hen it comes to the competitive impact of wages and price developments, in the period 2000–2009 the real effective exchange rate relative to the Euro area rose by 24.0% in terms of unit labour costs . . . . Decomposing growth in unit labour costs confirms that the driver of this development has been excessive growth in compensation per employee given a tightening labour market and easy financing conditions. This growth in the wage bill relative to general economic activity was especially pronounced in the public sector . . . . the labour cost developments played a key role in preventing the emergence of a stronger domestic export sector in the 2000s.”).

41 Gros, supra note 35.

interests and allowed their unit labor costs to diverge from those in the North. The correction for this problem is a sudden depression in wages and prices that can lead to a readjustment of domestic demand. This is the much-touted internal devaluation, which is indeed the only available tool for readjusting the trade imbalance in a currency union lacking other tools, such as unified tax and social policy. The point here is that the Commission has constructed a misleading narrative of lack of reforms leading to bulging unit labor costs, a development which in turn allegedly doomed market shares and the trade balance. Thus, the Commission indirectly justified the necessity for internal devaluation in the South, which in actuality exists because of a faulty euro setup, through the idea of faulty states now paying the price of an adjustment they could have avoided if only they had played by the rules before the crisis.

The structural accounts of the crisis suggest that, in the long-term, for the monetary union to be sustainable there needs to be political union. In the short-term, Europe needs mutualization of bonds, banking union, fiscal union, or some other form of internal adjustment for external shocks to avert the self-fulfilling prophecy of solvency problems through bond market speculation. Otherwise, the political pressures caused by using internal devaluation as the only adjustment mechanism, coupled with the invitation to financial markets to speculate, will eventually lead to the demise of the euro as a currency.

Even though the Commission has put forward the idea of such long-term reforms as necessary at some future point, it continues to tout structural reforms of a very neoliberal character as necessary for indebted countries. Interestingly, it has justified such reforms as necessary for the sake of preserving Europe’s social fabric and extended their reach to every euro zone member.

C. Post-Crisis Normal: Structural Reforms in Defense of Social Europe

The Commission’s idea of the types of structural reforms necessary for the correction of the competitiveness problems facing the economies of the European South further signals an entrenchment of a neoliberal tendency in Commission policy visible since at least 2005. The conditionality of the loans rests heavily on extreme austerity coupled with structural adjustment that includes many of the elements of reform programs coming out of international financial institutions in the

---

43 A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate, at 20, COM (2012) 777 final (Nov. 30, 2012), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:REV1:EN:PDF ("Slow or absent implementation of important structural reforms over long periods of time aggravated competitiveness problems and hampered Member States’ adjustment capacity, in some cases significantly. This contributed to increasing these Member States’ vulnerability.") [hereinafter A Blueprint for a Deep and Genuine Economic and Monetary Union].


46 A Blueprint for a Deep and Genuine Economic and Monetary Union, supra note 43.
1980s and 1990s. The new element emerging from the management of the crisis is that the Commission now touts such reforms as part and parcel with the goal of protecting Europe’s social fabric.

Take the example of the Greek program. Despite the severe consequences of what the Commission calls “fiscal consolidation” for the Greek economy and social fabric, the Commission has insisted that the Economic Adjustment Programs are precisely what Greece needs. It is worth quoting the Commission at some length here to fully convey its understanding of the relationship between the program’s structural reforms and social equity:

The economic crisis and subsequent fiscal consolidation measures have had an impact on the ability of Greece to achieve the Europe 2020 goals, especially the socially oriented ones. Nevertheless, the structural reforms, particularly those in the labour market, the liberalisation of several sectors and a number of measures to improve the business environment, will help promote competition, spur productivity, increase employment and reduce production costs, thus contributing to an increase in employment and limiting poverty and social exclusion in the medium term.\(^{47}\)

In this statement, the Commission recognized that part of the conditional austerity was compromising “the socially oriented” goals of EU policy. Given the economic destruction wreaked in Greece by the sudden stoppage of credit coupled with crippling austerity, this is an understatement. Nonetheless, the Commission insisted that the structural reforms would benefit Greece in the medium-term. In April 2012, the Commission published a communication entitled “Growth for Greece,” noting that it would be of interest to the Greek people, among others, “because it shows that a more fair, socially cohesive, trustworthy and efficient system can emerge from the current crisis.”\(^{48}\) In the communication, the Commission threw its weight behind the politically contested Economic Adjustment Programs, characterizing the loans that came with them as “financial aid” larger than the Marshall Plan,\(^{49}\) and repeatedly emphasizing that these programs were designed to ensure social equity:

The reforms agreed under the Second Economic Adjustment Programme seek to create a more equitable society—where all segments of the


\(^{49}\) Id. at 2. The Marshall Plan consisted of grants and not thus far profitable loans for creditor countries. It also included direct investment in the country instead of loans whose bulk went into debt repayment of Greece’s creditors. See Hellenic Republic Ministry of Finance, Budget of the Greek Government, Fiscal Year 2011, 165 (2010) http://www.minfin.gr/budget/2011/prop/PROPY1.10.pdf [in Greek] (illustrating in Table 8.7 that approximately €32.8 billion of the €38.1 billion borrowed went into debt servicing in 2010). See also Liz Alderman & Jack Ewing, Most Aid to Athens Circles Back to Europe, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/30/business/global/athens-no-longer-sees-most-of-its-bailout-aid.html?pagewanted=all&_r=0 (“[A]lmost none of the money is going to the Greek government to pay for vital public services.”).
population bear a fair share of the burden of adjustment and will all enjoy the benefits of reform . . . . The whole population will benefit from these changes and deserve better governance . . . .50

[S]ocial equity has always featured strongly in the design of the programmes. This is reflected in reforms of pensions, other social programmes, labour market, and health care and in the fight against tax evasion, where particular efforts have been made to protect the most vulnerable parts of the population.51

As is evident in these quotes, far from seeing this as a moment of suspension of social concerns such as poverty and equality for the sake of needed austerity, the Commission sees the loan conditionality, especially the structural reforms, as part and parcel with the project of creating a more equitable society in Greece.

This Article argues that this understanding of the necessary reforms that the EU Commission is promoting as manager of this crisis on behalf of creditor countries, marks an important moment for the EU as a whole, as it entails the entrenchment of a social policy vision that rests primarily on markets and minimal safety nets, in contrast to the aspirations of many a social progressive in Europe.52 However, this is not necessarily new. Indeed, I argue here that the crisis has been used by the European Commission as an opportunity to entrench a vision of social policy that was in the making for a while, but also to enhance its own enforcement capacity in social policy in a way that was not possible before the crisis. Perhaps, neither one of those elements would be as negative if it weren’t for the fact that there is little democratic consensus in Member States about these reforms, and there is very little democratic legitimacy for the competence creep the Commission’s entrenched version of technocratic governance entails.

To show that there was no consensus as to what constitutes desirable social policy at the European level, I will briefly sketch an account of the OMC process, where the discursive and policy battle for Social Europe was already raging before the 2009 crisis broke out.

III. THE PRE-CRISIS SOCIAL EUROPE

A “market-making” project in its origins,53 the European Union has incorporated social policy goals at various stages of its historical development.54

50 Growth for Greece, supra note 48, at 2.
51 Id. at 20.
52 Even though many social progressives have been skeptical about the capacity or desirability of Europeanizing social policy, others were calling openly for such a process through the constitutionalization of social rights at EU level. See, e.g., Brian Bercusson, Simon Deakin et al., A Manifesto for Social Europe, 3 EUR. L.J. 189 (1997). Later, some expressed disillusionment about the corrosive effects of the jurisprudence of the European Court of Justice on social rights and the meager results of Europeanization of social rights. See Alain Supiot, Conclusion: Europe’s Awakening, in BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE ‘EUROPEAN SOCIAL MODEL’? 292 (Marie-Ange Moreau ed., 2011).
54 For an overview of the EU’s engagement with social policy, see Catharine Barnard, EU “Social” Policy: From Employment Law to Labour Market Reform, in THE EVOLUTION OF EU LAW (De Búrca &
Since the Treaty of Amsterdam (1997), the EU has been directly engaged in fashioning employment policy through the Open Method of Coordination (OMC). Since the expansion of the OMC into social policy in 2000, the process has provided the main terrain for negotiating the substantive contents of the project of Social Europe. The main results of the process before the crisis were the formation of a technocratic consensus on the need to reform national social protection systems and an intensification of the imperative to use labor markets as the main mechanism for providing welfare to able-bodied adults. Such reforms, however, were stalling before the crisis due to political resistance from Member States, reflecting a lack of democratic consensus about them.

A. The Open Method of Coordination and the Lisbon agenda: Social Europe’s Maastricht?

The first OMC process was in employment policy. Member States undertook a process of yearly review to identify best practices with a commitment to eventually reform their employment policies. This coordination process resulted in specific goals of convergence towards “employability, adaptability, entrepreneurship and gender equality,” which, along with the commitment of Member States to the Stability and Growth Pact, meant a move away from social democratic understandings of employment policy. Thus, social democrats who had pushed for the inclusion of an Employment Title in the Treaty of Amsterdam with the hope that this would lead to a reconstruction of elements of the welfare state at European level, watched as employment policy became subordinated to economic policy, and was then redefined as an inseparable part of the structural reforms that would transform Europe into the most “advanced, knowledge based” society in the world.

Between 2000 and 2005, Member State social policy also became the object of an OMC process. In 2000, the European Council launched the Lisbon strategy for transforming the EU into “the most competitive and dynamic knowledge-based economy in the world . . . with more and better jobs and greater social cohesion.” According to the Lisbon Presidency conclusions, this involved “modernizing” systems of social protection and creating “active and dynamic welfare state[s].” Welfare regimes needed to be adapted “to ensure that work pays, to secure their long-term sustainability in the face of an ageing [sic] population, to promote social inclusion and gender equality, and to provide quality health services.”


58 Id. at 24.

59 Id. at 31.
Council then extended the scope of the OMC to the fields of poverty and social inclusion. Another OMC-like process on pensions started in 2001 and health care in 2004. The three distinct “social” OMCs were then streamlined into one OMC on social protection and inclusion in 2005.

The underlying idea of the Lisbon strategy was that competitiveness and social cohesion need not be a zero sum game, but should instead work together in a seamless process resulting in a knowledge-based economy with better jobs and social cohesion. The specific goal for social protection systems in the Lisbon context was “modernising the European social model, investing in people and combating social exclusion.” Far from being an impediment to growth, the Lisbon strategy now recognized social protection systems as the backdrop against which the transition towards a knowledge-based economy could be achieved. To attain this goal, however, Member States needed to pursue “active welfare policies,” and make sure their social protection systems were “sustainable,” especially in the face of an aging population.

The reactions to the social policy piece of the Lisbon agenda were widely varied, which goes to illustrate how, at that level of abstraction, the normative contents of the OMC were in the eye of the beholder. Some scholars argued that it did not constitute any deviation from the previous status quo in which the market-making aspects of the European project had prevailed. Fritz Scharpf, for example, noted that even though the OMC remained the “best hope” for Social Europe, that hope was constrained to “optimizing the adjustment of social protection systems to market forces and fiscal constraints.” Chalmers and Lodge discussed the “colonization of the welfare state by the economic policy-making process.” However, there were others, like Mary Daly, who noted that there were enough new elements in the Lisbon agenda that pointed in a more socially progressive direction, which, for the first time, made fighting poverty and social exclusion goals at the highest policy level. In addition, the OMC on social protection inaugurated with Lisbon allowed the inclusion of a wide variety of civil society actors, like anti-

---

60 The Open Method of Coordination’s main characteristics were summarized by the Lisbon Presidency Conclusions as follows: “fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; periodic monitoring, evaluation and peer review organised as mutual learning processes.” Id. at 37.


62 Lisbon European Council, supra note 57 at 5.
63 Id. at 31.
64 Scharpf, supra note 53, at 645.
poverty NGOs, to participate in the shaping of the EU agenda on social policy. Even more enthusiastic observers called it a “Maastricht for Welfare.”

As the OMC process on social inclusion advanced, some more concrete goals for the social policies of Member States began to emerge. The 2004 Joint Report identified eight common challenges for Member States struggling with social exclusion and poverty. The first on the list continued to be the development of inclusive labor market policies that would promote employment, confirming the emphasis on employability as one of the main ways out of poverty in the Commission’s view. Far from a monodimensional emphasis on the markets as panacea, the OMC process on social inclusion seemed to be generating some policy goals closer to traditional concepts coming out of European welfare traditions, such as the need to guarantee adequate incomes.

B. The Relaunching of Lisbon and Markets as Welfare

The co-existence of market aspects and state provisioning aspects in the social OMC, however, was short-lived. A round of revisions of the Lisbon strategy resulted in its so-called re-launch in 2005. Many observers characterized the re-launch as a toning down of the social goals and a prioritization of the flexibilization agenda in employment policy. Under the guidance of new Commission President Jose Manuel Barroso, the Lisbon strategy was revised to place more emphasis on the “jobs and growth” agenda. Even though the European Council continued to assert that the Lisbon strategy should “reinforce the European social model” with its emphasis on “full employment” and “social cohesion,” the revisions indicated a

---

67 KENNETH ARMSTRONG, GOVERNING SOCIAL INCLUSION: EUROPEANIZATION THROUGH POLICY COORDINATION 83 (2010).
69 The eight major challenges identified in the first joint report continue to be the following: developing an inclusive labor market and promoting employment as a right and opportunity for all; guaranteeing an adequate income and resources to live with dignity; tackling educational disadvantage by prevention and lifelong learning opportunities; preserving family solidarity while promoting gender equality and protecting the individual rights and benefits of family members and the rights of the child; ensuring proper accommodation for all; guaranteeing equal access to quality services; improving public services so that they meet local and individual needs; regenerating areas of multiple hardship. See generally Communication from the Commission of 12 December 2003 Concerning the Joint Report on Social Inclusion Summarising the Results of the Examination of the National Action Plans for Social Inclusion, COM (2003) 773 final (Dec. 12, 2003) [hereinafter Communication from the Commission of 12 December 2003].
70 Communication from the Commission of 12 December 2003, supra note 69, at 33 (identifying the eight challenges including “guaranteeing an adequate income and resources to live with dignity; tackling educational disadvantage; promoting accommodation for all; guaranteeing equal access to quality services; and improving public services so that they meet local and individual needs”). See generally ESPING-ANDERSEN, supra note 16 (identifying three variants of welfare capitalism: the liberal, the corporatist/statist, and the social democratic). Universal provision of public services, such as the one emphasized in the Joint Report, is characteristic of the social democratic regimes according to Esping-Andersen.
belief that those goals would be best served by “raising the employment rate” along with “reform of the social protection” systems.72

The overall goal of the re-launched Lisbon program was to fashion a European social model whose emphasis would be employment as the main route towards social inclusion, with an important role for public investment in education and skills, and a fight against excluding people from the labor markets. The Commission stated that the overarching objective was to fashion “adequate, accessible, financially sustainable, adaptable and efficient social protection systems and social inclusion policies” that would at the same time be compatible with the Union’s growth objectives.73

The primacy of the fiscal sustainability imperative was evident in this reformulation of the OMC process. The Commission emphasized the central role of labor markets in providing basic welfare, the need for protecting the most marginalized through welfare, and the imperative of reforming pension systems with a view towards future sustainability. Reactions in the European Parliament against the shift in emphasis of the Lisbon re-launch were met with frank condescending paternalism by Commission President Barroso, who, in addressing the European Parliament avowed that he loved the social agenda just as well, but that the priority needed to be his “sick child,” that is, the stagnating economy.74

C. The Pre-Crisis Emergence of Technocratic Social Europe

Despite the Commission’s liberal use of the idea that the EU needed to protect “its” social model, Member States of the European Union had—and still have—dramatically different regimes of social protection.75 Thus, even as the Commission was discussing the need for the EU to modernize its social model, Member States’ welfare regimes fell under at least four distinct types of welfare provisioning with different degrees of reliance on the state, the market, and the family for the provision of basic welfare. As Esping Andersen has aptly shown, different types of welfare regimes in Europe entailed different degrees of de-commodification, namely the degree to which a specific regime allows individual workers to be free from pressure to commodify their labor in order to obtain their basic survival.76 They also relied on personal, family obligations to a different extent for the performance of basic care work, allowing different degrees of de-familialization for individual workers.

---

72 Presidency Conclusions, Brussels European Council (Mar. 22−23, 2005), at 10 (“The objectives of full employment, job quality, labour productivity and social cohesion must be reflected in clear and measurable priorities: making work a real option for everyone, attracting more people into the labour market, improving adaptability, investing in human capital, modernising social protection, promoting equal opportunities inter alia between men and women, and fostering social inclusion.”).


75 See generally ESPING-ANDERSEN, supra note 16.

76 Id.
The Commission’s vision of modernized social protection regimes emerging out of the 2005 Communication entailed a combination of elements from two ideal types, the liberal and the social democratic. More specifically, the Commission’s most desirable reforms would mean intense dependency on labor markets for providing basic welfare, and therefore a low degree of de-commodification. Citizens of a state endowed with an OMC compliant social protection regime would have to look to markets first for the provisioning of basic needs. However, this would be tempered somewhat in the cases of individuals suffering from extreme poverty or marginalization, who would be the target of universal, means-tested benefits, aimed at correcting their disadvantage. Nonetheless, even in those cases, the goal would not be freeing the marginalized individual from the need to work, but rather assuring the resources necessary to transform them from marginalized citizen to employable participant in the labor market. Universal-style entitlements would be assured to marginalized groups and aging workers to make sure they could rebound and become employable individuals.

On the other hand, the Commission’s ideal scheme would entail a degree of de-familialization characteristic of social democratic regimes rather than liberal or corporatist/statist. This can be deduced from the emphasis on the need for increased labor participation of women in the marketplace. The need arises, of course, from the fiscal unsustainability of the current social protection regimes, according to the Commission, but the conclusion is inevitable. If women will be allowed to participate in the market in increasing numbers, for example, there will have to be some provision for child care either by the state or the market, at affordable rates, so that women can be free from care labor and become employable workers in the marketplace.

This analysis illustrates that despite the rhetorical emphasis on the European social model, the project of social policy coordination towards the targets set by the Commission would entail a dramatic transformation of welfare regimes in various Member States. In some, entitlements would have to be pared down to the basics, sacrificing de-commodification for sustainability. In others, entitlements would have to be universalized and homogenized in order to allow individuals previously “trapped” in the family to emerge as employable individuals in the market. In all cases Member States would need to undertake dramatic reforms starting from distinct starting points. Thus, the concrete policy message of modernization of a European social model contained a basic tension: for current levels of protection to become sustainable, welfare regimes needed to be reformed. The direction of reforms, however, necessarily entailed a dramatic transformation of levels of protection towards re-commodification and de-familialization.

This might not have been as problematic had the OMC process resulted in a truly bottom-up and democratic, rather than a technocratic consensus on required reforms. By many accounts the most successful aspect of the OMC process has been the “learning” aspect of the exercise amongst direct participants in the process, most of them state bureaucrats and academics. After more than a decade of repeated

---

77 European Commission, A Renewed Commitment to Social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion, at 1, COM (2008) 418 final (July 22, 2008) [hereinafter A Renewed Commitment to Social Europe] (citing mutual learning first in a list of OMC
rounds of consultation, the OMC was successful in generating a language of social policy at the European level, shared by policymakers and academics alike, discussing issues of poverty and social exclusion in the mode of concepts, statistical measurements, and aspirations generated by the OMC process and its sequels. This language defined the contours of the project of “Social Europe” as imagined by various institutional actors up until the crisis hit in 2008.

Nonetheless, technocratic consensus was not enough. By 2008, right before the outbreak of the crisis, the Commission expressed frustration about the rhythm of reforms in the social policy coordination field. The 2008 Communication by the Commission on the need for reinforcement of the social OMC process noted that “more can and should be done,” especially in the domain of pension reforms. More specifically, it suggested borrowing benchmarking and targeting practices from other OMC processes such as employment, in order to improve implementation by national authorities of commonly agreed upon objectives. In other words, the Commission believed that the social OMC process had yielded consensus among the various actors on the desired direction of reforms, but the latter were stalling because of national politics. In terms of its own enforcement capacity, the Commission’s hands were tied. Despite the meager results on the ground, the desired reforms in systems of social protection, including pensions and healthcare, remained firmly in the domain of mere policy coordination. The Commission could, at best, help Member States continue the process of mutual learning and standard setting through the OMC process, without much capacity to force Member States into the desired reforms.

Paradoxically, the Commission also seemed to understand that reform stalling was partly due to the need for more consensus building from the bottom up than was available at the time. It recognized that target setting in the Social OMC required

---


78 *A Renewed Commitment to Social Europe*, supra note 77, at 2.

79 Id. at 8.
more consensus building and would probably be more gradual, involving Member States and other relevant “stakeholders.” The areas of consensus were still vague as to substantive content, but concise enough to allow the Commission to hold that more consensus building was necessary even as it was pushing for more reforms in the direction “agreed.” More specifically, the Commission could arguably rely on the consensus reached that after the crisis there was a need for radical reform for the sake of sustainability. Indeed, the crisis itself could be pointed to as evidence of the potential effects of failure to reform. As I will argue in the next section, this is exactly how the Commission framed the crisis in relationship to social policy reform.

In the next section, I show how measures initially designed to deal with the debt sustainability of indebted countries were integrated into overall EU policy as necessary for everyone. Substantively they represented an accentuation of the neoliberal trend present since 2005. Procedurally, they entailed further competence creep in social policy through the new macroeconomic governance procedure and the fiscal sustainability imperative.

IV. CRISIS MANAGEMENT AND THE NEW SOCIAL EUROPE

In this section I argue that the European Commission’s management of the crisis between 2009 and 2012 marks the latest significant episode of competence creep. Important social policy reforms, including pension and health care, moved from the domain of voluntary coordination through the OMC to the domain of strict loan conditionality for bailout countries, and eventually to the domain of enhanced economic policy coordination for every member of the euro zone. Thus, the EU emerged with enhanced capacity to twist the arms of Member States. The Commission repeatedly emphasized that interdependency between euro zone members and the possibility of spillover effects dictated the deepening of coordination in social policy. It also articulated a highly technocratic vision of reforms, seemingly removing previously contestable and highly contested policy goals from the political realm.

I also argue that the vision for social policy reform that emerged from the Commission’s management of the crisis entails a one-size-fits-all recipe that collapses social policy into the need for generating growth and setting up jobs as the primary safety net. Gone is the Commission’s 2008 recognition that safety nets played an extremely important role in avoiding the marginalization of the most vulnerable immediately after the crisis hit, and its assertion that jobs in and of themselves do not necessarily lift people out of poverty.

The first step in this process was the formulation of the Europe 2020 program in the spring of 2010. In Europe 2020, the Commission articulated its vision for “smart, sustainable, and inclusive growth.” The program was formulated against

---

80 Id.
81 See discussion infra Section IV.C.2.
83 Id.
the backdrop of the Greek sovereign debt crisis, and the Commission relied on this background to argue that more and deeper reforms of the kind previously recommended were needed for Europe to overcome the crisis. The second step in this process was the articulation of loan conditionality for Greece, Portugal, and Ireland in the loan agreements with the euro zone countries and the IMF. Developing the conditions and monitoring progress gave the Commission an opportunity to further articulate the types of reforms it considered necessary for growth. The vision emerging from the loan agreements is closely related to the neoliberal agenda for growth stemming from the OECD’s 1994 Jobs Study. The final step in the process was the carry over of lessons learned through the bailout management to the overall process of economic policy coordination for the euro zone in general.

A. Europe 2020: Smart, Sustainable, and Inclusive Growth as Structural Adjustment

In March 2010, in the full aftermath of the financial crisis, and at the still early stages of the sovereign debt crisis, the Commission announced the launch of the Europe 2020 project.84 According to the Commission, Europe 2020 set out “a vision of Europe’s social market economy for the 21st century” by pursuing the “mutually reinforcing” goals of attaining a “smart, sustainable, and inclusive growth.”85 The Europe 2020 program, with its two accompanying “flagship initiatives,”86 used the background of the global financial crisis to articulate a policy mix centered on employment markets as safety nets against poverty, conflating macro-economic stability with social policy.

Commission President Barroso prefaced the announcement of the Europe 2020 program with the following:

- Economic realities are moving faster than political realities, as we have seen with the global impact of the financial crisis. We need to accept that the increased economic interdependence demands also a more determined and coherent response at the political level . . . .

- [The crisis] has also exposed some fundamental truths about the challenges that the European economy faces . . . . How Europe responds will determine our future.

- The crisis is a wake-up call, the moment where we recognise that “business as usual” would consign us to a gradual decline, to the second rank of the new global order. This is Europe’s moment of truth. It is the time to be bold and ambitious.87

84 Id. at 5. Building on the experience of the OMC with their repeated rounds of benchmarking and peer review, Europe 2020 set specific targets for the year 2020. The targets were set in the areas of employment rates, investment in research and development, pollution levels, rates of early school dropouts, and numbers of Europeans living in poverty.
85 Id.
86 Id. at 5–6. Finally the program was completed by a number of flagship initiatives, Europe 2020’s code word for EU funded programs.
87 Id. at 2.
Thus, Barroso stressed economic interdependence as the fact dictating the need for a more coherent response.\textsuperscript{88} He also pointed to the slow pace of previous reforms, making a plea for acceleration:

Either we face up collectively to the immediate challenge of the recovery and to long-term challenges . . . . Or we continue at a slow and largely uncoordinated pace of reforms, and we risk ending up with a permanent loss in wealth, a sluggish growth rate (“sluggish recovery”) possibly leading to high levels of unemployment and social distress, and a relative decline on the world scene (“lost decade”).\textsuperscript{89}

The structural changes envisioned as necessary for achieving Europe 2020’s “inclusive growth” were largely focused on structural reform of labor markets and social protection regimes and aimed to achieve higher employment rates, while providing some basic levels of protection through “adequate access” to pensions and health services. Similar to prior articulations of policy goals after the 2005 re-launch of the Lisbon strategy, employment and social policy in Europe 2020 were subsumed under the economic policy goals. It was more or less assumed that once fiscal consolidation measures and structural reforms get going, those constitute sufficient employment and social policy by themselves, with the exception, perhaps, of special measures to deal with cases of extreme poverty and social exclusion. This is also why the Commission insisted on an “exit strategy” not from the crisis, but from the Keynesian (counter-cyclical) measures the crisis has forced Member States to adopt.

Sound public finances are critical for restoring the conditions for sustainable growth and jobs so we need a comprehensive exit strategy. This will involve the progressive withdrawal of short-term crisis support and the introduction of medium to longer-term reforms that promote the sustainability of public finances and enhance potential growth:

The Stability and Growth Pact provides the right framework to implement fiscal exit strategies and Member States are setting down such strategies in their stability and convergence programmes.\textsuperscript{90} The degree to which

\textsuperscript{88} This is an idea that has permeated Commission communications since the financial crisis and seems to constitute the new understanding among the EU policy elites. Interdependence means EU Member States need more cohesive policy responses, and they also need enhanced enforcement mechanisms on existing coordination of policy. In November 2012, the Commission published a Blueprint for a Deeper and Genuine EMU, laying out a vision for a path towards greater integration. The idea of policy spillovers was prominently featured as justification for such a move. See Europe 2020, supra note 82, at 8 ("The 27 EU economies are highly interdependent: the crisis underscored the close links and spill-overs between our national economies, particularly in the euro area. Reforms, or the lack of them, in one country affect the performance of all others, as recent events have shown."). See A Blueprint for a Deep and Genuine Economic and Monetary Union, supra note 43, at 3, 16, 20, 42 ("Little consideration was given to the euro area-wide spillover effects of national measures. National economic policy-making paid insufficient attention to the European context within which the economies operate . . . . This is the only way to effectively break the vicious circle linking Member States’ public finances and the health of their banks, and to limit negative cross-border spillover effects . . . . The potentially significant spillover effects associated with structural reforms in the euro area justify the use of specific instruments, as has already been done through the enforcement mechanisms introduced under the six-pack legislation . . . . Larger spillover effects within the currency union call for such a more stringent process of economic policy coordination for euro area Member States.").

\textsuperscript{89} Europe 2020, supra note 82, at 9 (emphasis added).

\textsuperscript{90} Id. at 26.
employment and social policy implications are derived from this position on macro-economic sustainability is evident: fiscal consolidation and long-term financial sustainability will need to go hand in hand with important structural reforms, in particular of pension, health care, social protection and education systems. Public administration should use the situation as an opportunity to enhance efficiency and the quality of service.91

Growth and macro economic stability, in other words, imposed nothing less than the complete reform of existing basic structures of public administration and social protection in Member States, with the paradoxical purpose of assuring the “sustainability of our social models.”92 As was the case before the crisis, if Member States were to fully pursue the structural reforms recommended here, they would end up with a different set of necessary structural reforms. Some would need to upgrade the level of protection provided, expanding coverage to everyone at some basic level, whilst others would need to reduce levels of entitlement downwards. In all cases, however, “public administration should use the situation as an opportunity to enhance efficiency and the quality of service.”93 This is a policy goal that would be further elaborated by the Commission in the process of the annual economic policy coordination and would be used to introduce “good governance” ideas and indicators into European governance.

Even the term “inclusive growth” entails a certain conflation of the economic goal of achieving growth with the social goal of having an inclusive society. Notice the Commission’s fleshing out of the term. The Commission defined inclusive growth as “fostering a high-employment economy delivering economic, social and territorial cohesion.”94 According to the Commission, participation in the labor markets and access to the labor markets remained the main goal of an inclusive society:

Inclusive growth means empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build a cohesive society . . . . It is about ensuring access and opportunities for all throughout the lifecycle. Europe needs to make full use of its labour potential to face the challenges of an ageing [sic] population and rising global competition. Policies to promote gender equality will be needed to increase labour force participation thus adding to growth and social cohesion.95

Social protection systems had to be modernized. The resulting modernization would not guarantee the safety net that allows for some degree of de-commodification of labor,96 as it traditionally had in the social democratic welfare regimes, but rather would offer a guarantee against deprivation whilst the

91 Id.
92 Id. at 18.
93 Id. at 26.
94 Id. at 10.
95 Id. at 17.
96 See ESPING-ANDERSEN, supra note 16.
worker/citizen performs her duty to re-skill and bounce back into the labor market “through the lifecycle”—or, to quote Tom Waits, “forevermore.”

Thus, inclusive growth in the Europe 2020 initiative entails a fusion of employment and social policy goals, with the understanding that they are mutually reinforcing. Gone is the 2008 realization by the Commission that “higher growth and more jobs have in themselves not been sufficient to achieve the hoped-for results in terms of poverty reduction and improvement of the circumstances of the most vulnerable.”97 Instead, the 2010 Commission was back to emphasizing that “restoring economic growth with more and better jobs will be the key to fight against poverty.”98

This conflation is also obvious in the choice of the two Flagship Initiatives (EU lingo for EU funded programs) to support the struggle for inclusive growth, one on Skills and Jobs and the other on Poverty and Social exclusion.99 The Skills and Jobs initiative has as its goal “modernising labour markets with a view to raising employment levels and ensuring the sustainability of our social models.”100 Ensuring the sustainability of social models in turn means that, “Member States will need to implement their national pathways for flexicurity . . . to reduce labour market segmentation and facilitate transitions as well as reconciliation of work and family life.”101 More than that, they will need to promote active aging policies, to promote continuous labor force training, and to reform their tax systems so as not to discourage job creation through high taxes on labor and the self-employed.102

In its 2010 Communication elaborating on the Agenda on Skills and Jobs, the Commission added that Member States needed to improve the “business environment” in order to support job creation. This included finding ways to ease administrative and legal obstacles to hiring and firing and to reduce non-wage labor costs.103 This directive was in tension with Europe 2020’s initial instruction to Member States to “[p]romote and monitor the effective implementation of social dialogue outcomes.”104 The reason for the tension is that many of the legal obstacles to hiring and firing were the legally binding results of collective agreements, which were themselves outcomes of social dialogue. During the Commission’s work on the conditionality of the loans to Greece, Portugal, and Ireland, the tension between these two goals, both part of Europe 2020, became even more evident.105

The initial articulation of the Platform Against Poverty in Europe 2020 entailed basic support for a safety net (including adequate income support and access to

---

97 A Renewed Commitment to Social Europe, supra note 77, at 4.
100 Europe 2020, supra note 82, at 18.
101 Id. at 19.
102 Id.
103 An Agenda For New Skills and Jobs, supra note 99, at 18–19.
104 Europe 2020, supra note 82, at 19.
105 See discussion infra Section IV.B.
health care), especially for “groups at particular risk.” Even though this initial elaboration of the Platform could be plausibly construed as favorable to traditional notions of solidarity coming from continental welfare regimes, the Commission Communication on the program published later in 2010 refocused the agenda on employment as the main motor for avoiding poverty and social exclusion. The Commission asserted that “[r]estoring economic growth with more and better jobs will be the key to the fight against poverty.” And, even more plainly, the Commission noted, “Getting a job is the safest route out of poverty for those who can work.”

Admittedly, access to employment needed to be complemented with access to social protection and essential services, such as health care. A closer look at the elaboration of these points in the Platform reveals, however, that when talking about access to such services, the Commission repeatedly shifted attention from access for existing populations to access for future generations. This move turned a discussion of a universal entitlement into a discussion about the fiscal sustainability of the same. The Commission analyzed pensions systems as “crucial for tackling elderly poverty.” However, the discussion soon became one of fiscal sustainability:

[The rapid ageing [sic] of Europe’s population is having wide-ranging impacts on all types of pension schemes and gives unprecedented urgency to the agenda for reforms . . . . The key to adequate and sustainable pensions in the future is ‘active ageing’ [sic] which implies in particular creating conditions that allow older workers to remain longer on the labour market.]

The need for future sustainability then dictated the necessary reforms: longer working lives combined with a paring down of entitlements to levels low enough to be able to sustain future generations. The discussion on access to health care services also emphasized the need for increased efficiency of health systems, given the budget pressures on Member States.

At no point did this policy entrenchment of employment market primacy deter the Commission from invoking the idea of Social Europe. In fact, defending European social models became the main justification for the pursuit of the same structural reforms that would dramatically alter them and in some cases, dismantle them:

[O]ur exit from the crisis must be the point of entry into a new economy. For our own and future generations to continue to enjoy a high-quality of healthy life, underpinned by Europe’s unique social models, we need to take action now.

---

106 Europe 2020, supra note 82, at 19.
107 The European Platform Against Poverty and Social Exclusion, supra note 98.
108 Id. at 6.
109 Id. at 7 (“Preventing illness and providing access to effective, affordable health and social care are therefore important measures in combating poverty. This is a challenge for public health policy and health systems where increasing demand coupled with severe budget pressure has given new urgency to the efficiency of health systems: the challenge is to improve efficiency while ensuring access for all to quality health care.”) (emphasis omitted).
110 Europe 2020, supra note 82, at 10.
Welfare regimes were credited by the Commission with having helped people deal with the effects of the global financial crisis. Yet, they were simultaneously criticized for their rigidity and lack of adaptability to the global economy, to the extent that they allowed unemployed people to rely on state transfers rather than return to the labor market for a job, even at a reduced wage. This tension became evident in the Commission’s elaboration of “activation measures” in the Irish loan conditionality. The activation measures envisioned included removing minimum wage protections that had served as automatic stabilizers in the face of the global financial crisis because they allowed unemployed workers to remain happily unemployed instead of seeking a lower-wage job to deal with the crisis.

B. Structural Adjustment in Loan Conditionality

The next stage in the Commission’s policy elaboration through crisis-management came with the Economic Adjustment Programs (EAPs) of euro countries seeking bailouts from other euro zone countries and the IMF. The EAPs included strict conditionality for each borrowing country. The Commission participated in the elaboration of conditionality for Greece, Ireland, and Portugal as a representative of the euro zone creditor countries. Notably, structural reforms in labor law, privatizations, and an overhaul of inefficient public sectors became the focal points of the program conditionality. These reforms were partly justified on the basis of their potential for spurring growth in borrowing countries, but also on their potential for enhancing social equity. Thus, they were not limited to borrowing countries, which had to urgently deal with their competitiveness problem through internal devaluation. Rather the implication of the conditionality in the EAPs was that they included a recipe for growth, one that also conformed with social equity, and could, therefore, be followed elsewhere in Europe. Thus, the Commission put forth structural adjustment as a recipe for growth in its elaboration of loan conditionality for borrowing countries.

It should be noted that the idea of structural adjustment in the form of labor flexibilization has been challenged as a one-size-fits-all recipe for growth. The OECD originally introduced the idea that labor regulation was largely to blame for high levels of unemployment in developed countries. International financial institutions adopted labor reform recommendations calling for labor market deregulation as part of their loan programs with developing countries. The next
decade of research, however, revealed, at best, ambivalent results about the relationship between labor market flexibilization and unemployment. The discussion shifted from labor deregulation as a pre-requisite to growth to establishing appropriate labor market institutions as a pre-requisite to growth. After more than a decade of policy recommendations and reforms the OECD reviewed and significantly revised its original Jobs Strategy Report. According to the 2006 revision, highly concentrated collective bargaining systems tended to achieve lower unemployment. This is a surprising reversal given the originally unequivocal recommendation to decentralize collective bargaining for the sake of growth and employment. In its 2006 revision, the OECD insisted that collective bargaining could still result in downward wage rigidities but urged that “it would be useful to take fuller account of the fact that national industrial relations structures and practices are part of the social and political fabric, implying that bargaining structures are not easily changed by government action.” Equally importantly, the 2006 revision noted that “the effect of Employment Protection Legislation on overall unemployment is probably small.” This was a far cry from the former casual observation that countries with “stringent legislation generally have a high rate of long-term unemployment.” Even more importantly, the OECD seemed to admit that the famous Anglo-Saxon model with low benefits and low investment in training programs for the unemployed yielded the same results as a system with generous unemployment benefits along with active labor market programs. Finally, the 2006 report observed that even though simple economic rationality suggests that minimum wages would lead to less output and less job creation, the evidence was “mixed” and “ambiguous.” The World Bank’s own review of the literature in 2013 confirmed these more nuanced findings, exonerating labor market institutions from blanket condemnation.

Despite these developments, the EU took a definite turn towards the entrenchment of ideas of labor market flexibility as both a culprit of inefficient “rigidities” and a potential locus for reforms through its crisis management. This

---

115 See Richard B. Freeman, Labour Market Institutions Without Blinders: The Debate Over Flexibility and Labour Market Performance, 19 INT’L ECON. J. 129 (2005); Alvaro Santos, Labor Flexibility, Legal Reform, and Economic Development, 50 VA. J. INT’L L. 43, 49 (2009) (reviewing the relevant literature and positing that “we know less than we might think” about the impact of labor market flexibility on “job creation, unemployment duration, productivity, investment in research and development, and, ultimately, on economic growth”). See also JAMES GALBRAITH, INEQUALITY AND INSTABILITY: A STUDY OF THE WORLD ECONOMY JUST BEFORE THE GREAT CRISIS 194–203 (2012).


118 Id. at 86 (“[R]ecent empirical research . . . suggest[s] that high corporatism bargaining systems tend to achieve lower unemployment than do other institutional set-ups.”).

119 Id. at 88.

120 Id. at 96.

121 OECD Jobs Study: Facts, Analysis, Strategies, supra note 113, at 34.

122 OECD 2006, supra note 117, at 193 (“[A] policy mix with low unemployment benefits and low investment in active labour market programmes appears to perform no better than a policy mix with high unemployment benefits and high investment in active labour market programmes.”).

123 Id. at 86.

section describes how labor market flexibilization became the centerpiece of loan conditionality for the sake of both growth and equity. The conditionality of the loans to Greece, Ireland, and Portugal, pushed the concept of “labor market activation measures” into uncharted territory by equating the dismantling of unemployment protection with activation measures. Crisis management reinforced the idea that labor institutions created wage “rigidities” and broadened the conditionality of the loans in “good governance” directions.125

1. Labor Flexibilization for Growth

Greece signed two loan agreements each accompanied by an Economic Adjustment Program (EAPGr1 and EAPGr2). Portugal and Ireland signed one loan agreement each, accompanied again by their respective Economic Adjustment Programs (EAPPort and EAPIr). Each of these programs came with strict conditionality, heavily relying on market flexibilization as a recipe for growth.

EAPGr1 declared that beyond the short-term goal of fiscal adjustment, that is, austerity, the goal of the Program was to spur export-led growth and foreign-investment in the medium term:

In parallel with short-term anti-crisis fiscal measures, there is a need to prepare and implement an ambitious structural reform agenda to strengthen external competitiveness, accelerate reallocation of resources from the non-tradable to the tradable sector, and foster growth. Structural reforms that boost the economy’s capacity to produce, to save and to export are critical for the success of the programme and recovery of the economy. Reforms are, in particular, needed to modernize the public sector, to render product and labour markets more efficient and flexible, and to create a more open and accessible business environment for domestic and foreign investors, including a reduction of the state’s direct participation in domestic industries. The deep structural reforms foreseen in the programme, including reform of public management, will not only help address current challenges but will also boost growth prospects in the medium and long run.126

As this quote illustrates, the scope of the required reforms was quite sweeping from the beginning. Beyond a “modernization” of the public sector, the reforms included a “flexibilization” agenda in regard to product and labor markets, as well as far-reaching privatizations. This program bore sure marks of similarity to an understanding of growth that came out of international development institutions during the 1990s. With regards to the labor reform more specifically, EAPGr1 echoed the 1994 OECD Jobs Study flexibilization agenda rather than the 2006 revision.127 EAPGr1 noted that labor market reforms would “spur job creation and

126 EAPGr1, supra note 1, at 10.
increase wage flexibility.” It also affirmed that conditionality was carefully chosen to prioritize those reforms that would boost growth and jobs. EAPPort also included similar labor market reforms; although the word labor flexibilization was carefully avoided. More importantly, even though the Commission recognized that Ireland already had flexible labor markets, it advised further reforms.

2. Labor Flexibilization for Social Equity

The conditionality of the first Greek loan was designed mostly by IMF staff. Nonetheless, a concern with “social” effects of the program can be discerned in several places. Specifically, the program provided for the establishment of a universal minimal-entitlement, for every elderly citizen without means, so as to strengthen minimum social safety nets. It also urged a revision of the existing safety net with a view to better targeting entitlements towards the weakest citizens. For countries like Greece, this might have been a welcome reform in the direction of stronger public safety net institutions had it not been imposed in the middle of a crippling recession made worse by the austerity cuts. More importantly, labor market reforms were touted as central for reasons of “equity,” as they were thought to increase job opportunities for the young and the long-term unemployed:

Labour market reforms will spur job creation and increase wage flexibility . . . . Other than efficiency aspects, reforms are also needed to improve equity, therefore increasing job opportunities for young and long term [sic] unemployed and improving access to services.

The idea that equity for the most vulnerable groups, including the youth and women, demanded a dismantling of labor protection for those already employed was thus an early part of the Commission’s elaboration of conditionality. The Commission explicitly attributed difficulties of the youth, women and the long-term unemployed in entering the market to increased levels of employment protection legislation for both temporary and permanent workers.

This idea would eventually make it to the broader process of economic policy coordination for euro zone countries. Its basis is some empirical evidence that

---

128 EAPGr1, supra note 1, at 20.
129 Id. at 21.
130 Directorate-General for Econ. & Fin. Aff., The Economic Adjustment Programme for Portugal, Occasional Papers 79, June 2011, at 19, 77 [hereinafter EAPPort] (“Revise the unemployment insurance system to reduce the risk of long-term unemployment while strengthening social safety nets; reform employment protection legislation to tackle labour market segmentation, foster job creation, and ease the transition of workers across occupations, firms, and sectors; ease working time arrangements to contain employment fluctuations over the cycle, better accommodate differences in work patterns across sectors and firms, and enhance firms’ competitiveness; promote labour cost developments consistent with job creation and enhanced competitiveness; ensure good practices and appropriate resources to Active Labour Market Policies to improve the employability of the young and disadvantaged categories and ease labour market mismatches.”).
131 Directorate-General for Econ. & Fin. Aff., The Economic Adjustment Programme for Ireland, Occasional Papers 76, Feb. 2011, at 34 [hereinafter EAPIr].
133 EAPGr1, supra note 1, at 20.
134 Id. at 23.
suggests that when a labor market combines strong employment protections for the currently employed and very few protections for temporary contract workers it incentivizes the substitution of permanent jobs with temporary contracts, rendering precarious the conditions of the most under-privileged groups.\textsuperscript{135} The necessity of such reforms as a general policy guideline, however, is highly doubtful, especially since there is also empirical evidence showing that strong levels of employment protection combined with other labor market institutions such as activation measures can result in equally dynamic labor markets.\textsuperscript{136}

More importantly, the identification of equity concerns with less labor protection that began developing in the loan conditionality entailed a collapse of the idea of social equity into the idea of equal access to markets for the sale of one’s labor.

3. Dismantling Welfare as an Activation Measure

Ireland became the second EU Member State to ask for a bailout in November 2010. The conditionality for Ireland’s bailout warrants some analysis because it too conditioned the disbursement of the loan tranches upon performance of labor market reforms, despite Ireland’s avowed “labour market flexibility,” which had led its adjustment to be already well under way.\textsuperscript{137} In addition, Ireland’s crisis had been caused by a banking bubble and a rescue of the banking sector after the bubble burst, and not by the accumulation of public debt through the public wage bill.\textsuperscript{138} Distinguishing between labor market reforms that supposedly led to the crisis and labor market reforms that would help the country exit the crisis through downward adjustment of wages and prices—internal devaluation—was therefore easier. In Ireland’s case, there were no such supposed rigidities predating the crisis and the conditionality of the program acknowledged that “Ireland has a good track record regarding the flexibility of its labour market and is recognised to provide an attractive business environment.”\textsuperscript{139} Nonetheless, the structural reforms demanded of Ireland focused on the labor market, and specifically on minimum wage, unemployment protection, and activation measures.

The EAPFr’s first reason for wanting to lower minimum wages was the goal of internal devaluation. More specifically, despite the downward adjustment of wages since the bursting of the bubble, the Commission found that Ireland’s real wages had actually increased, despite cuts, because of the dramatic drop in prices. However, demand had not dropped sufficiently to restore Irish current account imbalances through a drop in imports, regardless of whether wages had contributed to the initial problem.

More importantly, the Commission thought that minimum wages might be affecting labor demand for the low-skilled workers who had been suffering most

\textsuperscript{135} OECD 2006, supra note 117, at 96.
\textsuperscript{136} Id. at 98.
\textsuperscript{137} Id. at 98.
\textsuperscript{138} EAPFr, supra note 131, at 21.
\textsuperscript{139} Id. at 15 (attributing the deterioration of public finances to the banking sector rescue more than any other factor, and noting that “[t]he total impact of support measures to the financial sector on the general government deficit amounted to 22.7% of GDP in 2009–10”).
\textsuperscript{140} Id. at 34.
from unemployment since the construction bubble burst. However, this argument for reducing minimum wages was not proven anywhere; the Commission simply referred the reader to a chart showing that the unemployment figures were worst amongst the low-skilled since the crisis. This was accompanied by a chart showing that Ireland had the second highest minimum wage requirements after Luxembourg and a footnote explaining that even though Ireland’s minimum wage was not as high a percentage of the Irish average wage, it was high in terms of employers’ potential labor costs. In other words, the downward shift in minimum wage was mandated by the unproven idea that its change might spur employment for the low-skilled and the more obvious goal of inducing cost convergence through internal devaluation.\textsuperscript{140}

Another interesting characteristic of the Irish program was the complete conflation of labor activation measures with a reduction in unemployment protection. Before the crisis, “activation measures” in the OMC process often referred to positive action, such as retraining programs and re-skilling for the purpose of allowing unemployed workers to re-enter the labor market. In the Irish program, the reduction in severance payments and unemployment protection recommended appeared as itself part of the “activation” measures envisioned by the EAPIr. Given that activation in labor markets is one of the main components of the Europe 2020 program and the Commission’s vision on how to enhance employment, it warrants some analysis. According to the Irish EAP, Ireland needed to decrease its levels of unemployment protection and “increase incentives to accept job offers.”\textsuperscript{141} In other words, the degree of de-commodification of labor allowed by the Irish unemployment protection legislation was seen as an obstacle to growth and to increased participation rates in employment.

Here is how the Adjustment Program articulated the benefits of lowering minimum wage protections and other regulated wages:

\textbf{A reduction in the minimum wage and a review of the framework for other regulated wages will exert downward pressure on wages both directly and through spill-over effects. Stylised simulations carried out for the Irish economy by D’Auria et al. (2009) . . . show that, after 10 years, a decline in nominal wages of 0.6% leads to a 0.3% increase in employment and a 0.2% increase in GDP compared to a baseline scenario of no policy change. A decrease in the unemployment benefit replacement rate is also likely to have sizeable effects on employment and output. In a scenario where the unemployment benefit replacement rate is reduced by 5 percentage points, total employment increases by 1% and GDP by 0.7% after 10 years relative to the baseline. The measure is particularly

\textsuperscript{140} The most recent literature on the minimum wage shows that there is no direct impact of minimum wages on overall unemployment. The only way the minimum wage matters for overall unemployment is through its impact on the “tax wedge,” the difference between the cost of hiring a worker and the worker’s take-home pay. Increases in the tax wedge through higher labor taxation combined with high minimum wages relative to average wages can magnify the tax wedge’s negative impact on unemployment. See OECD 2006, supra note 117, at 92. Admitting that the Irish minimum wage was not high as compared to average wages, as the Commission did, was to admit that the Irish minimum wage did not have a compounding effect on the tax wedge, and therefore would have no effect on overall unemployment. Additionally, the OECD has characterized evidence of the impact of the minimum wage on the employment of low-skilled labor as “ambiguous.” See id. at 86.

\textsuperscript{141} EAPIr, supra note 131, at 35.
beneficial for low-skilled workers, whose employment rate increases by 1.8%.

Beyond its conflation of activation measures with reduced wages and lesser unemployment protections, this paragraph warrants analysis because of its conflation of an expected welfare-enhancing benefit for the economy (more employment) with its distribution among workers. The overall benefit for the economy through increased employment (by 1%) and increased output (by 0.7%) is thoroughly conflated with the benefit to individual low-skilled workers, who might otherwise have felt themselves better off with prior protections in place. Assuming the results of this study are true, which suggests that such measures could be potentially overall welfare-enhancing (not spectacularly so, though), the distributional effects over specific segments of the working population are actually obscured. Will the low-skilled workers whose minimum wages and unemployment protections have been reduced be better off because more of them can now occupy those same jobs, but with lower wages and lesser protections? This is a question that the Adjustment Programs promoted through the Memoranda of Understanding, and which all three peripheral countries tend to answer in the affirmative with an appeal to economic expertise. From the perspective of the low-skilled workers of Europe, though, this could be described as a “fundamental change” in the social contract through the “technocratic” backdoor.

4. Labor “Rigidities” and the Technocratic Competence Creep

EAPGr1 stepped over the division of competences between the EU and the Member States in question regarding labor policy, and disregarded the tension between compliance with the conditionality and Greek collective bargaining rights. EAPGr1 made it clear that a horizontal wage reduction in the private sector was not included in the program’s conditionality, in contrast with public sector wages, which were significantly cut. However, the fact that the Commission, as manager of the loan on behalf of the euro area countries, was mandating the reduction of wages in any sector was unheard of in EU law, where wage policy was thought of as set independently by each Member State within the “soft” constraints of economic and employment policy coordination at EU level.

The fact that this mandate was imposed in the context of a loan program to Greece does not change its importance or its potential significance for labor policy in other Member States. Labor “rigidities” were seen as a causal factor in unemployment, and removing them was seen as a potential technocratic tool in fighting unemployment. Thus, minimum wage policies and employment protection legislation, the product of intense political negotiations and compromises in each country, were presented as a technical obstacle to growth with macroeconomic significance for the entire euro area. If rigid labor law hindered the downward adjustment in wages, then it contributed to divergences in competitiveness among euro area members, which, in turn, contributed to the destabilization of the euro area financial system through current account imbalances. Arguably, this was then an

---

142 Id. at 35–36.
143 Chang, supra note 17 (arguing that there is a rewriting of the social contract through the back door at play in Europe).
area ripe for EU intervention, despite concerns about the division of competences between the EU and Member States, and despite concerns about respective national labor relations systems. Indeed, the regulations on the monitoring of macroeconomic indicators, which were adopted a year later, incorporated unit labor costs on the monitored scoreboard. This arguably has opened the way for the Commission to supervise Member State labor law and impose fines in case it turns out such labor law imposes “rigidities.” Thus, labor law and even collective bargaining rights have firmly entered the realm of economic governance in the EU.

In the case of the EAPGr1, the lack of worry about interfering with national collective bargaining traditions was quite extraordinary. The program gestured towards “the sensitivity of labour market and wage reforms,” announcing that the Greek government would take a two-step approach to deal with such sensitivity. The first step would be to try and convince social partners (the Greek unions) to agree to the decentralization of wage bargaining, to the revision of important aspects of the rules on hiring and firing, and to the revision of part time and temporary work regulations. The second step would be to simply enforce the required changes despite lack of agreement and contravention to then existing labor law. Indeed, the specific conditionality of the Memorandum of Understanding between Greece and its creditors fore saw that “[f]ollowing dialogue with social partners, the government proposes and parliament adopts legislation to reform wage bargaining system [sic] in the private sector,” along with a slew of other basic changes in Greek labor law. EAPGr2 included these labor reforms in the tiny list of Greek accomplishments since the first loan:

Since the social dialogue between and with private sector employers’ and employees’ representatives did not deliver a satisfactory outcome, the Government legislated a reduction in minimum wages in the private sector and a modification of number [sic] of wage-setting procedures, including the rules on the expiration of collective agreements and the arbitration of wage disputes. Moreover the government committed to take additional corrective measures to facilitate collective bargaining and ensure wage flexibility and higher employment.

By comparison, the Portuguese program’s conditionality—agreed to almost a year later—was not as exacting in the magnitude of the fiscal adjustment mandated. Nonetheless, the content of the substantive reforms envisioned by the program’s conditionality were remarkably similar in the labor law domain. Portugal undertook reform of its employment protection legislation and its wage-setting mechanisms with a view towards improving market-driven adjustments to labor costs, among other things.

144 EAPGr1, supra note 1, at 22.
145 Id.
146 Id.
148 EAPGr1, supra note 1, at 68.
149 EAPGr2, supra note 6, at 3.
This also meant dramatic changes in its traditional labor relations: revise the unemployment insurance system to reduce the risk of long-term unemployment while strengthening social safety nets; reform employment protection legislation to tackle labour market segmentation, foster job creation, and ease the transition of workers across occupations, firms, and sectors; ease working time arrangements to contain employment fluctuations over the cycle, better accommodate differences in work patterns across sectors and firms, and enhance firms’ competitiveness; promote labour cost developments consistent with job creation and enhanced competitiveness; ensure good practices and appropriate resources to Active Labour Market Policies to improve the employability of the young and disadvantaged categories and ease labour market mismatches.  

The rhetorical nonchalance as to the conditionality’s conformity with existing EU law was thus somewhat less pronounced. In fact, the program gave assurances that social partners would be consulted in the process and reforms would take place in accordance with EU Directives and Core Labour Standards. The overall language of the program was more recognizably “EU-ian” than the Greek program, using, as of 1997, the familiar “employability” and active labor market vocabulary and conditioning the loan on the “strengthening” of social safety nets. Nonetheless, it also had the sure mark of the flexibilization programs promoted through international development institutions. Several aspects of the changes imposed as conditionality for the Portuguese program were challenged in front of the Portuguese Supreme Court and found to be unconstitutional.

5. Good Governance Comes Home to Roost

Another notable characteristic of some of the EAPs was the gradual turn towards including more and more conditions that had little to do with the immediate problem of austerity and the budget, but that were instead understood to promote long-term growth. EAPGr1 focused primarily on the labor market, the product and service market, and financial reform. All of these envisioned reforms could be tied to the overall goal of austerity, internal devaluation, and the sustainability of the Greek public debt. EAPIr focused on labor market reforms almost exclusively, even though the Commission noted that a revision of state owned assets with a view towards privatization should be considered. EAPPort contained a much more expansive range of required reforms. The Commission characterized them as “structural” reforms aimed at “improving framework conditions” for growth. Part of the program bore intense similarities to the judicial and legal reforms recommended by the World

---

150 EAPPort, supra note 130, at 77.
151 Id. at 19.
152 Id.
154 EAPPort, supra note 130, at 27, 29.
Bank through its Doing Business program. They included judicial reform and the easing of the regulatory burden for “doing business.”

The EAPGr2 was particularly expansive in this regard. In fact, a subsequent IMF report on conditionality of loans in general noted that the Fund should be careful “to continue to scrutinize the macro-criticality of certain conditions in these programs, particularly given the large number of conditions in non-core areas (e.g., judicial reform and competition policy).” Interestingly, it seems that the IMF on this occasion thought that the expansive conditions were the result of the Fund’s collaboration with “institutions with broader mandates than the Fund.” This is quite striking, because the public administration and judicial reform conditions were explained by the Commission as necessary for growth, but the majority of the conditions fell outside the purview of the Commission’s legislative competence.

Thus, good governance indicators entered European policy coordination, which itself left the domain of “new governance” through soft law and started becoming harder, first for the borrowing countries through conditionality, and later through the inclusion of some of these broader reform goals into the European Semester.

C. Structural Adjustment in Post-Crisis Economic Governance

The Europe 2020 framework inaugurated a new phase in economic policy coordination called the European Semester. Substantively, the first three rounds of the European Semester, in 2011, 2012, and 2013, reveal a carry-over of loan conditionality into the overall process of policy coordination within the euro zone. Procedurally, fiscal coordination now implies obligatory reform in domains such as labor, social, and tax policy, previously outside the grasp of EU legislative capacity.

1. The Collapse of Social Policy into Economic Governance

The main goal of labor market reform is to induce more people to enter the labor market, through shifts in tax and benefit systems, some of which had thus far worked “to protect people relatively well from income poverty, but [which] provide[d] weak incentives and/or little support for the labour market participation of those furthest away from the labour market.” Notably such labor market reform is also the main

---

155 See e.g., Daniel Kaufmann & Aart Kraay, Governance Indicators: Where Are We, Where Should We Be Going?, 23 WORLD BANK RESEARCH OBSERVER 1, 1–30 (2008).
156 EAPPort, supra note 130, at 28 (“[T]he inefficient judicial system is a pervasive and major obstacle to doing business in Portugal.”).
158 Id.
159 The European Semester is the enhanced economic policy coordination process, which starts with the Commission’s publication of its Annual Growth Survey. It entails country specific recommendations and monitoring of progress towards the Europe 2020 goals. See European Commission, Europe 2020, Making it Happen: The European Semester, http://ec.europa.eu/europe2020/making-it-happen/index_en.htm.
reform aimed at reducing social exclusion and poverty, further entrenching the collapse of social policy into economic policy.\(^{161}\)

Observe some of the European Commission’s main recommendations for how Europe could return to a “job-rich recovery”:

\[
\text{[L]imit the tax burden on labour, notably for the low-paid, as part of broader efforts to shift tax burden away from labour;] . . . continue modernising labour markets by simplifying employment legislation and developing flexible working arrangements, including short-time working arrangements and work environments conducive to longer working lives. . . . monitor the effect of wage-setting systems, in particular indexation mechanisms, and if necessary . . . amend them, respecting national consultation practices, in order to better reflect productivity developments and support job creation. It is important that minimum wage levels strike the right balance between employment creation and adequate income.}\(^{162}\)

Even though the Commission denies that its recommendations constitute a one-size-fits-all recipe for growth, the substantive contents of its overall goals reveal a strong reliance on the idea that labor market “rigidities” can be blamed for loss of competitiveness, as well as an insistence on the idea that flexibilization in the guise of loosening worker protections will lead to job creation.\(^{163}\)

Discussion of pension reforms and health care reform seems to have now firmly passed under the “fiscal consolidation” side of economic policy coordination, which means that the EU now has increased enforcement tools regarding these policies too. In the 2012 round, the Commission was recommending the following:

Pursuing the reform and modernisation of pension systems, respecting national traditions of social dialogue to ensure the financial sustainability and adequacy of pensions, by aligning the retirement age with increasing life expectancy, restricting access to early retirement schemes, supporting longer working lives, equalising the pensionable age between men and women and supporting the development of complementary private savings to enhance retirement incomes. This modernisation should be coupled with a reform of health systems aiming at cost-efficiency and sustainability.\(^{164}\)

The Commission proposed the inclusion of macro-economic indicators in the process of fiscal surveillance precisely because of the systemic importance of certain policy choices that fell under Member State competence such as labor law:

Overcoming these challenges in the euro area is of paramount importance, and urgent, in order to secure stability and sustained and employment creating growth. Addressing these challenges requires strengthened and closer policy co-ordination including:

A framework for deeper and broader surveillance for euro area countries: in addition to strengthening fiscal discipline, macro-economic imbalances

\(^{161}\) Id. at 9.

\(^{162}\) Growth Survey 2013, supra note 8, at 10.

\(^{163}\) Growth Survey 2012, supra note 111, at 11 (recommending reforms of employment protection legislation, and a reduction in “excessive rigidities of permanent contracts”).

\(^{164}\) Id. at 4–5.
and competitiveness developments should be an integral part of economic surveillance, in particular with a view to facilitating a policy driven adjustment. ¹⁶⁵

The Commission has thus introduced the idea that macro-economic surveillance and competitiveness are areas of core EU competence having to do with the economic policy coordination of the euro zone, even though legislative capacity in macro-important domains had remained largely with the Member States.

2. Enhanced Macro-Economic Surveillance and Social Policy

Both the Commission and the Council treated the sovereign debt crisis as evidence of the need for closer policy supervision of Member States. The Greek scenario drove home the idea that the EU needed to have more tools in the toolkit for controlling national budgets. The measures adopted on this front included the so-called six-pack, a package of five regulations and one directive. ¹⁶⁶

On the fiscal surveillance side, the regulations reinforce preventative supervision of the Member States’ application of the SGP and, more importantly, allow the imposition of fines in cases of Member State non-compliance. The stricter application of the SGP has obvious indirect implications for Member States’ capacity to use counter-cyclical deficit spending in times of economic recession and, therefore, impacts their capacity to use deficit spending as employment policy. Currently, all but four of the European Union Member States are in an excessive deficit procedure initiated by the Commission, which means that they are all mandated to take budget constraining measures to reduce deficit and debt levels. ¹⁶⁷ Each country has a different composition of debt and deficit, as well as different capacities for reducing spending without hurting basic safety nets. But in all cases, the impact of mandated austerity for everyone in the European Union means constrained capacity to spend on employment and social policy measures. Cumulatively, this means that the European Union is pursuing policies that have already led to an economic downward spiral as both public and private sectors in all Member States try to save.

This is not all, however. The six-pack includes two new regulations mimicking the fiscal surveillance process, but this time with a view towards preventing and then correcting macro-economic imbalances. The regulations operate on the basis of a scoreboard of indicators tracking the development of key macroeconomic characteristics in each Member State. A deviation from the target levels for macro indicators triggers an in-depth review by the Commission, which can even include IMF-style “missions” to the Member States under review. The Commission can then suggest corrective courses of action for the Member States. Non-compliance with the suggestions can eventually lead to a fine equal to 0.1% of GDP for refusing to comply with the Commission’s recommendations. ¹⁶⁸

¹⁶⁵ Europe 2020, supra note 82, at 26–27 (emphasis in original).
¹⁶⁶ See supra note 7.
¹⁶⁸ See supra note 7.
From a substantive perspective, the two macro-regulations explicitly encompass surveillance of a Member State’s “main economic policy areas,” including “fiscal and wage policies, labour markets, product and services markets and financial sector regulation.”169 Regarding labor market surveillance, the relevant scoreboard indicator chosen is the rate of change in unit labor costs of each Member State. Despite provisos incorporated into the macro-regulations in the six-pack about according “full respect” to national parliaments and social partners (i.e., unions) as well as to differences in systems of “wage formation,” it is hard to see how that will happen when the Commission in its macro-surveillance role recommends lowering unit labor costs in order to comply with the European Semester process. As Daniel Gros notes, “one legacy of the euro crisis thus is that competitiveness indicators now play a key role in the economic governance of the euro zone.” 170 With respect to labor policy, this implies that the EU now has a lot to say about wage setting in Member States, and has even acquired a financial pressure mechanism for enforcement.

It will be interesting to see how far the Commission will be willing to go in its future enforcement of labor related “macro-economic imbalances.” There is already some indication that it is willing to test the ground of such top-down governance in domains as politically sensitive as labor reforms. In its 2012 country specific recommendations to France, the Council recommendation noted that France should ensure that “any development in the minimum wage is supportive of employment, especially of low skilled and inexperienced workers.” 171 Translation: France should reduce, or not further increase, minimum wages because this creates disincentives for employers to hire low-skilled workers. Similarly, the Commission noted that, “some aspects of the unemployment benefit system for older workers (duration) may provide limited incentives to work.” 172 This quote does not need much translation; it is evidently aimed at reducing unemployment benefits for the elderly so as to “activate” them. The Council recommendation noted that France was one of the countries for which an in-depth review of its macro-indicators had been deemed necessary and that macro-economic imbalances had been observed even though they had not been deemed excessive. Excessive imbalances trigger the correlative correction process, which can ultimately lead to the imposition of fines for non-compliance.

3. Fiscal Supervision Goes Rogue: The European Semester as a Good Governance Project

The European Semester starts with an Annual Growth Survey (AGS) published by the Commission. The AGS contains overall guidelines for the European economy, as well as specific recommendations for the Member States. These recommendations are no longer merely theoretical. They can be accompanied by the

170 Gros, supra note 35, at 1.
172 Id.
enforcement measures described in the previous section. The Commission’s recommendations in the context of this newly established annual process of policy coordination are thoroughly aligned with the substantive requirements of the EAPs for Greece, Portugal, and Ireland. Finally, a review of the AGSs highlights the expansive understanding the Commission has developed through this crisis about the extent of desirable reforms for the sake of growth.

According to the Commission, “the EU needs to use this crisis to address decisively the issues of its global competitiveness,”173 and more bluntly, “Europe can use the crisis to trigger a profound transformation of its economic structure.”174 This means close integration of economic surveillance and monitoring of policy reform.175 The recommended economic reforms now range from labor market flexibilization, to pension reforms, to improvements in the business environment through judicial reforms and the reduction of administrative burdens. Reform in taxation also featured prominently in the 2012 round of the European Semester, with a special section dedicated to it. The 2012 AGS also included a whole section on “modernizing public administration.” The Commission emphasized that the Member States needed “well-performing administrations to be able to play their full role in the EU, to meet their obligations and to ensure that their citizens can benefit fully from the advantages of EU membership.”176 Just as in the terms of the EAPs for Greece and Portugal, as well in other good governance projects in the past, the Commission suggested that several Member States needed to enhance their civil justice systems to resolve conflicts more expeditiously.177

4. Tensions Between Pre and Post-Crisis Social Europe

Despite the Commission’s efforts to present its reform agenda as a coherent whole, important tensions between different policy areas within the AGS could also be discerned. Some of them related to the contrast between the permeating concern with speedy fiscal consolidation and structural reform, on the one hand, and the imperative to respect “social dialogue” and basic safety nets, on the other. Despite the redefinition of structural reforms as major inputs into the post-crisis idea of Social Europe, pre-crisis Social Europe is still present and presenting points of tension.

One of the most important sources of tension is labor reform. On the one hand, the Commission was recommending labor reforms that would deal with wage “rigidities” such as excessive employment protection or decoupling wages from inflation. On the other hand, it also recommended that such reforms proceed “respecting traditions of social dialogue.”178 In the case of Greece’s EAPs, as we saw, there was very little regard for such traditions, while Portugal’s program, which included a provision for respecting “social dialogue,” also proceeded pretty much via

175 Id. at 11 (Europe needs “to step up coordination of reform and economic policies to ensure that macro-economic adjustment, fiscal consolidation and policy reforms go together.”).
176 Growth Survey 2012, supra note 111, at 12.
177 Id. at 13.
178 Id. at 4.
The country-specific recommendations for countries without loan agreements within the euro zone have included exhortations for respecting social dialogue. It is not clear yet what the result would be in a scenario in which social dialogue at the Member State level did not yield the desired results. There are some indications, though, that it would not sit very well with the Commission in its role as economic policy coordinator. Commission staff, in the 2013 preparatory work for reform recommendations to France, noted that “uneven” acceptance of labor flexibility reforms by social partners might decrease the effectiveness of reforms already undertaken. The Commission’s official recommendation included an exhortation to the French government to adopt whatever branch/enterprise specific agreements necessary to give full effectiveness to labor reforms already adopted at the legislative level.

A second policy tension could exist between recommendations in the field of social protection and in the field of taxation. On the one hand, the Commission observed that, “cost and quality of housing are a key determinant of living standards and well-being, especially for the most vulnerable people.” On the other hand, in its tax guidelines in the 2012 AGS, the Commission noted that, “to enhance labour mobility and efficient allocation of the housing stock, rebalancing housing taxation away from transaction towards recurrent taxes might be warranted.”

The idea that Member States should move towards recurrent property taxes has been repeated elsewhere and seems to be part of the new technocratic understanding promoted through the AGS. Transaction taxes that happen only once seem to encourage neither enough labor mobility nor the efficient allocation of the housing stock because they allow people who cannot afford recurrent taxes, nor potentially property maintenance, to keep these houses.

Greece immediately comes to mind as an example where the application of this tax recommendation could lead to the immediate impoverishment of the least protected, since Greece has one of the highest rates of homeownership in Europe thanks to its strong family inheritance regime coupled with non-recurrent taxes. In the context of the current crisis, implementation of such a recommendation would mean possible dispossession of the middle-aged unemployed who inherited their houses, but cannot afford to pay recurrent taxes anymore. The troika’s insistence on the implementation of the measure has already created significant ripples in Greece. The Commission’s insistence on a specific type of tax reform for the sake of efficiency may possibly undercut their fight against poverty.

183 Id. at 5.
V. TECHNOCRACY, LEGITIMACY, AND THE FUTURE OF SOCIAL EUROPE

The new Social Europe emerging out of the crisis management measures strongly associates social justice with the distribution of existing jobs between different groups of workers and better access to the market with equity. The post-crisis direction of EU required policy reform indicates that social progressives seem to have lost another battle in the struggle to define the contents of Social Europe. As things stand, their most important victory is the Commission’s rhetorical use of defending European social models as justification for the process of dismantling, especially the decommodification aspects of continental welfare states.\(^{184}\)

The Commission’s reform stance throughout the crisis calls for an explanation. One can imagine two initially plausible accounts. A first account, which we can call “ideational,” would posit that the Commission’s seeming endorsement of 1990s style reform reflects a hurried reaction to market pressures on the euro rather than confidence in the growth spurring potential of structural reforms. Bond vigilantes are testing the choppy waters of European governance, and would like to see reduced debt levels and increased private investment. Therefore, the Commission does not have much choice but to comply with what it thinks markets want. In addition, the Commission may be responding to pressures from a European Central Bank dominated by the ordoliberal school of economics eager to guarantee that any future fiscal and banking union will not be characterized by inflation prone policies, such as printing money.\(^{185}\) There is some reason to think that this is not an implausible account.

A second, “political realist” explanation would suggest that this is all a process driven by politics and, more specifically, the national politics currently driving European integration. Germany is the country that holds the biggest purse supporting an already planned banking and fiscal union. Its citizens will only cede part of the purse if there are strings attached, strings that make sure Germany is not engaged in funding someone else’s generous welfare regime. This account has perhaps even more plausibility than the first one, but may also explain only part of the picture.

\(^{184}\) Growth Survey 2012, supra note 111, at 3.

\(^{185}\) Ordoliberalism is a German variant of neo-classical economics that emphasizes market competition, prudent fiscal fundamentals, and monetary stability as necessary prerequisites for growth. Ordoliberal ideas were crucial in the design of the German Central Bank, which in turn served as a blueprint for the design of the European Central Bank. The emphasis on monetary restraint means that ordoliberals are averse to the monetization of sovereign debt through printing money or other expansionary programs. The ECB has shown reluctance to use expansionary policies, even though its new head, Mario Draghi, is understood to have performed an about-face by agreeing to expand the ECB’s bond buying programs even as the sovereign bonds of multiple euro zone countries were being downgraded. See, e.g., Jörg Bibow, At the Crossroads: The Euro and its Central Bank Guardian (and Savior?) (Levy Economics Institute of Bard College, Working Paper No. 738, Nov. 2012), http://papers.ssm.com/sol3/papers.cfm?abstract_id=2183401 (explaining the historical links between the Bundesbank and German ordoliberalism, the influence of ordoliberals in the design of the ECB, and the ECB’s trajectory in dealing with the euro crisis). Ordoliberal ideas are so prominent in the German political scene that by some accounts even a now unrealized change in the German government after the October 2013 elections would not have done much to change the emphasis on monetary stability through fiscal austerity. See Sebastian Dullien & Ulrike Guérot, The Long Shadow of Ordoliberalism: Germany’s Approach to the Euro Crisis, EUROPEAN COUNCIL OF FOREIGN AFFAIRS, http://ecfr.eu/content/entry/the_long_shadow_of_ordoliberalism_germanys_approach_to_the_euro_crisis.
After all, Germany’s own welfare state may eventually be on the line as well as a result of the Commission’s proposed reforms.186

This Article suggests a third account, which I will call “technocratic path dependence,” not as an alternative that excludes the other two, but rather as a story that may complete the picture. This account has an institutional and a substantive arm.

From the institutional perspective, one needs to note that European integration was from the very beginning designed as an elite bureaucratic project that would be capable of counter-acting centrifugal, nationalist forces.187 Furthermore, integration through the management of spillover effects of prior integration is not new.188 Neo-functionalist ideas about spillover effects of certain policy areas propelling further integration are strongly reflected in the Commission’s version of what went wrong before the crisis and how Europe could move forward.189 According to this account, a monetary policy designed without enough preventive and corrective measures for macro-economic imbalances created a spillover effect that every European country is now paying. The natural solution to this problem is further integration.190 The technocratic path dependence account suggests that a European bureaucracy institutionally invested in the project of European integration and trained to think of crises as opportunities for further integration is doing exactly what it has done previously, which is to take the goal of fully fledged political union as a given and strive towards that goal with whatever means available.

The now almost inverted language about program “ownership” permeating Commission policy documents is an important indication of how deep the belief in integration by technocracy runs in the institution. Program ownership ideas appeared in the OMC process soon after the Lisbon strategy. They were meant to provide more meaningful citizen participation in policy formulation.191 However, the documents produced by the Commission since the beginning of the crisis have almost inverted the meaning of ownership. Notice the following quote from the AGS 2011:

"In spite of the urgency of the situation, progress by Member States in implementing the guidance of the 2011 Annual Growth Survey is below..."

186 Commenting on Germany’s need to boost its domestic demand, Commissioner Rehn noted that required reforms in this direction would include lowering taxation and social security contributions, namely the same types of reforms recommended for countries needing to depress domestic demand. He also announced a potential in-depth review of the German economy by the Commission. See Olli Rehn, Turning Germany’s Surplus into a Win-win for the Eurozone, OLLI REHN’S BLOG, http://blogs.ec.europa.eu/rehn/turning-germanys-surplus-into-a-win-win-for-the-eurozone/.

187 Jean Monnet recognized as one of Europe’s early architects was “motivated by a Europe united by a bureaucracy.” See Kevin Featherstone, Jean Monnet and the “Democratic Deficit” in the European Union, 32 J. COMMON MKT. STUD. 150 (1994); MAX HALLER, EUROPEAN INTEGRATION AS AN ELITE PROCESS: THE FAILURE OF A DREAM? (2008).

188 On the effects of spillover in neo-functionalist theories of European integration, see Wayne Sandholtz & Alec Stone Sweet, Neo-functionalism and Supranational Governance, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 22 (Erik Jones et al. eds., 2012).

189 A Blueprint for a Deep and Genuine Economic and Monetary Union, supra note 43, at 3.

190 Id. at 20.

expectations. There is not yet full ownership, at national level, of the radical changes which have been decided in terms of future economic governance. There is sometimes a disconnection between what is decided at EU level and the length of time it takes to come through in national policy decisions. To remedy this, a sense of urgency needs to accompany the next European semester, with rapid and demonstrable follow through by Member States of EU level guidance. An implementation gap also exists at EU level, where decisions already agreed are not fully or well implemented by Member States, even in areas of core importance . . . .

Reference to lack of “ownership” here simply denotes an implementation gap by national governments in carrying through the radical changes which have already been decided and which need to be corrected. The Commission’s complaint boils down to lack of implementation of top down decision-making.

The substantive arm of the technocratic path dependency account would suggest that there is an entrenchment of belief in the neoliberal ideas reflected in the crisis management measures and the new macro-economic governance framework. This article has argued that reform measures reflecting neoliberal ideas about growth have made it from the loan conditionality of bailout countries into the European Semester. Macro-economic coordination has been redefined to include areas of policy such as employment and social policy, defining certain measures in those areas as technocratically justified by the imperative of macro-economic stability. This is not a break, but rather as a continuation and deepening of a previous trend in European social policy formation through the Open Method of Coordination (OMC). Right before the Greek crisis broke out, the European Commission was focusing on trying, and failing, to get Member States to conform to this normative version of Social Europe by transforming their traditional schemes of dividing welfare provisioning between the family, the market, and the state, by relying more on the market, rather than the family or the state.

How deeply entrenched might a substantive belief in the power of structural reforms be amongst Europe’s technocrats? More work is needed, especially empirical, to clarify whether this turn can indeed be identified with the work of Commission technocrats in combination with Member State bureaucrats convinced of the technocratic merits of this agenda. Certain top-level actors, like Commissioner Olli Rehn certainly express themselves as believers in a “competitiveness agenda,”193 It would be interesting to know the depth of entrenchment of this agenda within the Commission and within Member State top-level bureaucracies. A counterhypothesis would be that the Commission’s agenda for growth is being shaped by the limitations of a monetary union without appropriate tools for crisis management such as fiscal power. In other words, it might be that the Commission’s current agenda does not reflect a clear idea about growth enhancing structural reforms but the rather sharp limits of trying to save the euro without tools usually in the technocrat’s toolkit. If the latter hypothesis were true, then perhaps the new Social Europe emerging out of crisis management at EU level is an ephemeral

---

192 Growth Survey 2012, supra note 111, at 3.
193 Rehn, supra note 186.
phenomenon, likely to disappear if and when the planned political union with direct
democratic legitimation of the Commission’s agenda materialized.

However, as long as European elites remain convinced that the crisis is an
opportunity to move Europe to its ultimate destiny, the “ever closer union,” and as
long as the northern Europeans continue to believe in the ants/grasshoppers version
of what went wrong, the dynamics in place are likely to keep producing a version of
European integration that entails variations of this new Social Europe. In other
words, a substantive belief in the new Social Europe agenda may not even be
necessary for its incorporation into EU policy.

Take the Commission’s Blueprint for a Deep and Genuine Economic and
Monetary Union (EMU). 194 Its advocacy for full fiscal and economic union is
coupled with indirect assurances to surplus countries that the EMU would not be
transformed into a Europe-wide welfare state. Instead, it would be endowed with “an
EMU-level stabilisation tool to support adjustment to asymmetric shocks.” 195 At
each step, the Commission addresses worried audiences that this fiscal capacity
would not be geared towards “permanent transfers,” but would instead be
“supportive of structural reforms and be subject to strict political conditionality to
avoid moral hazard.” 196 The Blueprint also includes an institutional innovation
directly transferred from the management of the loan agreements into pan-European
macroeconomic governance. The Commission is proposing linking the structural
funds, the only cross-country transfers in the European Union, with the national
reform programs, and demanding “rigorous macroeconomic conditionality.” 197 This
idea draws heavily upon the experience of international financial institutions and the
troika in managing loan agreements with indebted countries. The substantive ideas in
the Blueprint also heavily borrow from the crisis management. The Commission’s
plan envisions enacting future legislative capacity for the EU in the area of labor
markets, “given the importance of well-functioning labour markets and in particular
labour mobility for adjustment capacity and growth within the euro area.” 198 Thus, a
combination of the Commission’s technocratic take on further European integration
with the current political circumstances are likely to produce a dynamic of further
entrenchment of policy tendencies already evident through the EU crisis
management.

This same dynamic also creates democratic legitimacy problems. Questions that,
from the citizen’s point of view, constitute fundamental re-engineering of the social
contract, are defined as technocratic imperatives for the sake of saving and then
deepening the EMU. They are also defined as, already by necessity, implied in the
existing legal framework. According to the Commission, the deepening of the EMU
in the short term, which requires “structural reforms necessary to overcome
imbalances and to improve competitiveness,” 199 should be achieved within the

\[^{194}\text{A Blueprint for a Deep and Genuine Economic and Monetary Union, supra note 43.}\]
\[^{195}\text{Id. at 31.}\]
\[^{196}\text{Id. at 32.}\]
\[^{197}\text{Id. at 19.}\]
\[^{198}\text{Id. at 27.}\]
\[^{199}\text{Id. at 12.}\]
already existing Treaty framework because the euro is a product of the Treaties. More importantly, the Commission argues that Treaty amendments should be avoided when possible and that where needed, they should be drafted carefully so as to ensure the “democratic ownership needed for a smooth ratification process.”

This effort to take outside the realm of democratic contestation issues of a deeply political and redistributive nature, such as fundamental aspects of social and employment policy, for the sake of a euro driven technocratic imperative is unlikely to convince as sufficient “input legitimacy.” This is especially so at this difficult moment in time when the EU’s “output legitimacy,” the acceptance of EU policymaking on the basis of its concrete results, is being challenged because of the devastating effects of the crisis. The question of what would constitute adequate democratic legitimacy for such re-engineering of the institutional setup of the EMU deserves separate treatment. This Article has argued that the tendency towards turning political issues into technocratically determined goals is already visible in post-crisis EU governance and hypothesizes that it is likely to continue, despite the problems that it poses for the democratic legitimacy of the European integration project.

VI. CONCLUSION

This Article traced the transformation of a structural adjustment program designed as conditionality for bailout countries into a reform agenda for every euro zone member. It argued that the agenda’s neoliberal reforms have made it into the core of European economic governance through the European Semester, in a significant episode of competence creep. Furthermore, this agenda has been justified as necessary for the sake of European welfarism. The new, post-crisis Social Europe centers on a flexibilization agenda, with member state governments, like company CEOs, responsible for turning their citizens into the most productive workers for the sake of export-led growth. This new Social Europe has arrived through a technocratic turn in economic governance, which was already visible in the OMC at least since 2005, but has become more entrenched through the EU crisis management process. The effort to justify this new direction through an argument of technocratic necessity is unlikely to provide the necessary democratic legitimacy for the deeply political issues at stake.

200 *Id.* at 13.
201 *Id.* at 14.
202 FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999) (defining input legitimacy as acceptance of decision-making due to individual participation and output legitimacy as acceptance based on concrete problem solving).