Balance of Competence
Social and Employment Competence – legal analysis

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A. Introduction

This report, commissioned by the Department for Business, Innovation & Skills, aims to provide a succinct overview of the EU's powers in the field of social policy[1] measures and a summary of the measures the EU has adopted (section B). It also looks at the important role played by the Court of Justice in the development of EU social policy (section C), and the changes brought about by the financial crisis (section D). Annex II contains a list of the major pieces of secondary legislation adopted in this field, together with the legal basis on which they were adopted.

B. The development and content of EU social policy

1. The Treaty of Rome 1957

The Treaty of Rome contained a very limited Title on social policy. It included provisions relating to equal pay (Article 119 EEC (new Article 157 TFEU)), paid holiday schemes (Article 120 EEC (new Article 158 TFEU)) and a general exhortation on the improvement of living and working conditions. The main substantive provision relating to workers was not found in the social Title at all but in the Title on free movement: Article 45 TFEU allows workers to move to another Member State to take up employment there.

The reasons for the limited social policy at EU level were twofold:

- Most Member States regarded social policy as a matter for national law
- The prevailing view was that improvements in social policy at national level would be the *consequence of* the successful creation of the single market (Article 151 TFEU), so EU level social policy was not necessary

EU level social policy remained pretty dormant until the mid 1970s when action occurred on two fronts. First, the Court of Justice injected some vigour into Article 157 TFEU on equal pay in Case 43/75 *Defrenne v. Sabena (No. 2)* [1976] ECR 455 where the Court famously said:

> Article [157 TFEU] pursues a double aim. *First*, . . . the aim of Article [157 TFEU] is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-[Union] competition as

[1] Although the phrase 'social policy' is used throughout (the term that the Treaty of Rome itself uses), in fact the EU's notion of social policy more closely maps labour and employment law in the national systems. It certainly does not cover matters as diverse as the law of the welfare state, housing law and (generally) state pensions.

compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.

Second, this provision forms part of the social objectives of the [Union], which is not merely an economic union, but is at the same time intended, by common action to ensure social progress and seek the constant improvement of living and working conditions of their peoples . . . This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the [Union].

The Court also said that Article 157 TFEU was directly effective, which meant that it could be enforced by individuals in their national courts. This eventually led to some major decisions by the Court of justice on, for example, the equalisation of occupational pension age (see section C.5 below).

Second, the mid 1970s witnessed a flurry of legislative activity following the 1974 Action Programme. Key directives were adopted in a number of areas which are still in force today:

- **equality** directives
    - Directive 75/117 on equal pay,[2] adopted under Article 100 EEC
    - Directive 76/207 on equal treatment,[3] adopted under Article 235 EEC
    - Directive 79/7 on equal treatment in social security,[4] adopted under Article 235 EEC
    - Directive 86/378 on equal treatment in occupational social security,[5] adopted under Articles 100 and 235 EEC
    - Directive 86/613 on the principle of equal treatment between men and women engaged in an activity in a self-employed capacity,[6] adopted under Articles 100 and 252 EEC (amended by Directive 96/97,[7] adopted under Article 100 EEC, repealed and replaced by Directive 2010/41,[8] adopted under Article 157(3) TFEU).

  Directives 75/117, 76/207 and 86/378 have been consolidated into Directive 2006/54,[9] adopted under Article 141(3) EC (Article 157(3) TFEU);
- Directive 75/129 on **collective redundancies**,[10] adopted under Article 100 EEC (amended by Directive 92/56,[11] also adopted under Article 100 EEC, repealed and replaced by Directive 98/59,[12] adopted under Article 100 EEC)
- Directive 77/187 on **transfers of undertakings**,[13] adopted under Article 100 EEC (amended by Directive 98/50,[14] also adopted under Article 100 EEC, now repealed and replaced by Directive 2001/23,[15] adopted under Article 94 EC)

[2] OJ 1975 L45/19.
[3] OJ 1976 L39/40, as amended by Dir. 2002/73 (OJ 2002 L269/15).
[4] OJ 1979 L6/24
[5] OJ 1986 L225/40.
[6] OJ 1986 L359/56.
[7] OJ 1997 L46/20.
[8] OJ 2010 L180/1.
[9] OJ 2006 L204/23.
[10] OJ 1975 L48/29.
[11] OJ 1992 L245/3.
[12] OJ 1998 L225/16.
[13] OJ 1975 L48/29.
[14] OJ 1998 L201/88.
[15] OJ 2001 L82/16.

- Directive 80/987 on **insolvency**,[16] adopted under Article 100 EEC (amended by Directive 2002/74,[17] adopted under Article 137(2) EEC, now repealed and replaced by Directive 2008/94)[18]
- A number of Directives were also adopted in the field of **health and safety** which have subsequently been repealed and replaced by the framework directive on health and safety and the daughter directives (see heading 2 below).

The striking feature of this legislation is that it was adopted *in the absence of* a dedicated legal basis. These important directives were all adopted under general legal bases: Article 100 EEC and/or Article 235 EEC (Article 94 and 308 EC, now Articles 115 TFEU and 352 TFEU) which were about completing the internal market.

2. The Single Market and the Single European Act (SEA) 1986

The Single European Act (SEA) 1986, which set the deadline of achieving the single market by 31 December 1992, was a disappointment to the trade union movement due to its lack of social provisions. However, it did include a new legal basis (ie a measure giving competence to the EU to act) in the field of health and safety (Article 118a EEC, now Article 153 TFEU) which provides:

> 1 Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers
>
> 2. In order to help achieve the objective laid down in the first paragraph, the Council, acting by qualified majority voting … shall adopt by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each Member State.

The Commission President, Jaques Delors, conscious of the trade unions' disappointment, was instrumental in securing the adoption of the (non-legally binding) **Community Social Charter 1989** (to which the UK did not originally sign up) and another Action Programme which led to the adoption of important directives (all of which bound the UK since they were based on provisions in the Treaty) which are still in force today:

- The Framework Directive 89/391 on health and safety,[19] adopted under Article 118a EEC
- Pregnant workers Directive 92/85/EEC,[20] adopted under Article 118a EEC
- Directive 91/383 on health and safety of atypical workers,[21] adopted under Article 118a
- Young workers Directive 94/33/EEC,[22] adopted under Article 118a
- Working Time Directive 93/104/EEC,[23] adopted under Article 118a EEC (amended by Directive 2000/34,[24] adopted under Article 137(2) EC, repealed and replaced by Directive 2003/88,[25] adopted under Article 137(2) EC (see Box 1))

[16] OJ 1980 L283/23.
[17] OJ 2002 L270/13.
[18] OJ 2008 L283/36.
[19] OJ 1989 L183/1.
[20] OJ 1992 L348/1.
[21] OJ 1991 L206/19
[22] OJ 1994 L216/12.
[23] OJ 1993 L307/18.
[24] OJ 2000 L195/41.

- Proof of Contract of Employment Directive 91/533/EEC,[26] adopted under Article 100 EEC (now Article 115 TFEU)
- Posted workers Directive 96/71/EEC,[27] adopted under Articles 57(2) and 66 EEC (Articles 53(1) and 62 TFEU). This Directive is considered in section C below)

The striking feature of these measures is that they are based on the principle of minimum (but not minimal) harmonisation: states were free to impose standards over and above the minima specified in the Directive. So while the Working Time Directive laid down a maximum 48 hour working week, France was able to introduce a 35 hour week.

Box 1 The *Working Time* case

The Pregnant Workers, Young Workers and Working Time directives were adopted under Article 118a EEC. The Working Time Directive was – and still is – the most controversial. It contains restrictions on night work, requirements for regular rest breaks and four weeks paid annual leave. Most controversial, however, is the requirement for a maximum working week of 48 hours, including overtime, but referenced over a period of four months (which can be extended by negotiation with the social partners). The UK successfully negotiated the possibility for individuals to sign an 'opt-out' from the 48 hour working week. This possibility has been used extensively in the UK,[28] and, following decisions of the Court of Justice that on-call time counts as working time,[29] has also been used by a number of other Member States, especially in the healthcare sector.

Despite securing some significant concessions in the original directive and having abstained in the final vote, the UK challenged the choice of legal basis of the original Directive, namely Article 118a.[30] It argued that given that the Directive was intended to achieve social policy and job creation objective, recourse should have been had to (Article 100 EEC (Article 115 TFEU) or Article 235 EEC (now Article 308) which, unlike Article 118a EEC, requires unanimous voting. The Court disagreed.

The UK also argued that the link between working time and health and safety was too tenuous. However, the Advocate General noted the breadth of the phrase 'working environment, as regards the health and safety of workers' used in Article 118a EEC. Referring to the Danish origins of the term, he said:

> 'the relevant Danish legislation is not limited to classic measures relating to safety and health at work in the strict sense, but also includes measures concerning working hours, psychological factors, the way work is performed, training in hygiene and safety, and the protection of young workers and worker representation with regard to security against dismissal or any other attempt to undermine their working conditions. The concept of "working environment" is not immutable, but reflects the social and technical evolution of society'.

[25] OJ 2000 L195/41.
[26] OJ 1991 L288/32.
[27] OJ 1997 L18/6.
[28] Barnard et al, 'Opting out of the 48 hour working week: Employer necessity or individual choice?' (2003) 32 ILJ 223.
[29] See eg Case Case C-303/98 *Simap* [2000] ECR I-7963.
[30] Case C-84/94 *UK v. EU Council* [1996] ECR I-5755; [1996] 3 CMLR 671.

The Court of Justice, without referring to the Danish origins of the term, also favoured a broad reading of the term health and safety. It said:

> where *the principal aim* of the measure in question is the protection of the health and safety of workers, Article 118a must be used, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market

It took the view that the Directive's principal aim was health and safety and so was correctly adopted under Article 118a.

The UK also argued that the Directive breached the principles of subsidiarity and proportionality. The Court disagreed:

> Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes [Union] wide action.

This *Working Time* case paved the way for continued use of Article 118a EEC (now Article 153 TFEU) to adopt social legislation. For some, the decision also implicitly represented judicial endorsement of the so-called Treaty base game: the Court accepted a broad reading of the phrase health and safety in *Working Time*. Given the fact that qualified majority voting only was required under this provision (so it would take more than one recalcitrant state to block the measure), the Commission needed little encouragement to use Article 118a. But the heyday of EU legislative activity in the social arena of the early 1990s has not since been repeated.

3. The Treaty on European Union (the Maastricht Treaty 1992)

3.1 The Social Chapter

From the perspective of social policy, the Maastricht Treaty was significant because it contained the Social Policy Agreement and Social Policy Protocol, collectively known as the **Social Chapter**, from which the UK initially secured an opt-out. The opt-out remained in force until 1997 when the UK agreed to opt back into the Social Chapter which was reincorporated into the Treaty at Amsterdam. Legislation which had been adopted by the then 11 Member States (eg the **Burden of Proof Directive 97/80**[31] (adopted under Article 2(2) of the Protocol, extended to the UK by Directive 98/52[32] adopted under Article 100 EEC, and repealed and replaced by Directive 2006/54) and the **European Works Council Directive 94/45**,[33] adopted under Article 2(2) of the Protocol, extended to the UK by Council Directive 97/74,[34] adopted under Article 100 EEC (now repealed and replaced by Directive 2009/38[35] adopted under Article 137 EC) had to be readopted and extended to the UK.

[31] OJ 1997 L14/6.
[32] OJ 1998 L205/66.
[33] OJ 1994 L254/64.
[34] OJ 1998 L10/22.
[35] OJ 2009 L122/28.

Contrary to popular misconception, the Social Chapter is not a Charter of social rights. Instead it did two things. First, it gave **greater powers (competences) to the EU to legislate**. In some areas this was by qualified majority voting in Council, in others by unanimity (see Box 2).

Box 2: Areas of EU competence and type of voting

Qualified majority voting:

- improvement in particular of the working environment to protect workers' health and safety
- working conditions
- information and consultation of workers
- equality between men and women with regard labour market opportunities and treatment at work
- integration of persons excluded from the labour market
- The combating of social exclusion
- The modernisation of social protection systems

Unanimity:

- social security and social protection of workers
- protection of workers where their employment contract is terminated.
- representation and collective defence of the interests of workers and employers, including co-determination.
- conditions of employment for third-country nationals legally residing in the EU
- financial contributions for promotion of employment and job creation, without prejudice to the provisions relating to the social fund.

However, the Treaty also made clear (and continues to make clear) that the competences in Article 153 do not apply to pay, the right of association, and the right to strike or impose lock-outs (Article 153(5) TFEU). As *Viking* and *Laval*[36] show (see section C.5 below), this does not, however, preclude the Court of Justice applying the Treaty provisions on the four freedoms to these 'excluded' areas. Nor has it precluded the EU legislating in respect of, for example, pay-related issues, such as *equal* pay (see eg Directive 2006/54), provided the issue does not concern the constituent parts of pay, the level of pay or the setting of a minimum or guaranteed wage.[37] As the Court said in *Bruno*, Article 153(5) TFEU has to be narrowly construed because it is a derogation from Articles 153(1)-(4) TFEU.[38] Further, the Court added, even in those areas excluded from EU competence, the Member States and social partners must still exercise their competence consistently with EU law, including the principle of non-discrimination.[39] Therefore, even though the EU would have no power to legislate as to the level of the minimum wage in the UK, due to the exclusion in Article 153(5) TFEU, if the UK were to set a higher rate for nationals than for migrant workers this could be challenged under Article 45 TFEU on the free movement of workers.

[36] Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.
[37] Joined Cases C-395/08 and C-396/08 *INPS v Bruno* [2010] ECR I-000, para. 37.
[38] Ibid., para. 36.
[39] Ibid, para. 39.

3.2 The Role of the Social Partners

Legislation adopted

The second feature of the Maastricht Social Chapter was that it envisaged a **greater role for the social partners** (management and labour). They must be (1) consulted on legislation and (2) have the option of implementing legislation. In addition – and more significantly or so it appeared at the time – was the power the Social Chapter gave to the social partners to adopt European-wide **interprofessional** or **intersectoral** collective agreements which can then be given *erga omnes* effect by a Council 'decision' (in practice a Directive). This means that the Council can effectively rubberstamp a collective agreement negotiated by the social partners and turn it into a piece of legislation which must be implemented by the Member States. Three main directives have been adopted via this route:

- the Parental Leave Directive 96/34/EC,[40] adopted under Article 4(2) of the Protocol (repealed and replaced by Directive 2010/18/EU,[41] adopted under Article 155(2) TFEU)
- the Part-time Workers Directive 97/81/EC,[42] adopted under Article 4(2) of the Protocol
- the Fixed-term work Directive 99/70/EC,[43] adopted under Article 139(2) EC

The social partners were unable to reach an agreement on agency work and eventually this was agreed via the usual legislative routes: Directive 2008/104.[44]

The striking feature of these four directives was that they contained significant space for Member States and or the social partners, or for the states acting in conjunction with the social partners, to spell out the detail of the standards in the Directive (eg the length of certain rest breaks, the start of the leave year) or even to derogate from the social standards (see eg the so-called 'Swedish derogation in the Agency work directive which allows states not to apply the directive in respect of pay to temps who have a permanent contract of employment with the agency and who continue to be paid between postings). This flexibility is an important means for the EU to accommodate EU level rights with diversity of industrial relations in the national systems.

In addition to these *intersectoral* collective agreements, the **sectoral social dialogue** has produced more than 500 texts of varying legal status, ranging from joint opinions and responses to consultations to agreements that have been implemented as EU legislation. There are four European-wide agreements, plus one amendment, which have legislative force:

- Working time of Seafarers Directive 99/63,[45] as amended by Directive 2009/13/EC,[46] both adopted under Article 139(2) EC,
- Working time in Civil aviation 2000/79,[47] adopted under Article 139(2) EC
- Directive 2005/47 on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector,[48] adopted under Article 139(2) EC

[40] OJ 1996 L145/9.
[41] OJ 2010 L68/13.
[42] OJ 1998 L14/9.
[43] OJ 1999 L244/64.
[44] OJ 2008 L327/9.
[45] OJ L167/33.
[46] OJ 2009 L124/30.
[47] OJ 2000 L302/57.
[48] OJ 2005 L195/15.

- The Sharps Directive 2010/32,[49] adopted under Article 155(2) TFEU.

Autonomous agreements

Where the Council refuses to endorse a Commission proposal to give legal force to a collective agreement, as was the case with the Hairdressers Agreement,[50] the social partners remain free, according to Article 155(2) TFEU, to implement an agreement 'in accordance with the procedures and practices specific to management and labour and the Member States'—so-called **autonomous agreements**. The second declaration appended to the Maastricht Social Policy Agreement (SPA) explains that this means 'developing, by collective bargaining according to the rules of each Member State, the content of the agreements'. However, the declaration continues that this does not imply any obligation on the Member States 'to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'. For this reason, the three intersectoral agreements adopted via this route – on teleworking, work-related stress and harassment and violence at work – have in no way had the same impact on individuals' working lives as have the directives on fixed-term and part-time work.

Legitimacy of the social partners

The legitimacy of involving the social partners so actively in the negotiating process has been questioned, most notably by those not present at the negotiating table. However, the General Court upheld the legislation adopted via this route (the Parental Leave Directive 96/34) in *UEAPME*[51] on condition that there was rigorous overview by the Council and the Commission.

> 89 In contrast, the second procedure, ..., does not provide for the participation of the European Parliament. However, the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at [Union] level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

However, checking whether 'the signatories to the agreement are truly representative' poses a particular difficulty for the Commission and Council. How can they tell? While some systems, such as the Italian one, are familiar with the criteria of representativity, others, including the British one, are not. To overcome these difficulties, the Commission produced some guidance in the mid-1990s which, in essence, said that the question of representativeness had to be examined on a case by case basis, as the conditions will vary depending on the subject-matter under negotiation.

The Commission therefore examines whether those involved in the negotiation have a genuine interest in the matter and can demonstrate significant representation in the domain concerned.[52] To date, in the interests of efficient bargaining, negotiation over agreements which apply generally to

[49] OJ 2010 L134/66.
[50] http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1286&furtherNews=yes
[51] Case T-135/96 *UEAPME v Council* [1998] ECR II-2335.
52 COM(96) 448, para. 71.

all employment relationships (ie intersectoral agreements)[53] has been conducted by the established general cross-industry organizations (ETUC, UNICE, CEEP)[54] 'based on principles of autonomy and mutual recognition of the negotiation parties'.[55] The Commission has said that these three organizations fulfil its own criteria of representativeness.[56] However, subsequently three other cross-industry organisations have become involved (UEAPME (small business), Eurocadres (professional and managerial staff) and CEC (executives and managerial staff)).

At sectoral level, the Commission has been active in encouraging the establishment of sectoral dialogue committees (there are currently 40 such committees).[57] One committee negotiated the controversial framework agreement on occupational health and safety in the hairdressing sector agreed in 2012. This agreement demonstrates in microcosm some of the difficulties now faced by the EU and/or by the EU social partners in negotiating/ legislating at EU level. For the unions, at least, this measure was important: in some countries up to 70% of hairdressers suffer from work-related skin damage such as dermatitis at some point during their career, which is least 10 times more than the average for workers of all sectors. Almost 40% of hairdressers report musculoskeletal complaints, five times more than the rate for workers of all sectors.[58] For others, in particular the states which had to consider whether the Council would extend the agreement by way of a Directive, there was no need for such legislation. They argued that many hairdressers are self-employed; there are existing health and safety provisions on various chemicals; the rules would be difficult to enforce and the costs and burden on small businesses would have been disproportionate. Those states eventually won the day: the Council reviewed the agreement and chose not to accept it. The agreement was adopted as an autonomous agreement, with the immediate effect that the impact of the measure, at least in the UK, was significantly reduced.

4. The Treaty of Amsterdam

The Treaty of Amsterdam delivered four main changes to the original Treaty provisions on social policy. First, it incorporated the **Social Chapter into the mainstream of the Treaty** and so it now applied to all Member States, including the UK.

Secondly, it beefed up the provision on **equal pay** to include the possibility of some form of positive discrimination.

Thirdly, it introduced a **new legal basis**, Article 19 TFEU, into the Treaty (but not into the Title on Social Policy). This provides: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." This led to the enactment of two important Directives:

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53 Sectoral agreements have also been negotiated by European sectoral organizations. These are considered further below.

54 These three cross-sector organizations have long enjoyed a favoured position through the social dialogue steering group and have therefore developed a 'substantial body of experience' COM(93) 600, para. 25, confirmed in COM(96) 448 and COM(98) 322.

55 COM(98) 322, 13.

56 COM(96) 26 final, para. 14.

57 For a detailed report, see SEC (2010) 964.

58 http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1286&furtherNews=yes.

- Directive 2000/43 on equal treatment between persons irrespective of racial origin,[59] and
- Directive 2000/78 the general framework Directive for equal treatment in employment and occupation.[60]

Fourthly, and perhaps most importantly, the Treaty of Amsterdam included a new **Title on Employment**. Unlike the other legal bases discussed so far, the new Title did not envisage the adoption of, say, EU Directives on job creation (how could it?). Instead, it envisaged a new approach, referred to in the jargon as OMC (open method of coordination), based on target setting, peer review, and guidelines. This change of approach was signalled in Article 145 TFEU: Member States and the Union shall 'work towards developing a co-ordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change'. The Union is to support and, if necessary, complement Member States' action (Article 147 TFEU). Article 148 TFEU provides that the Council is to adopt certain labour market policies, albeit in the form of soft law, drawing up guidelines on employment.

These guidelines have been revised a number of times but they generally contain a mix of active labour market policy (education, training) with exhortations to states to deregulate to make the labour market more flexible. These guidelines and the general OMC approach fed into the Lisbon Strategy which was intended to make the EU 'the most competitive and dynamic knowledge based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion' by 2010. Despite the chronic failure of the strategy – caused largely by the worst financial and economic crisis since the Great Depression - the legacy of the Lisbon strategy can still be felt in the 'EU2020 strategy for smart, sustainable and inclusive growth'. As with the Lisbon Strategy, the European Council agrees on headline targets, 'which constitute shared objectives guiding the action of the Member States and of the Union', as part of EU2020. In the light of the headline targets, 'Member States will set their national targets, taking account of their relative starting positions and national circumstances. They will do so according to their national decision-making procedures, in a dialogue with the Commission in order to check consistency with the EU headline targets.'

This use of a more soft law approach to rule making has also been extended to social policy measures more generally. The Treaty of Nice made clear that not only could the EU institutions adopt traditional legislative measures but they could also adopt

> measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.

Another strand of thinking prevalent in the late 1990s/early 2000s was partnership to create 'better jobs'– that social partners should cooperate and this would create the conditions for 'flexicurity' – flexibility combined with security (see further section C below). The legal manifestation of this

[59] OJ 2000 L180/22.
[60] OJ 2000 L303/16.

aspect of flexicurity took the form of the **Information and Consultation Directive 2002/14**,[61] adopted under Article 137(2) EC, which required Member States to create the conditions in which workers and employers would be encouraged to talk.

5. The Lisbon Treaty

In the field of social policy, the Lisbon Treaty is important for three reasons. First, in the statement of aims of the EU, Article 3(3) TEU provides:

> 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy, aiming at full employment and social progress**, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

The reference to 'social market economy' is seen by some as a way of helping to rebalance the social and the economic aspect of the Treaty (see the discussion of *Viking* and *Laval* in section C.5 below), albeit for others it is merely part of a rhetorical device.[62]

Secondly, the Treaty incorporated the **Charter of Fundamental Rights** into the primary law of the EU (Box 3).

Box 3 Provisions in the Charter relevant for social policy

Chapter III: Equality including

- Art.20 equality before the law
- Art.21 non-discrimination: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'
- Art.22 cultural, religious, linguistic diversity
- Art.23 Equality between men and women: 'Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

Chapter IV: Solidarity including

- Art.27 information and consultation within the undertaking
- Art. 28 right to collective bargaining and collective action
- Art. 30 protection in the event of unjustified dismissal
- Art. 31 fair and just working conditions including in Art. 31(2) 'the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

[61] OJ 2002 L80/29.

[62] See eg the ETUC's views on the European Council's, *Towards a genuine Economic and Monetary Union*, 5 Dec 2012.

- Art. 33 family and professional life

The UK has argued that the 'rights' in Chapter IV are in fact 'principles' and so are not justiciable (ie directly enforceable in the national courts). This view is contested, not least because some of the provisions, like Article 28, talk about the *right* to negotiate and conclude collective agreements.

Some people think that the UK has an opt-out from the Charter as a result of Protocol No. 30. In fact, it is not an 'opt-out', as the government itself has conceded.[63] However, there is still the possibility that Article 1(2) of the Protocol might provide the UK with an opt-out from the provisions in Chapter IV if the Court were to find that any of the Articles contain rights, not principles.

Even if the UK does have an opt-out from the rights in Chapter IV of the Charter, the rights would still be enforceable as **general principles of law** (from which the UK has no opt-out). General principles of law have been developed by the Court of Justice to supplement the provisions of the Treaty. They include principles of proportionality, legal certainty, equality, the right to a hearing. Importantly, fundamental human rights, including the right to strike, are general principles of law, a point now confirmed by Article 6(3) TEU. The general principles are used as a way of controlling the activities of the EU institutions and the Member States when acting in the sphere of EU law. They will therefore apply to the UK when acting in the field of EU law. So, for example, if the UK decides to implement a Directive in such a way that might interfere with the right to strike it must take that right into account in the process of implementation.

Despite its considerable potential, the effect of the Charter has not been as great as might have originally been expected in the field of social policy. In particular, the Court has refused to hear any references which raise issues of the compatibility of the reforms to national labour law introduced as part of the conditionality of the bailout (see further section D.4 below). In most others cases, the Court has referred to the Charter to buttress its arguments in other areas[64] or to show that it has recognised that the case raises issues of fundamental importance[65] but the use of the Charter has not been transformative.

The one exception to this is where the Court controversially used the equality provisions of the Charter in *Test-Achats*[66] to strike down a derogation from the equality provisions in Directive 2004/113 on equal treatment in respect of goods and services. This derogation, which had been negotiated by various states including the UK, allowed states to maintain the use of sex discriminatory actuarial factors when setting insurance premiums (ie higher rates for young male car drivers than for female drivers). Because this exception was not time limited, it was found to contravene Articles 21 and 23 of the Charter and so was declared void from 21 December 2012.

6. The rationale for EU legislative intervention

The story so far suggests a continuous broadening of the EU's competence to legislate, albeit that this has not been matched by a vigorous use of that competence by the EU legislature. In fact, EU social legislation is piecemeal: for example, there are EU rules on no discriminatory dismissal but not on unfair dismissal; there are rules on consultation about redundancy but not redundancy itself.

[63] Joined Cases C-411/10 and C-493/10 *NS* [2011] ECR I-000.
[64] Case C-555/07 *Kücükdeveci* [2010] ECR I-000.
[65] See *Viking* and *Laval* considered below.
[66] Case C-236/09 [2011] ECR I-000.

One explanation for this pot-pourri of EU legislation is that there is no clear justification for the EU to act in the field of social policy. That said, it is possible to detect at least three rationales for EU legislation:

1. The creation of a level playing field on which companies across the EU can compete equally (sometimes, rather misleadingly, described as the social dumping thesis, a term whose use is so vexed that it will not be used further in this report). This is the view the UK took in respect of encouraging the EU to adopt (high levels) of health and safety legislation to ensure that British companies, already subject to high standards, did not suffer a competitive disadvantage. This justification was also the original rationale for including the provisions on equal pay in the Treaty of Rome.
2. The need to ensure that those workers exercising their free movement rights enjoyed a core of protection in whichever country they work.
3. The need to give the EU a human face: without social measures, citizens would see the EU merely as an economic enterprise in which they had no stake. Ultimately this would lead to an undermining of popular support for the EU. This was part of the rationale behind the 1974 and 1989 Social Action programmes.

The disparate choice of legal basis for the EU social policy measures over the years underlines the contested rationale for adopting social policy measures at EU level. So for example, the real justification for the adoption of the Working Time Directive, despite the rhetoric of health and safety, might have had more to do with rationale (3), with a spoonful of rationale (1). The Posted Workers Directive 96/71, by contrast, with its legal basis in the services provisions of the Treaty (Articles 53(1) and 62 TFEU) had more to do with rationale (1), with rationale (2) as a subsidiary objective. This is confirmed in the Preamble to the Directive which makes clear that the Directive is intended to promote the transnational provision of services in a 'climate of fair competition' while 'guaranteeing respect for the rights of workers'. This approach has also shaped the interpretation of the Directive, as the decisions in *Laval* and *Rüffert* make clear.

While it is easy to fill the Preamble of a proposed Directive with references that support the Commission's choice of legal basis, the real justifications for the adoption of a measure have depended much on the economic climate. When times are good, states are less hawkish about the justification for a measure and recognise the value of rationale (3) (human face). This may explain the states' willingness to accept the raft of EU legislation in the 1970s and 80s. However, when times are hard states require more convincing about the need for, and value of, any legislation, let alone *EU* legislation. This is all the more acute when states are being forced by the troika to deregulate their own labour laws (see Section D)

7. The Court as supporter of the development of EU social policy

The role of the Court of Justice in the evolution of social policy at EU level should not be underestimated. For a long time the Court of Justice was perceived as a champion and defender of EU social rights. And there are a number of leading cases where it is widely accepted that the Court has not only broadened the scope of social rights by, for example, extending EU law protection to

transsexuals, [67] improving the position of pregnancy workers[68] and to those who care for those with disabilities,[69] but it has also ensured that those rights are effective on the ground.[70]

While the broad reading of the scope of social rights has been welcomed by many employees and their representatives, others have argued that the Court's interpretation has, at times, strayed into the realm of rule-making. One example of this was the Court's willingness to read into the phrase 'discrimination on the grounds of sex', discrimination on the grounds of change of sex and thereby extending the protection of the original Equal Treatment Directive 1976/207 to transsexuals in the *P v S* case.[71]

While this decision was seen as radical at the time, it could be justified by the Court's **teleological approach** to reasoning, where the Court looks at the purpose of the rules and not just their literal meaning. Drawing on the general principle of equality, the Court said that the Equal Treatment Directive was 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of [Union] law'.[72] This enabled the Court to conclude that the scope of the Directive could not be confined simply to discrimination based on the fact that a person is of one or other sex and so would also apply to discrimination based on gender reassignment.[73] It seems that a strong opinion on the part of the Advocate General also influenced the Court. He declared:

> I am well aware that I am asking the Court to make a 'courageous' decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person's sex with regard to the rules regulating relations in society. ... I consider that it would be a great pity to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch as it is undeniably based on and consonant with the great value of equality.[74]

However, in the subsequent case of *Grant v South-West Trains*[75] the Court refused to read the word sex to include sexual orientation, clearly recognising there were outer limits of the Court's competence:

> 47 ...the scope of that article [157 TFEU], as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that

[67] Case C-13/94 *P* v. *S and Cornwall County Council* [1996] ECR I-2143 (dismissal on the ground of sex change is sex discriminatory)
[68] Eg Case C-177/88 *Dekker v. Stichting Vormungscentrum voor Jong Volwassenen* [1990] ECR I-3941 (discrimination on the grounds of pregnancy is per se directly discriminatory);
[69] Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.
[70] Eg Case 152/84 *Marshall v. Southampton Area Health Authority (No. 1)* [1986] ECR 723; Case C-188/89, *Foster v. British Gas* [1990] ECR I-3313; Case C-271/91 *Marshall (No.2)* [1993] ECR I-4367*;* Joined Cases C-6 and 9/90 *Francovich v. Italian Republic* [1991] ECR I-5357.
[71] Case C-13/94 *P* v. *S and Cornwall County Council* [1996] ECR I-2143 (dismissal on the ground of sex change is sex discriminatory)
72 Para. 17.
73 Para. 20.
74 Para. 24.
[75] Case C-249/96 *Grant* v. *South West Trains* [1998] ECR I-621.

> Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.
>
> 48. It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

Thus, the Court recognised that there were limits to its interpretative abilities and that addressing the issue of discrimination on the grounds of sexual orientation was a matter for the EU legislature (which quickly acted when it adopted Directive 2000/78).

Another area of the Court's case law which has attracted considerable disapproval of a number of Member States concerns the Working Time Directive 2003/88. Two particular issues have proved difficult:

- the question of what constitutes working time for the purposes of determining what time counts towards the 48 hour working week, and
- whether, in the case of casual workers, holiday pay can be rolled up as part of the payment when working.[76]

I shall focus on the former topic by way of illustration. Article 2(1) of the Working Time Directive 2003/88 defines 'working time' as having three elements: (1) any period during which the worker is working, (2) at the employer's disposal, and (3) carrying out his activities or duties, in accordance with national laws and/or practices. How does this apply to emergency workers on call? In a number of cases (*Simap* (doctors in primary care teams),[77] *CIG* (nursing staff in the emergency services),[78] and *Jaeger* (doctor in the surgical department of a hospital))[79] the Court ruled that the time spent by these medical and emergency workers at their workplace on-call and on the premises of the

[76] The Court has now decided that this is not possible: Joined Cases C-131/04 and C-257/04 *Robinson-Steele* [2006] ECR I-2531, para. 50: 'an agreement under which the amount payable to the worker, as both remuneration for work done and part payment for minimum annual leave, would be identical to the amount payable, prior to the entry into force of that agreement, as remuneration solely for work done, effectively negates, by means of a reduction in the amount of that remuneration, the worker's entitlement to paid annual leave under Article 7 of the directive'. A further issue has also arisen as to whether those on long-term sick leave were entitled to take annual leave. The British courts thought not (*IRC v Ainsworth* [2005] IRLR 465); the Court of Justice disagreed. In Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer* [2009] ECR I-179 the Court said 'the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill'. It therefore ruled that Member States could prevent annual leave from being taken during sick leave but the right to paid annual leave could not be extinguished at the end of the leave year even where the worker's incapacity to work had persisted until the end of his employment relationship.

77 Case C–303/98 *Simap* [2000] ECR I–7963.

78 Case C–241/99 *CIG* v. *Sergas* [2001] ECR I–5139.

79 Case C–151/02 *Jaeger* [2003] ECR I–8389.

employer (even where they could sleep in a bed provided by the employer[80]) constituted working time. As the Court explained in *Jaeger*,[81] an on-call doctor who is required to keep himself available to the employer at a place designated by the employer is subject to appreciably greater constraints than a doctor on standby (i.e. a doctor required to be permanently accessible but not present at the health centre) since he has 'to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required'. Furthermore, the time spent asleep or otherwise inactive on the employer's premises could not count towards the rest periods because the worker must be able 'to remove himself from the working environment ... to enable him to relax and dispel the fatigue caused by the performance of his duties'.[82] As the Court put it in *Simap*, in the scheme of the Directive, working time is placed 'in opposition to rest periods, the two being mutually exclusive'.[83]

Employers, especially in the healthcare sector did not like these decisions, given the significant increase in employment costs. The effect has been a wider use of the so-called opt-out where workers, subject to certain conditions, agree to work more than 48 hours a week (see Box 1)). However, the decisions again can be explained by reference to the Court's teleological approach. As the Court said in *Jaeger*:[84]

> In fact that is the only interpretation which accords with the objective of Directive 93/104 which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest. That interpretation is all the more cogent in the case of doctors performing on-call duty in health centres, given that the periods during which their services are not required in order to cope with emergencies may, depending on the case, be of short duration and/or subject to frequent interruptions and where, moreover, it cannot be ruled out that the persons concerned may be prompted to intervene, apart from in emergencies, to monitor the condition of patients placed under their care or to perform tasks of an administrative nature.

C. Social Policy and the Internal Market

1. Introduction

As the previous section made clear, while the EU has expanded its competence to adopt social and has indeed adopted a number of important Directives, in fact EU social policy is far from comprehensive. Key areas of what is traditionally regarded as employment law in the Member States (dismissal law, redundancy, rules on collective bargaining, freedom of association and collective action) have not been adopted at EU level, some due to the lack of competence (eg strikes, lock-outs and pay – although see the discussion above), some due to the lack of political will (eg dismissal, redundancy unless motivated by discriminatory reasons (eg sex, race etc). In these areas where there is no EU legislation the national rules remain the point of reference. However, some employers have tried to argue that the national labour law rules contravene the hierarchically

80 Case C–151/02 *Jaeger* [2003] ECR I–8389, paras. 60–4.
81 Case C–151/02 *Jaeger* [2003] ECR I–8389, para. 65.
82 Para. 95.
83 Para. 47.
84 Para.70.

superior EU rules on free movement or competition and thus should be struck down. They have enjoyed mixed success.

2. Albany and Article 101 TFEU

One of the earliest examples of the conflict between national labour law rules and EU law was in *Albany*.[85] It concerned a collective agreement negotiated by representative organizations of employers and workers setting up a supplementary pension scheme, managed by a pension fund, to which affiliation was compulsory. The Dutch Minister of Employment had, on request of the Social Partners, made affiliation to the scheme compulsory for all workers in the sector. The Court said this guaranteed a certain level of pension to all workers in the sector which contributed directly to the improvement of one of the conditions of employment knowing their pay. For this reason the Court said that competition law did not apply to the collective agreement provided that the agreement aimed at improving working conditions.[86]

3. The Services Directive

The Services Directive 2006/123 also used a similar exclusionary technique to protect national labour law from the potential effect of the Directive. Article 1(6) provides:

> This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

Article 1(7) adds:

> This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

This so-called 'Monti' clause, named after Mario Monti the former trade commissioner, has been inserted into various other pieces of legislation with a view to protecting national labour law from EU law.

4. Other techniques to protect national labour law from the internal market rules

In respect of social welfare, the Court has used the solidarity principle to protect certain schemes from EU competition law: the Court says that where the activity is based on national solidarity, it is not an economic activity and therefore the body concerned cannot be classed as an undertaking to which Articles 101 and 102 TFEU apply.[87]

In other cases the Court has (instinctively?) felt that the effect of the national measures was too remote from interfering with the EU free movement rules and so found no breach of EU law. The best known example of this is *Graf*.[88] Graf, a German national, worked for his Austrian employer for

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[85] Case C-67/96 *Albany* [1999] ECR I-5751.

[86] Paras. 63–4. See also Joined Cases C-115-7/97 *Brentjens Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025; Case C-219/97 *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121.

[87] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v. AGF and Cancava* [1993] ECR I-637.

88 Case C–190/98 *Graf v. Filzmozer Maschinenbau GmbH* [2000] ECR I–493.

four years when he terminated his contract in order to take up employment in Germany. Under Austrian law, a worker employed by the same employer for more than three years was entitled to compensation on termination of his contract provided that he was dismissed (and did not just resign). Graf argued that this rule contravened Article 45 TFEU because the effect of the rule was that, by moving to another State, he lost the chance of being dismissed in Austria and so was unable to claim the specific compensation.

The Court disagreed: the Austrian law was genuinely non-discriminatory and did not preclude or deter a worker from ending his contract of employment in order to take a job with another employer.[89] The Court explained that the entitlement to compensation was not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event (being dismissed).[90] The Court concluded that '[s]uch an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder free movement for workers'.

5. The decisions in Viking and Laval

The cases considered so far suggest that the national employment law and EU law could operate in parallel. *Viking* and *Laval*[91] put an end to this uneasy settlement. *Viking* concerned a Finnish company wanting to reflag its vessel, the Rosella, under the Estonian flag so that it could staff the ship with an Estonian crew to be paid considerably less than the existing Finnish crew. The International Transport Workers' Federation (ITF) told its affiliates to boycott the Rosella and to take other solidarity industrial action. Viking sought an injunction in the English High Court, restraining the ITF and the Finnish Seaman's Union (FSU), now threatening strike action, from breaching Article 49 TFEU.

In *Laval*, a Latvian company won a contract to refurbish a school in Sweden using its own Latvian workers who earned about 40% less than comparable Swedish workers. The Swedish construction union wanted Laval to apply the Swedish collective agreement but Laval refused, in part because the collective agreement was unclear as to how much Laval would have to pay its workers. There followed a union picket at the school site, a blockade by construction workers, and sympathy industrial action by the electricians unions. Although this industrial action was lawful under Swedish law, Laval brought proceedings in the Swedish labour court, claiming that this action was contrary to EU law (Article 56 TFEU).

The Court said that EU law did apply to national labour law on strike action (even though this is an area over which the EU has no competence to legislate (Article 153(5) TFEU considered above) but acknowledged for the first time that the right to take collective action, including the right to strike, was a fundamental right, referring to Article 28 of the EU Charter (see Box 3 above). However, the Court did say that the right to strike was subject to limits laid down by both national law and practices (eg notice and balloting rules) *and* EU law (eg rules on free movement considered below). The Court also confirmed that Articles 49 and 56 TFEU applied to trade unions.

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[89] Para. 23.
[90] Para. 24.
[91] Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

The Court then found that the collective action constituted a restriction on free movement and so breached Articles 49 and 56 TFEU. On justification, the Court noted in *Viking* that the right to take collective action for the protection of workers was an overriding reason of public interest provided that jobs or conditions of employment were jeopardised or under serious threat. On the facts, the Court suggested this was unlikely because Viking had given an undertaking that no Finnish workers would be made redundant.

If, however, the trade unions could justify the collective action, the national court would have to apply the proportionality test. The Court then applied the strictest form of the proportionality test, unmitigated by any references to 'margin of appreciation'. On the question of suitability, the Court said that collective action might be one of the main ways in which trade unions protected the interests of their members. However, on the question of necessity, the Court said it was for the national court to examine whether FSU had other means less restrictive of freedom of establishment to bring the collective negotiations with Viking to a successful conclusion, and whether FSU had exhausted those means before starting the collective action. In other words, industrial action should be the last resort. Since *Viking* has been settled we shall never know what conclusions the Court of Appeal would have reached on the questions of justification and proportionality.

Turning to *Laval*, the Court recognised that the right to take collective action for the protection of Swedish workers 'against possible social dumping' was a justification but found on the facts that using collective action to force Laval to sign a collective agreement whose content on central matters such as pay was unclear could not be justified. *Laval* also considered the effects of the Posted Workers Directive. It found that because Sweden had not complied to the letter with the terms laid down by the Directive, it could not involve the Directive to require the Latvian workers to enjoy the terms and conditions of employment enjoyed by Swedish workers. Furthermore, because the Swedish terms and conditions breached the Directive, strike action to enforce those terms and conditions was also unlawful.

The striking feature about the decisions in *Viking* and *Laval* is that the Court conducts the balancing between the economic and social through justifications and proportionality. For trade unions, this is balance in name, not substance. The moment collective action is found to be a 'restriction' and thus in breach of EU law, the 'social' interests are on the back-foot, having to defend themselves from the economic rights of free movement. And the Court has made it difficult to defend the social interests due to its strict approach to justification and proportionality. So, despite recognition of the right to strike, the limitations on the exercise of that right laid down by EU law subsume much of the right.

The question now is – what difference will the Lisbon Treaty make? Some argue that the phrase 'social market economy' in Article 3(3) TEU mandates a better balance between the economic and social; some support for that view can be found in the Advocate General's Opinion in *Commission v Germany (occupational pensions)*.[92] However, the Court did not seem inclined to follow that route. And a legislative attempt to draw the teeth of the decisions in *Viking* and *Laval,*[93] the so-called Monti II proposal,[94] based on Article 352 TFEU, prompted such fierce criticism from all sides, including the

[92] Case C-271/08 *Commission v Germany* [2010] ECR I-7091.
[93] COM(2012) 130.
[94] COM(2012) 130.

trade unions, that the proposal was rapidly withdrawn following the so-called 'yellow card' being shown by the national parliaments alleging subsidiarity concerns.

D. EU Social Policy and the Crisis

1. Introduction

The EU's response to the financial and economic crisis is destined to have a profound effect on the future shape of EU social policy. The picture, outlined in section B above, of an EU acquiring ever greater competences in the field of EU social policy more, has frozen. The EU, once seen as a saviour of social policy by trade unions, is now viewed as a threat to the very existence of social policy, both at EU level (there are few legislative proposals on the table) – and, more importantly, at national level. Deregulation of national labour standards – in those key areas where there is no EU legislation – has been seen as an essential pre-requisite to making the EU's labour market more flexible.

This push towards deregulation can be seen most clearly in the **Memoranda of Understanding** with those states in receipt of a 'bailout' (formally the financial assistance programmes). This makes it clear that key reforms of labour law are necessary as a condition for receiving financial assistance from the EU/IMF. The EU's governance reforms, including the **Euro Plus Pact** (EPP) and the 'six pack' adopted in the Autumn of 2011, also reveal something of the EU's attitude to labour market regulation. While these measures focus mainly on the need for greater surveillance of the Member States' economic policies to prevent states from running up such large debts as well as reducing those debts already incurred, they also have a direct and an indirect impact on labour law and social policy. The section that follows will briefly examine two EU measures which have a direct impact on national labour law.

2. The Euro Plus Pact

The 'Euro Plus pact' (EPP) was agreed at the European Council meeting of 24/25 March 2011 by the euro area Heads of State or government.[95] This document went through a number of incarnations, from its original Franco-German conception.[96] The uncertainty of the EPP's purpose is reflected in the various name changes: first the 'Competitiveness Pact', then the 'Pact for the Euro' and now the 'Euro Plus Pact'.[97] The 'Plus' reflects the fact that the deal applies to not only the Eurozone states but also to Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (hence the 'Plus' – the same group of states which agreed unconditionally to the fiscal compact of the 9 December 2011). The other Member States (UK, Sweden, Hungary and the Czech Republic) remain free to join. According to the European Council, the aim of the Pact is to 'further strengthen the economic pillar of EMU and achieve a new quality of economic policy coordination, with the objective of improving competitiveness and thereby leading to a higher degree of convergence reinforcing our social market economy.'

[95] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf
[96] 'France and Germany propose EU competitiveness Pact', BBC News Online, 4 Feb 2011, http://www.bbc.co.uk/news/world-europe-12368401 (accessed 20 Sept 2011).
[97] Charlemagne's notebook, *The Economist*, 25th March 2011.

The Pact builds on existing instruments (Europe 2020, European Semester (see Annex I), Integrated Guidelines,[98] Stability and Growth Pact and the new macroeconomic surveillance framework). The Member States made their first commitments under the Pact in their Stability or Convergence Programmes and National Reform Programmes (adopted under the European Employment Strategy (EES) and Article 121 TFEU considered in section B.4 above and D.5 below) submitted in April 2011. They are thus subject to the regular surveillance framework, with a strong central role for the Commission in the monitoring of the implementation of the commitments, and the involvement of all the relevant formations of the Council and the Eurogroup.

The Pact is upfront: it focuses 'primarily on areas that fall under national competence'. In the absence of EU competence, the EU can encourage and exhort but cannot actually put mechanisms in place to order change. Rather it can facilitate change through peer pressure, targets and guidelines. This can be seen in the provisions under the heading 'Fostering competitiveness'. It provides that '[e]ach country will be responsible for the specific policy actions it chooses to foster competitiveness, but the following reforms will be given particular attention:

- respecting national traditions of social dialogue and industrial relations, measures to ensure costs developments in line with productivity, such as:
    - review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms, while maintaining the autonomy of the social partners in the collective bargaining process;
    - ensure that wages settlements in the public sector support the competitiveness efforts in the private sector (bearing in mind the important signalling effect of public sector wages).

The proposed monitoring system for wage and productivity levels proved particularly controversial. The original German plan would have achieved this partly by forcing countries to end the indexing of wages to inflation – a move strongly opposed by a number of Member States, in particular Belgium which feared this would undermine its social model.[99] However, the final version does not oblige countries to give up indexing but, if they do not, each government must implement other measures to ensure that wages develop in line with productivity. The original draft also talked of enhancing 'decentralisation in the bargaining process'.[100] This antagonised trade unions in those key countries with centralised bargaining processes such as Finland, the Netherlands and Austria. Again, this has been diluted to 'where necessary' reviewing the degree of centralisation in the bargaining process.

The second part of the Pact which impacts on labour comes under the heading 'fostering employment'. This provides:

[98] Namely the Council's recommendation on the broad guidelines for the economic policies of the Member States and the Union (2010 to 2014) and a decision on guidelines for the employment policies of the Member States. Together they form the 'integrated guidelines'.

[99] P. Hollinger and P. Spiegel, 'Cracks over Franco-German Eurozone plan' *FT. com,* 4 Feb. 2011. Cf Council Recommendation 2011/C 209/01 on the NRP 2011 of Belgium and delivering a Council Opinion on the updated Stability program of Belgium 2011-14 (OJ [2011] L209/1) which identifies the 'system of wage bargaining and wage indexation' as a problem needing reform, a point reiterated in the Council Recommendation 2011/C 217/05 on the implementation of the broad guidelines for the economic policies of the Member States whose currency is the euro (OJ [2011] L209/1), para. 5.

[100] L. Phillips, 'Competitiveness pact "was never the blueprint people thought it was' *EU Observer*, 11 March 2011.

> Each country will be responsible for the specific policy actions it chooses to foster employment, but the following reforms will be given particular attention:
>
> - labour market reforms to promote "flexicurity", reduce undeclared work and increase labour participation;
> - life long learning;
> - tax reforms, such as lowering taxes on labour to make work pay while preserving overall tax revenues, and taking measures to facilitate the participation of second earners in the work force.

'Flexicurity' is the neologism around which the emphasis on quality of working life and employability of the workforce has coalesced.[101] Underpinning this idea is the aim to create a 'labour market which is fairer, more responsive and inclusive, and which contributes to making Europe more competitive'.[102] As the Commission explains in its 2007 Paper, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security',[103] 'Flexicurity promotes a combination of flexible labour markets and adequate security'. It says flexicurity is not about deregulation, giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Instead, flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organization to offer jobs with future. They need to invest in their workers' skills. That was 2007. Post the crisis, the emphasis is on the 'flex' rather than the 'curity'.

Although many on the trade union side feared that the Euro Plus Pact would be deregulatory, in fact the final version is more complex. As a product of many hands, it sought both to assuage the concerns of the Germans who want more control over national expenditure while at the same time supporting other states, such as Spain and Belgium, which are wedded to the maintenance of their national social systems. Hence the final Pact does create the space to recognise the diversity of the national systems. One of the 'six pack' measures, the Macro-economic Surveillance Regulation 1176/2011, goes even further in recognising the role for the national systems and, at the behest of the European Parliament,[104] now contains a 'Monti' clause:[105]

> The application of this Regulation shall fully respect Article 152 TFEU and the recommendations issued under this Regulation shall respect national practices and institutions for wage formation. It shall take into account Article 28 of the Charter of Fundamental Rights of the European Union, and accordingly shall not affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.'

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[101] See more generally J. Kenner, 'New Frontiers in EU Labour Law: From Flexicurity to Flex-security' in S. Currie and M. Dougan (eds) *Fifty Years of the Treaty of Rome* (Oxford: Hart Publishing, 2009).

[102] Commission (EC) 'Modernising labour law to meet the challenges of the 21st century' (Green Paper) COM (2006)708, 4. There is a surprising lack of reference to A. Supiot's influential report for the Commission, 'Transformation of Labour and the Future of Labour Law' Luxembourg, 1998. See S. Sciarra, 'EU Commission Green paper "Modernising labour law to meet the challenges of the 21st century"' (2007) 36 ILJ 375, 378.

[103] COM (2007) 359, 5.

[104] A7-0183/3.

[105] Art. 1(3). See also Recital 25 which adds 'When the Council and the Commission apply this Regulation, they should fully respect the role of national parliaments and social partners and respect differences in national systems, such as the systems for wage formation.'

Furthermore, the proposed Regulation on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (one of the so-called 'two pack') expressly provides in Article 6a:

> The Member State concerned shall seek the views of social partners as well as relevant civil society organisations when preparing a draft macroeconomic adjustment programme, with a view to contributing to building consensus over content.

The absence of any sanctions in the Pact suggests that its influence may be less than would first appear and that the Commission's six pack, hard law measures may in fact prove to be more significant. This much was acknowledged by one EU diplomat:[106]

> The pact is good for pressure; it's a bonus. But the Commission's proposals involve sanctions. The six pack, if fully implemented, means that things are now in the hands of the whole; countries can't fiddle the books any more. It will be difficult to disobey in a way that with peer pressure you still can.

3. The Memoranda of Understanding

The EPP probably presents a less direct threat to national labour law than would first appear. Much is left to the Member States to decide and, what started off as mandatory in early drafts became optional by the time it was finally agreed by the Member States. The EPP thus stands in stark contrast to the much more intrusive provisions in the Memoranda of Understanding which those countries receiving a bail-out have signed up to. Space precludes a detailed analysis of these lengthy documents but two examples will suffice to make the point.

First, take the case of Ireland.[107] The Irish government committed itself in the MoU to cut its minimum wage by a euro an hour. This decision was justified by the National Recovery Plan 2011-14[108] in the following terms:

> Where a NMW is imposed at a level higher than the equilibrium wage rate, unemployment will result. Some workers will be willing to work for a wage lower than NMW but employers are restricted from providing these job opportunities. Other negative effects include:
>
> > Acting as a barrier for younger and less skilled workers to enter the labour force and take up jobs;
> >
> > Preventing SME's from adjusting wage costs downward in order to maintain viability and improve competitiveness; and

[106] L. Phillips, 'Competitiveness pact "was never the blueprint people thought it was' *EU Observer*, 11 March 2011.

[107] See Implementing Decision 2011/77/EU (OJ [2011] L 30/34) on granting Union financial assistance to Ireland for a period of three years under the provisions of the Treaty and Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The accompanying Memorandum of Understanding signed on 16 December 2010 and its first update lay down the economic policy conditions on the basis of which the financial assistance is granted. Implementing Decision 2011/77/EU was amended by Implementing Decision 2011/326/EU (OJ [2011] L 147/17).

[108] http://budget.gov.ie/RecoveryPlan.aspx (last accessed 11 Dec. 2011).

> Reducing the capacity of the services sector to generate additional activity and employment through lower prices for consumers.

In addition, collective agreements (properly known as Registered Employment Agreements or Employment Regulation Orders) in the agricultural, catering, construction and electrical contracting sectors have been repealed. As the National Recovery Plan states:

> Both types of agreements constitute another form of labour market rigidity by preventing wage levels from adjusting. This in turn affects the sustainability of existing jobs and may also prevent the creation of new jobs, particularly for younger people disproportionately affected by the employment crises who form part of the labour force for these sectors.[109]

While a number of these agreements had been around for over 50 years and could result in arbitrary geographical divisions,[110] the removal of the agreements affected some of the lowest paid workers. In recognition of this, the reduction in the minimum wage was reversed in the summer of 2011.

Second, there is Portugal.[111] In the MoU, Portugal committed itself to a range of cuts in the employment field including a temporary suspension of thirteenth and fourteenth-month bonus salary payments for civil servants and pensioners who earn more than €1,000 a month. It also agreed to implement a reform in the severance payments for new hires in line with a tripartite agreement of March 2011. This included reforming the law on individual dismissal as well as aligning the severance payments of open-ended contracts with those of fixed-term contracts and reducing total severance payments for new open-ended contracts from 30 to 10 days per year of tenure (with 10 additional days to be paid by an employers' financed fund), with a cap of 12 months and elimination of the 3months of pay irrespective of tenure, and reducing total severance payments for fixed-term contracts from 36 to 10 days per year of tenure for contracts shorter than 6 months and from 24 to 10 days for longer contracts (with 10 additional days to be paid by an employers' financed fund).

To British eyes, these reforms are not radical. Nevertheless they go straight to the heart of the national labour law systems which in turn go to the core of national sovereignty. Furthermore, such reforms, together with the EU's own Council recommendations on the national reform programmes,[112] have created an expectation as to what Member States, who are in a state of crisis but not (yet) being bailed out, should do.

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[109] P.37.

[110] See the Duffy/Walsh report commissioned by the Irish government in accordance with its commitment in the MoU to hold an independent review f the Framework REA and ERO agreements: *www.djei.ie/publications/employment/2011/Report_ERO_REA.pdf.*

[111] On 17 May 2011, the Council adopted Implementing Decision 2011/344/EU (OJ [2011] L159/88) to make available to Portugal medium-term financial assistance for a period of three years 2011-2014 in accordance with Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The accompanying Memorandum of Understanding signed on the same day and its successive supplements lay down the economic policy conditions on the basis of which the financial assistance is disbursed.

[112] http://ec.europa.eu/europe2020/tools/monitoring/recommendations_2011/index_en.htm (last accessed 16 Dec. 2011).

4. The Role of the Court of Justice

In the light of the Court's increasingly expansive reading of the Charter outlined above, it was inevitable that trade unions would try to argue that the radical reforms to national labour law contravened the Charter.[113] This led to the reference in *Sindicatos dos Bancários do Norte.*[114] The questions raised the question whether, for example, 'the salary cut made by the State, by means of the Lei do Orçamento de Estado para 2011, applicable only to persons employed in the public sector or by a public undertaking, contrary to the principle of prohibition of discrimination in that it discriminates on the basis of the public nature of the employment relationship?' There were further questions about the compatibility of the reforms with the Charter. For example, the third question said:

> 3. Must the right to working conditions that respect dignity, laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that it is unlawful to make salary cuts without the employee's consent, if the contract of employment is not first altered to that effect?

The fifth question was even more expansive:

> 5. As a salary cut is not the only possible measure and is not necessary and fundamental to the efforts to consolidate public finances in a serious economic and financial crisis in the country, is it contrary to the right laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union to put at risk the standard of living and the financial commitments of employees and their families by means of such a reduction?

In fact, before the Court of Justice had a chance to rule on the matter, the Portuguese Constitutional Court found the public sector pay cut to contravene the equality provision, Article 13, of the Portuguese Constitution.[115] The decision required some rethinking of the budgetary plans for 2013.[116] The Court of Justice declined to hear the reference:[117]

> 12 Or, malgré les doutes exprimés par la juridiction de renvoi quant à la conformité de la loi de finances pour 2011 avec les principes et les objectifs consacrés par les traités, la décision de renvoi ne contient aucun élément concret permettant de considérer que ladite loi vise à mettre en œuvre le droit de l'Union.

The refusal of the Court to hear the case comes as no surprise: the Court had also refused to hear references from Romania about reforms to Romanian labour law. For example, in Case C-434/11

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[113] The section that follows draws on C. Barnard, 'The Charter in time of crisis: a case study of dismissal' in N. Countouras and M. Freedland (eds), *Resocialising Europe,* (Cambridge, CUP, forthcoming).

[114] Case C-128/12 *Sindicato dos Bancários do Norte* v. *BPN – Banco Português de Negócios SA*. See also the reference in Case C-264/12 *Sindicato Nacional dos Profissionals de Seguros e Afins v Fidelidade Mundial*, reference lodged 29 May 2012.

[115] Case 353/2012, judgment of 5 July 2012 http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html; the revised proposal was also rejected by the Portuguese Constitutional Court in ACÓRDÃO N.º 187/2013.

[116] Yet in its most recent report the IMF still notes 'Fiscal spending, particularly on public wages and social transfers, ratcheted up for many years, with a weak link between the state's goals and the budget's spending allocation. The main focus will have to be on further rationalizing public sector pay and employment as well as reforming pensions and other social transfers, aiming at more efficient public services and more equitable re-distribution': http://www.imf.org/external/np/ms/2012/112012b.htm.

[117] Order of 7 March 2013, available in French only

Corpul Naţional al Poliţiştilor, the Court refused to hear a challenge to national law for its compatibility with the Charter, despite the fact that the reduction in Romanian public sector salaries by, for example, Laws 118/2010 and 285/10, was part of a package of measures designed to rebalance the books of the Romanian government and a condition precedent for further instalments of money being lent to it by the EU/IMF/World Bank.[118] It may be that an inadequately drafted order for reference, which failed to make express the links between the national reforms and bailout conditionality, gave the Court an easy escape route to having to decide difficult cases.

While the Court's refusal to engage with the Charter in respect of 'crisis' measures may be the result of a pragmatic decision to ensure the troika negotiators have a free hand to deliver what they perceive to be in a country's best interest, it overlooks the fact that the states affected by conditionality are all signatories to other international standards with their own review bodies, notably the ILO and the European Committee on Social Rights (ECSR), a body of the Council of Europe whose role is 'to judge that States party are in conformity in law and in practice with the provisions of the European Social Charter'.[119] The ILO has become increasingly critical of the Court of Justice over the years, condemning it, in particular, for its judgment in *Viking* and *Laval*[120] and the effect this is having on freedom of association, collective bargaining and the right to strike.[121] It has also been critical of the major reforms to Greek labour law as a condition of the bailout.[122] The ECSR has also been critical of the major reforms to Greek law and the various ways they have contravened the provisions of the ESC.[123] These bodies have relevance for the EU if it is prepared to listen to what they say: Article 151 TFEU makes express reference to the role of the European Social Charter 1961.

5. Effect of these developments on the UK

5.1 Introduction

While most of the developments outlined in section D1-4 above affect the Eurozone states only there will inevitably be some spillover effects on the UK. For example, the UK has to submit annually

[118] See eg Annex I of the Supplemental MoU of February 2010 (http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2010-02-25-smou_romania_en.pdf) adopted in the context of Council Decision 2009/459/EC (OJ [2009] L 150/08) which in turn was adopted under Regulation (EC) No 332/2002. Full details of the Romanian position can be found in http://ec.europa.eu/economy_finance/eu_borrower/balance_of_payments/romania/romania_en.htm.

[119] http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp

[120] Case C-341/05 *Laval un Partneri Ltd*. v. *Svenska Byggnadsarbetareförbundet* [2007] E.C.R. I-11767; Case C-438/05, *International Transport Workers' Federation* v. *Viking Line ABP* [2007] E.C.R. I-10779

[121] See eg the Report of the Committee of Experts on the Application of Conventions and Recommendations, 2010 report which says 'The Committee observes with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless': http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2010-99-1A).pdf

[122] http://www.ilo.org/brussels/press/press-releases/WCMS_193308/lang--en/index.htm

[123] See eg *General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece*, Complaint No. 65/2011, Adopted by Resolution CM/ResChS(2013)2 on 5 Feb 2013.

a national reform programme under the EU employment guidelines and a convergence programme under the Stability and Growth Pact; the Council then issues Country Specific Recommendations (CSR) under Article 121(2) TFEU and 148(4) TFEU[124] which Member States, including the UK, must address. This process of states reporting and the Commission/Council responding is part of the European semester (see Annex I) which in turn forms the core of the EU's ten year growth strategy, EU 2020. The UK is also subject to the excessive deficit procedure.[125] For these reasons the UK is directly affected by the EU's thinking about how to tackle the crisis. However, it is striking that the latest Recommendations issued to the UK make no reference to reforms of labour law (unlike for example, the recommendations issued to Spain[126]), thus suggesting that labour law in and of itself in the UK is not perceived to be a problem.

5.2 Reforms to UK labour law

If, however, the spotlight is shone on UK labour law, to what extent can EU law prevent the UK from reforming its own system? At first sight the answer is straightforward: for those areas covered by UK law exclusively, the UK is free to make the reforms it chooses. So for example, the recent reforms to UK law on unfair dismissal (eg increasing the service requirement to two years, introducing the concept of employee shareholder who do not enjoy protection under the unfair dismissal legislation) are a legitimate exercise of UK parliamentary sovereignty and do not contravene a specific EU directive because there is no specific EU legislation on unfair dismissal.

This view is supported by *Polier*.[127] There the claimant argued that the new French law introducing the *contrat nouvelles embauches* (CNE), which in certain circumstances enabled individuals to be dismissed during the first two years of employment without the employer either giving reasons or following a procedure, contravened the EU Charter (the case arose before the Charter entered into force), the ILO Convention 150 and the ESC. The Court of Justice rejected the reference by order. It made two points. First, even though the EU has competence under Article 153(1)(d) ('protection of workers where their employment contract is terminated'), situations that have not been subject to measures adopted on the basis of these articles are not within the scope of Union law.[128] Secondly, even though there are a number of directives which touch upon dismissal (eg the Collective Redundancies Directive 98/59), the case of the applicant in this case was not covered by Union law.[129] For these reasons EU law did not apply.

Conversely, in an area where EU law has laid down a minimum standard in a Directive but the directive contains no non-regression clause, for example the Directive on collective redundancies,[130] the UK can amend its laws but only to the minima laid down by the Directive. This the UK has done by reducing the consultation period for 100 or more collective redundancies from 90 days to 45. It seems unlikely that there is a general principle of EU law concerning non-regression, particularly in the field of labour law, despite general (rhetorical) aspirations in the Treaty about improving the

[124] http://ec.europa.eu/europe2020/pdf/nd/csr2013_uk_en.pdf
[125] http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/uk_en.htm
[126] http://ec.europa.eu/europe2020/pdf/nd/csr2013_spain_en.pdf
[127] C-361/07 *Polier v. Najar* [2008] ECR I-00006*.
[128] Para. 13.
[129] Para. 14.
[130] Directive 98/59, Article 5.

standard of living in Article 151 TFEU, a provision which is not legally enforceable.[131] Given the deep cuts to labour law in Portugal, Greece and Ireland, it certainly looks like the troika do not think that such a principle exists (albeit that such cuts are part of the conditionality of receiving financial assistance).

By contrast, if a Directive contains a non-regression clause,[132] reforms to national labour law in an area covered by the Directive may contravene the clause. However, the Court's case law has done much to weaken the effects of non-regression clauses.[133] Take, for example, the non-regression clause in the Fixed term Work directive 99/70: 'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'. Implementation is broadly construed to cover not only the original transposition of the Directive but it also covers 'all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted'.[134] However:

- 'reduction of the protection which workers are guaranteed in [in this case in] the sphere of fixed-term contracts is not prohibited as such by the Framework Agreement where it is in no way connected to the implementation of that agreement.[135]
- the condition that the reduction must relate to the 'general level of protection' afforded to fixed-term workers, implies that 'only a reduction on a scale likely to have an effect overall on national legislation relating to fixed-term employment contracts is liable to be covered by the [non-regression] clause 8(3).[136] So where the changes do not affect a 'significant proportion' of people there may not be a breach of the clause.[137]
- Improvements in standards required by the Directive could offset any reduction in standards in connection with its implementation.[138]
- Non-regression clauses appear not to have direct effect.[139]

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[131] Case 126/86 *Fernando Roberto Giménez Zaera v. Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3697

[132] Article 18(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307/18); Article 16 of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work (OJ 1994 L 216, p. 12); Article 6 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6); Clause 6(2) of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9); Article 6(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); Article 8(2) of Council Directive 2000/78/EC; Article 9(4) of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees (OJ 2002 L 80, p. 29); Article 23 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). This list was taken from the Opinion in Case C-144/04 *Mangold* [2005] ECR I-9981, n.23.

[133] For a good discussion, see S. Peers, 'Non-regression clauses: the fig leaf has fallen' (2010) 39 ILJ 436.

[134] *Mangold*, para. 51.

[135] *Mangold*, para. 52.

[136] Joined Cases C-378/07 to C-380/07 *Angelidaki* [2009] ECR I-3071, para. 140.

[137] *Angelidaki*, para. 142.

[138] *Angelidaki*, paras. 144-6.

This suggests that non-regression clauses are significantly less effective than would first appear, a point emphasized by Advocate General Tizzano in *Mangold*. He gave a particularly narrow reading of non-regression clauses, arguing that the main purposes of such rules is not 'to function as a standstill clause absolutely prohibiting any lowering of the level of protection that exists under national law at the time of implementation of the directive' but rather to act as a transparency clause, in other words a clause which, in order to guard against abuses, prohibits Member States from taking advantage of the transposition of the directive to implement, in a sensitive area such as social policy, a reduction in the protection already provided under their own law, while blaming it (as unfortunately all too often happens!) on non-existent Community law obligations rather than on an autonomous home-grown agenda'.[140] He justified this interpretation on the basis of the wording of the clause as well as 'the scheme of allocation of responsibilities intended by the Treaty, which in the domain of social policy assigns to the Community the task of 'support[ing] and complement[ing] the activities of the Member States' in specified fields (Article [153(1) TFEU]).[141] He concluded:

> 65. If the clause in question were to be interpreted not, as I have argued, as a transparency requirement, but rather as a fully-fledged standstill provision, then upon implementation of the directive Member States would find themselves denied the possibility not only – as is obvious – of contravening the obligations imposed by the directive but also of absolutely any rowing back, for good cause, in the area governed by the directive. But that would be neither to support nor to complement their activities but to tie their hands completely in the field of social policy.

5.3 Possible avenues of challenge under EU law

That said Member State freedom to (de)regulate their labour laws may be subject to two possible challenges. The first is that the reform is indirectly discriminatory on the ground of sex and so contrary to Article 157 TFEU on equal pay. However, as the Court clearly explained in *Seymour-Smith*[142] this depends on the reforms relating to pay. In that case the claimants argued that the (then) two-year service requirement under UK law necessary to bring a claim for unfair dismissal was indirectly discriminatory against women. The Court allowed the challenge to be made because:

> It follows that compensation for unfair dismissal is paid to the employee by reason of his employment, which would have continued but for the unfair dismissal. That compensation therefore falls within the definition of pay for the purposes of Article [157 TFEU].[143]

Having established that Article 157 TFEU applied, the Court then said that 'the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain compensation fall within the scope of Article [157 TFEU]'.[144] The conditions for accessing the protection of the UK unfair dismissal regime were therefore subject to scrutiny under the principle of non-discrimination. The (then) House of Lords found that the UK rules were indirectly discriminatory but could be justified.

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[139] *Angelidaki*, paras. 210-12.
[140] Paras. 61-2.
[141] Para. 64.
[142] Case C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith* [1999] ECR I-623.
[143] Para. 28.
[144] Para. 41.

The second challenge to any such reforms might be made under the Charter, for example Article 30 which requires 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.' However, the Charter applies only if Article 51 is satisfied. Article 51(1) provides:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Article 51(2) adds:

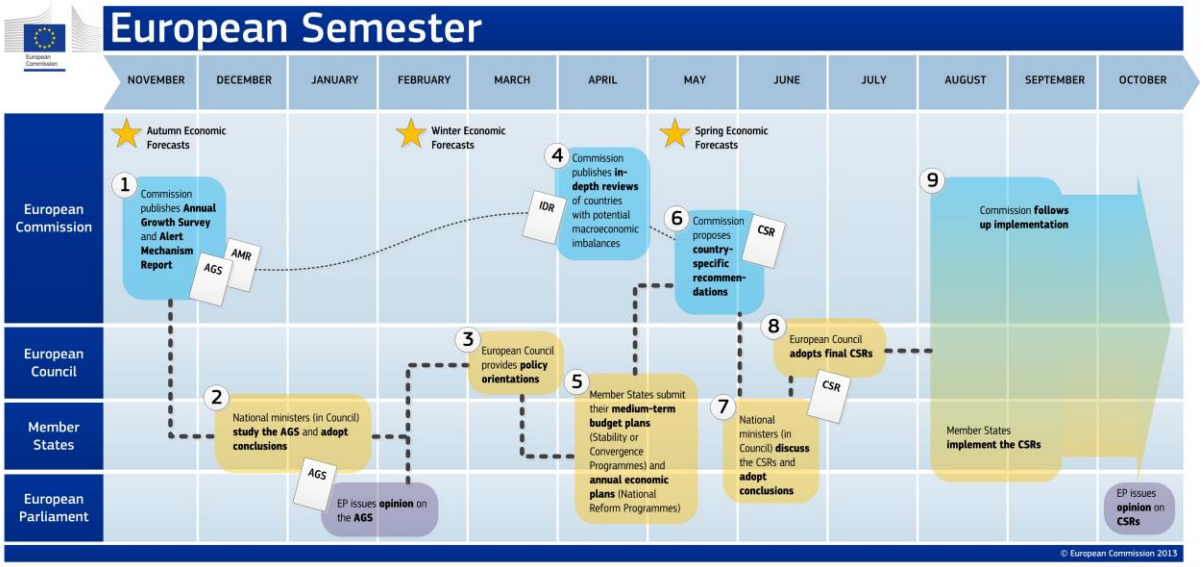
> The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

It seems likely that, in the UK at least, the British courts will consider that individual dismissal is not covered by EU law, so the Charter would not apply, nor, for different domestic reasons, would the ESC. The German courts have already reached this conclusion in a case concerning Article 30 of the Charter. The Federal Labour Court held that there was no need to seek a preliminary reference in a case that involved judge-made dismissal protection since there was no connection with EU-law. While 'the fundamental rights of the Constitution provide an objective order of values from which may arise a mandate of the state to protect and act where necessary to be fulfilled by enriching vague notions of statutory law by judges as is the case with regard to dismissal protection for employees not covered by the relevant Act. (…) "The Charter of Fundamental Rights of the European Union of 12.12.2007 lacks such a comprehensive and potentially expansive character. Pursuant to Article 51 para 1 the provisions of the Charter are addressed 'to the institutions and bodies of the Union only when they are implementing Union law"'.[145]

This analysis therefore suggests that the UK has considerable leeway to exercise domestic competence in this field.

[145] Case 6 AZN 1371/11, 08.12.2011. I am grateful to Bernd Waas for this information.

Annex I: The European semester



Source: http://ec.europa.eu/europe2020/making-it-happen/index_en.htm

Annex II: table of EU legislative acts in the field of social policy together with their legal basis

Subject area[146]	Legislation	Legal basis (TFEU numbers unless otherwise stated))
Equality	Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation	Article 157(3)
	Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security	Article 352
	Directive 2000/43 on equal treatment between persons irrespective of racial origin	Article 19
	Directive 2000/78 on the general framework Directive for equal treatment in employment and occupation	Article 19
	Directive 2010/41on the principle of equal treatment between men and women engaged in an activity in a self-employed capacity	Article 157(3)
Family friendly policies	Directive 92/85 on the introduction of measures to encourage the improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breast feeding	Article 118a EEC, Article 153 TFEU
	Directive2010/18 implementing the revised Framework Agreement on parental leave concluded by	Article 155(2)

[146] These headings are intended to help the reader. They are not intended to be prescriptive of the choice of legal basis.

	BUSINESSEUROPE, UEAPME, CEEP and ETUC	
Working conditions/working time	Directive 2003/88 concerning certain aspects of the organisation of working time	Article 118a EEC, Article 153(2)
	Directive 94/33 on the protection of young people at work	Article 118a EEC, Article 153 TFEU
	Directive 1999/63 concerning the Agreement on the organisation of working time of seafarers concluded by ECSA and the FST	Article 155(2)
	Directive 2000/79 concerning the European agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by AEA, ETF, ERA and IACA	Article 155(2)
	Directive 2005/47 on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector	Article 139(2) EC
	Directive 2002/15 on the organisation of working time of persons performing mobile road transport activities	Articles 91 and 153(2)
	Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract of employment	Article 115
	Directive 96/71 concerning the posting of workers in the framework of the proviso of services	Articles 53(1) and 62 TFEU
Health and safety	Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work.[147]	
	Directive 91/383 supplementing the measures to encourage improvements in the safety and health at work of	Article 118a EEC, Article 153 TFEU

[147] This has been accompanied by more than 16 'daughter' directives.

	workers with a fixed-duration employment relationship or a temporary employment relationship	
	Directive 2010/32 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU	Article 155(2)
Atypical workers	Directive 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC	Article 155(2)
	Directive 99/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP	Article 155(2)
	Directive 2008/104 on temporary agency work	Article 153(2)
Information and consultation	Directive 2009/38 on the establishment of a European Works Council or a procedure for Community scale undertakings and Community scale groups of undertakings for the purposes of informing and consulting employees	Article 153
	Directive 2002/14 establishing a general framework for the informing and consulting employees in the European Community	Article 153(2)
Restructuring of enterprises	Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies	Article 115
	Directive 2001/23 on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses	Article 115
	Directive 2008/94 on the protection of employees in the	Article 153(2)

	event of the insolvency of their employer