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SINGLE MARKET, EQUAL RIGHTS?

UK PERSPECTIVES ON EU EMPLOYMENT AND SOCIAL LAW

Edited by Adam Hug and Owen Tudor

Single Market, Equal Rights?
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The Foreign Policy Centre
Suite 11, Second floor
23-28 Penn Street
London N1 5DL
UK

www.fpc.org.uk
events@fpc.org.uk

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Introduction: Single Market, Equal Rights?

Adam Hug and Owen Tudor

This publication comes at a time of great uncertainty in Britain's future relationship with the EU, and even greater uncertainty about what sort of European Union can be salvaged from the current crisis of sovereign debt (or however you describe it).

Although linked, the specifically UK element of this follows a further resurgence of euroscepticism in the Conservative Party and the Prime Minister's more aggressive approach to fellow European leaders over Franco-German proposals for revisions to the European Treaties. The UK's apparent isolation has driven the issue of Britain's relationship with the EU up from an issue primarily vexing Conservative backbenchers and certain newspapers to one at the front and centre of political debate, and as one of the primary fault-lines within the coalition government. The clamour for some form of fundamental renegotiation of the relationship has grown louder, the possibility of outright withdrawal seems more plausible than it has for a generation and it may even be possible that the extent of the crisis has shaken some of Britain's previously dormant pro-Europeans from their torpor.

Meanwhile, across Europe, there has been a massive loss of confidence in the ability of the European Union to deliver a social model worth the name. The confluence of right of centre governments in power across most of Europe, as well as a decade or more of what many on the left regard as capture of EU institutions by neoliberals (after a decade or more during which the right thought the opposite had happened under Jacques Delors), the global financial and then economic crisis, which has now evolved into a crisis of sovereign debt, has precipitated a wave of austerity that threatens to engulf the European social model. Although most of the coverage of this crisis has focused on government debt and deficit reduction, and its effect on the provision of quality public services, unions are experiencing a long term attack on wage levels (as part of a worldwide shift in the balance of power between, and the relative rewards to, capital and labour), and now a threat to the very nature of the relationship between organised labour and employers, with labour standards and collective bargaining under attack.

The debate is alive and *'Single Market, Equal Rights?'* seeks to address what for many is one of its most critical issues.

European or domestic labour law

The role of the EU in employment and social law is one of the great fault-lines in the European debate in the UK. For some it is an intolerable interference into the nation's affairs and a burden on British business, but for many on the left it has been portrayed as the primary benefit of being in the EU. While not everyone may agree with the contention, the genesis of this project stems from the argument that if there is a common framework of rules that underpins the single market for capital, goods and services then the same should apply for labour.

Proponents go further than mere neatness in their argument. They say that, where every other element of economic life can move unhindered around the EU, including in many cases labour itself, the effect of having different rules for the labour market in different countries is to engender arbitrage[1] of terms and conditions of employment which provokes a race to the bottom, also known as 'social dumping', reducing wages and more to the lowest common denominator. That arbitrage has been held back in some countries by well-entrenched systems of collective bargaining (e.g. Scandinavia and Germany), but even that process is under assault both legally and politically (as Catherine Barnard explains in her contribution). What remains is the possibility of legal provisions, and whilst these can be implemented nationally (e.g. the UK's national minimum wage, which has prevented the emergence on the 'one euro an hour' jobs that have bedevilled German attitudes to free movement of labour from the east), the arbitrage stimulated by the primacy of free market rules over workers' rights can undermine those too, unless established in law at European level. Certain common standards can also assist movement of labour by harmonising basic working practices, making cross-border activity easier for both workers and employers.

[1] Essentially, taking advantage of the difference in price between a good or service in two different markets.

The main proponents of this argument are the trade unions, although there are social policy and legal experts – and of course politicians who see their main point of reference as working people – who share this concern. Many employers and economists are willing to accept the logic that this is a trade-off which is worth it to secure consent for the free market in goods and services which they see as a major advantage of the EU: and some point to the certainty that uniformity brings to investment decisions: arbitrage is sometimes unhelpful to companies making long term investment decisions.

Opponents come in various guises, and argue different points. Eurosceptics argue that European rules on labour relations and workplace terms and conditions are anathema per se – as they argue over so many areas of European law. Neoliberals argue that EU-wide labour laws act to constrain the free market, which they see either as pragmatically or ideologically important. In their view, workers benefit from lower labour standards because they drive down prices, and workers as consumers benefit more from that than they lose in lower wages. Some argue that the level at which EU labour laws have to be set so that they do not undermine northern European standards excludes the unemployed, or indeed Eastern European workers generally, from the labour market – an insider-outsider argument that sees EU-wide labour laws as protectionism. And others argue that the labour standards in Europe must not be set at a level which makes European workers uncompetitive in global markets, often referring to the extremely low current wage levels and employment conditions in countries like Bangladesh, China and Vietnam.[2]

The *Single Market, Equal Rights?* project seeks to do a number of things:

- To set out the current state of the debate regarding employment and social law at a European level;
- To give a range of different viewpoints about how EU employment and social law is seen from the UK; and
- To assess the desirability and feasibility of, on the one hand the repatriation of labour market rule-making to EU member states or, on the other the shoring up or strengthening of trans-national labour standards and rule-making.

A brief (British) history of 'Social Europe'

The concept of 'Social Europe' can be traced back to the original Treaty of Rome, although it really only began to develop in the late 1970s, ironically at the very point where, in the global economy, what Hobsbawm called the forward march of labour had been pretty much halted. Indeed, in some ways, that was what made 'Social Europe' necessary: it was a way of writing social rights into the functioning of labour markets which, due in part to the beginnings of globalisation, had ceased to deliver progress on a country by country basis.

In the UK, Social Europe was clearly portrayed, and seen by most protagonists, as one side of the deal between capital and labour, providing a gain for trade unions and working people to set against the increasingly free market in capital, goods and services. Indeed, this was the heart of the deal that Commission President Jacques Delors offered the British TUC in his epochal address in 1988 which reversed decades of labour movement hostility to the 'Common Market'. That he also offered an oar of respectability and influence to a movement dubbed 'the enemy within' by the then Prime Minister Margaret Thatcher, and thereby cocked a snook at the TUC's nemesis, was a key sweetener to a deal which was, in reality, welcomed as much by continental trade unionists too.

Throughout the implementation phase of the single market, workplace rights, especially the 'six-pack'[3] of health and safety directives, were advanced in lock step with economic liberalisation. Mrs Thatcher made it an

[2] This is not, technically, an argument against common European labour law in itself. However, if a common standard levels up, then clearly some European workers will become less competitive with lower waged workers in developing and emerging economies. It is also the case that such workers are paid so little that European workers can never be truly competitive with them on price alone, and there will therefore always have to be other reasons for employing labour in Europe rather than the Far East.

[3] The six-pack refers to EU health and safety directives implemented in the UK as:

- The Management of Health and Safety at Work Regulations (which set out principles such as risk assessment)
- The Provision and Use of Work Equipment Regulations
- The Manual Handling Operations Regulations
- The Workplace (Health, Safety and Welfare) Regulations
- The Personal Protective Equipment at Work Regulations
- The Health and Safety (Display Screen Equipment) Regulations

article of her commitment to Europe that Britain would implement these rights in full and on time, and be 'better Europeans' than the less Eurosceptical leaders she faced. It is said that she later regretted giving so much (as it is also said that Tony Blair regretted too late that he had not kept a case-by-case opt-out from the European Social Chapter), although in reality, the six-pack was based on UK principles of health and safety law, such as risk assessment – in theory, if not in practice, a very flexible approach to workplace protection.

However, by the time the European Commission proposed the Working Time Directive, the UK Government had had enough, and considered that the Commission was attempting to extend its reach into workplace issues that were beyond its competence and should be left if not to individual employees and employers, then certainly to individual member states. Lawyers were despatched to Strasbourg to challenge the competence of the EU in this area, although they were advised by the Government's own epidemiological expert that they were – as it turned out was true – wasting the air tickets.

The UK Government was by then taking a tougher line which led to the adoption of the UK opt-out from the Social Chapter of the Single European Act. Although the incoming Labour Government in 1997 signed away the opt-out with a flourish, the UK has since then remained sceptical of the regulation of the labour market by the European Union, believing that the pendulum had swung far enough if not too far in the direction of labour rights (not least because the Labour Government adopted a model of state agency over workers' living standards rather than earlier models of social democracy which afforded trade unions and collective agreements with employers primacy in such areas).

Recent challenges to Social Europe

These issues have all surfaced again as a result of three main trends: the perceived stalemate over the social model; a series of judgments in the European Court of Justice; and the impact of the Eurozone crisis.

Since 2000, unions have become increasingly concerned that the social model has been frozen, with protracted debate over the Temporary and Agency Workers Directive, eventually resolved when a major union campaign in the UK led employers, unions and government to negotiate a deal that allowed the Directive to be adopted; and no progress on revision of the Working Time Directive. Over the decade to 2010, employers at European level had proved resistant to further social measures either through the social dialogue process or through legislation, and the political balance in the Council of Ministers shifted towards governments less willing to enact social legislation, and more committed to deregulation and liberalisation than previously. All this is a matter of debate of course, and there were social measures adopted, and deregulatory measures such as the Services Directive were stripped of the parts that would have affected labour law, but progress was not made at the pace of the Delors period. Unions have clearly expressed concern that the social model has ceased to adjust to address gaps in social protection such as the agency workers, domestic workers and so on.

Towards the end of this period, a series of cases at the European Court of Justice (ECJ) began to rebalance the relationship between the economic rights of employers and unions. The Viking and Vaxholm judgments essentially gave primacy to the freedom of movement of employers, and undermined the right of trade unions to resist reductions in terms and conditions accordingly (these cases are analysed in greater detail in the articles which follow). Unions have responded by proposing reforms to the Posted Workers Directive (like the Working Time Directive revision, a very protracted process) and the introduction of a social clause in the European Treaties to redraw the balance of European law in favour of workers' rights.

And finally, the rolling impact of the global financial crisis, the recessions which followed, and now the Eurozone or sovereign debt crisis has begun to have an effect. In response to the worsening economic weather, the European Commission has called for unit labour costs to be reduced – including by reducing wages and interfering with wage determination measures such as the Belgian system of indexation – and various governments have cut terms and conditions for public sector workers (including the UK Government's public sector pay policy). Some governments – such as in Hungary – have gone further and changed the labour laws to restrict union rights.

So, while the Delors Commission saw an expansion of workers' rights and a growth in union influence, those trends have been reversed in the last 10-15 years, and unions have grown so frustrated with the situation that, in January, the European Trade Union Confederation agreed unanimously to oppose the treaty being

supported by 25 of the 27 EU member states to address the Eurozone crisis: the first time that the trade union movement has taken such a position on European governance reform.

The repatriation debate

Meanwhile, on the right in the UK, there has been a continuing debate over the relationship in general between the UK and the European Union, which has recently included a big debate about the repatriation of powers – with a strong focus on employment issues.

'A Conservative government will negotiate for three specific guarantees – on the Charter of Fundamental Rights, on criminal justice, and on social and employment legislation – with our European partners to return powers that we believe should reside with the UK, not the EU. We seek a mandate to negotiate the return of these powers from the EU to the UK.'[4]

Understandably, after going into government with the Liberal Democrats, this Conservative manifesto commitment was somewhat watered down in the coalition agreement to a less sweeping pledge to 'examine the balance of the EU's existing competences' and in particular to 'work to limit the application of the Working Time Directive in the United Kingdom'[5]. This has not stopped the issue remaining totemic for many Conservative parliamentarians and their supporters outside Parliament.

One organisation in particular, Open Europe, has played an important role in making the case for repatriation of employment and social rights. Their November 2011 report 'Repatriating EU social policy: The best choice for jobs and growth'[6] is the latest in a long line of detailed reports that argue against the EU's role in employment and social law, and the source of a much quoted '£8.6bn' a year cost of such regulation[7]. While Mats Persson from Open Europe makes a somewhat different argument focused on the left in this publication, it is also worth addressing some of the cost projections that are often at the centre of the repatriation debate.

First of all, Open Europe's data was compiled using a calculation of costs drawn from a total of cost predictions from UK government pre-implementation impact assessments (IAs), that was put together for a series of reports, 'Out of Control (2009)[8]and Still Out of Control (2010)[9]. In Still Out of Control they calculated the cumulative cost to the UK economy of EU employment legislation in the 11 years since the introduction of IAs at £38.9 billion or £3.54 bn per year[10]. Part of the reason for the higher £8.6 bn figure in the most recent report is that, unlike previously, 'transfer payments' where employees get a benefit and employers a cost are now added to the calculation. As Open Europe have acknowledged, this total relates to the costs to business and public sector employers, not the costs and benefits to society as a whole. On the basis of Open Europe's most recent data a couple of things are worth noting:

a) The £8.6bn figure is the protection of total savings if the employment and social regulation addressed in EU law was removed entirely and not replaced by national legislation. Open Europe argue that a more realistic approach would involve a 50% reduction in regulation, something that to these authors still seems fairly unlikely (and undesirable). It is worth stressing of course that some of the proposed cost savings could be achieved at EU level if desired.

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[4] Conservative Party Manifesto 2010, http://www.conservatives.com/Policy/Manifesto.aspx

[5] Coalition Agreement May 2010, http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

[6] Open Europe Repatriating EU social policy: The best choice for jobs and growth, November 2011 http://www.openeurope.org.uk/research/2011EUsocialpolicy.pdf

[7] For example, Roland Watson, Cameron moves to fortify the City against reformed Eurozone, November 2011, http://www.thetimes.co.uk/tto/news/uk/article3222159.ece (which wrongly states that the report puts the cost to Britain of EU social laws at £8.6 billion a year, rather than the cost to businesses and the public sector)

[8] Open Europe, Out of Control? Measuring a decade of European regulation, February 2009, http://www.openeurope.org.uk/research/outofcontrol.pdf

[9] Open Europe, Still Out of Control? Measuring eleven years of EU regulation, June 2010, http://www.openeurope.org.uk/research/stilloutofcontrol.pdf

[10] It is also interesting to note than in this earlier report, an assessment of regulatory impact across a far wider range of issues than just employment and social policy, the overall calculations show both a net benefit of all regulations brought in £1.58 in benefits to £1 of costs (a figure 27p lower than the Government estimate) in order to argue that within this UK regulation delivers benefits of £2.35 to £1 costs, compared to £1.02 to £1 costs for EU legislation. While not the point they are making this is nevertheless a 2p per £1 net benefit of EU regulation.

b) Open Europe identify £3.4 bn in quantifiable benefits from the same regulations to which they have identified the £8.6 bn in costs. However, as the report states, many of the benefits (beyond the £3.4 bn) of employment and social regulations are difficult to quantify, such as the impact of improved wellbeing on productivity[11]. Either way their calculations for the impact on output, GDP, employment and productivity put forward in the report seem to ignore the benefit side of the equation entirely and count removing the £8.6bn 'cost' as a direct increase in GDP.

c) Perhaps most importantly the areas of unquantifiable benefits of EU employment and social policy, including the 'better work life balance', 'improvements to health and safety' and 'a more committed work force' not only have potentially sizeable economic impacts but broader social benefits that make a purely financially driven cost/benefit analysis a somewhat narrow approach to take to the issue.

There is also a question mark over whether repatriation of employment law is likely to be possible at all, something highlighted by the fact David Cameron felt unable to push for this at the December 2011 Summit. Changes to the UK's participation in EU employment and social law under Articles 151-161 of the Treaty on the Functioning of the European Union (the consolidated post-Lisbon EU treaty) would require unanimity, something that was extremely unlikely. It would also, in all likelihood[12], require a full treaty change, thereby triggering referendums in a number of member states where campaigning for a yes vote to enable the UK to undercut that country's social provisions would be something of an uphill struggle if a standalone measure, or would risk undermining support for wider treaty change as part of a package. However, even this would not be enough for some Eurosceptic opponents of EU employment and social law, as this would still mean that the rest of the EU could apply certain new regulations through other treaty articles that got around the UK's opt-out and have these positions upheld by the ECJ. Therefore, Open Europe for example, argue that a 'double lock' is required so that not only would they need a protocol formalising an opt-out to Articles 151-161 but an open ended opt-out from anything that the UK decides infringes on social law, so that in the event of a dispute, London could unilaterally block the law by both suspending Qualified Majority Voting[13] and removing the issue from ECJ jurisdiction so that its decision could not be challenged.

If the fall-out from the December 2011 European Summit was to push the UK towards the EU's exit door, opponents of European employment and social law should avoid breaking out the champagne before examining what Britain's options for going it alone would actually be. For example, European Economic Area (EEA) members Norway, Liechtenstein and Iceland have full access to the single market for goods, services, capital and labour and as such have to accept EU regulations on these areas wholesale, without the ability to influence their formulation (with the exception of agriculture and fisheries policy which are independent). Even were it to consider the grandest, most sweeping renegotiation of powers, the EU would not and could not let the UK remove itself from social and employment conditions which it insists on applying to EEA members as the quid pro-quo for retaining unfettered access to the single market.

If the UK was to leave the EU it would be unlikely to be offered even the Switzerland option of negotiating bilateral agreements, with access to some areas of the single market balanced by corresponding regulatory convergence in related areas, given that its size would create a much bigger impact on the single market. Under such a scenario, the Eurosceptic ideal of the UK achieving single-market access while not complying with EU employment and social law in relevant areas seems absurd.

Gold-plating

We will end the so-called 'gold-plating' of EU rules, so that British businesses are not disadvantaged relative to their European competitors[14].

[11] Open Europe also argue that the £8.6bn cost figure may an underestimate due to not having impact assessment data before 1998 and that the IA's focus on direct rather than wider costs.
[12] As Open Europe point out on page 19 of the 2011 report.
[13] For this they give the example of Article 82(3) of the TFEU in criminal justice that if a proposal impacts on fundamental aspects of a country's legal system. Irrespective of wider comparability of the existing derogation and the one proposed, the existing example does give a specified area of application within the Treaty.
[14] Cabinet Office, The Coalition: our programme for government, May 2010
http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

Concern that the UK goes above and beyond the call of duty when implementing EU regulations is not a new one, and it is a concern supplemented by the common refrain that the UK plays by the rules while others gain an unfair advantage by cheating and not implementing anything.

In 2006, the Foreign Policy Centre and the Federation of Small Businesses produced a report by Sarah Schaefer and Edward Young looking into the issue of 'gold-plating' entitled 'Burden by Brussels or the UK? Improving the Implementation of EU directives[15]'. Schaefer and Young argued that 'there are a number of cases where Whitehall has extended the scope of the original directive' such as 'including extra pieces of legislation in the statutory instrument; widening the scope of the EU directive to cover extra requirements; and introducing targets and deadlines'. It asserted that businesses had been deterred from expanding due to the perceived effect of regulations, with lack of clarity often the problem rather than a real regulatory burden.

The previous Labour Government set up a review by Lord Davidson that explored the issue of gold-plating. Davidson reported in 2006 making the overall observation that 'it is sometimes beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation. There are other instances where the costs of over-implementing European legislation outweigh the benefits, with adverse consequences for UK competitiveness. I have found that inappropriate over-implementation of European legislation may not be as widespread as is sometimes claimed.'[16]

What is clear is that as part of the process of examining how to implement EU directives, UK civil servants and ministers re-evaluate what should be done in the particular policy area under consideration and may come to different conclusions than have been made at EU level, where directives tend to be relatively narrow in application. In some cases this may manifest itself as foot-dragging or minimalist implementation of the directive, but in others it may lead to something more comprehensive than would be strictly necessary to implement the EU level decision, or something that combines EU law with pre-existing practices. Schaefer and Young point out, for example, that EU health and safety directives do not cover the self-employed, yet the UK has tended to extend the definition of 'employer' in a number of cases such as the Control of Vibration at Work regulations, a practice that has its roots in the 1974 Health and Safety at Work Act and subsequent case law. Similarly, they found that the UK Government could have excluded casual workers from EU regulations to protect part-time workers from discrimination but chose not to. In addition, even John Cridland, then Deputy Director General of the CBI, acknowledged that one reason for so-called gold-plating was that in much of continental Europe, Directives can be partly implemented – in a flexible way that responds better than legislation alone can to different circumstances in different industries – by extensive collective bargaining arrangements which no longer exist in the UK. Civil servants therefore have to write rules for circumstances that in other countries are left to the social partners[17].

There are indeed strong arguments to be made in favour of making sure workers don't plummet to their deaths because they happen not to be at a permanent place of work, or that all part-time workers are treated equally lest there be an attempt to 'casualise' their employment to circumvent the rules – but they are not because an EU directive says that they must be so. What needs to be prevented is: a) the concern (real or perceived) that civil servants may end up making certain decisions on policy grounds and presenting them as requirements of the implementation of EU legislation and b) hyper-caution over the risk of facing legal challenge. Whitehall and Westminster need to take ownership of any embellishments that take place and make the political case for their actions, rather than claiming credit for popular decisions and passing the buck back to Brussels in the face of criticism, as seems to be the case at present.

One, admittedly fairly broad, indicator of the level of compliance of member state's implementation of EU law is the regularity with which it is hauled across the coals by the ECJ. Across the board, the number of ECJ decisions that go against the UK government are relatively low compared to other large member states. In the

[15] Sarah Schaefer and Edward Young, 'Burden by Brussels or the UK? Improving the Implementation of EU directives, 2006 http://fpc.org.uk/fsblob/1417.pdf

[16] Davidson Review Final Report, BIS, November 2006 http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file44583.pdf

[17] In fairness to the now Director General, he did not argue that this meant 'gold-plating' should be addressed by recreating widespread collective bargaining in the UK

period 2006-2010 of the pre-enlargement states[18], only the Netherlands (12) and the Nordic states, Denmark (4), Finland (17) and Sweden (18) had fewer ECJ decisions go against them than the UK (21). By contrast, another ten other member states had a higher number of losses at the court: Ireland (24), Germany (27), Austria (30), France (35), Portugal (36), Belgium (44), Luxembourg (52), Greece (53), Spain (59) and Italy (71)[19].

It is worth pointing out however that the majority of the 38 cases initiated[20] against the UK during this period seem to have been around its failure to complete the legislative procedures required to implement Commission directives within the required timeframe (where the Commission has been successful in an 'application for a declaration of failure to act'). This is not necessarily an indication of bad faith, legislative time being short, but can cover cases where the foot-dragging was intentional. Some of the cases were resolved before the Court reached a judgment, as the UK was able to comply with the Commission's demands to implement measures on road transport, freedom of movement and occupational retirement. A number of cases related to a failure to transpose the legislation for Gibraltar in the required timeframe. The only major policy judgment on an employment matter found in favour of the UK that was deemed to be complying with the Protection of the Safety and Health of Workers directive[21].

What our authors say

Prof Anne Davies gives an illuminating introduction to the role of the EU in developing and implementing employment and social law. She sets out the role national governments play in influencing EU decision-making and where they have scope to act alone. She puts forward the key arguments as to why the EU is involved in this area.

Prof Catherine Barnard explains that social policy was not originally seen as an essential component of the single market in 1957 but it developed into the patchwork of rules that form the European Social Model. This balance between national and European legislation is under threat from the application of Treaty rights by the Court of Justice beyond expected bounds to encompass trade unions as well as states, where Viking and Laval have had a chilling effect on industrial action by restricting the right to strike. She discusses the Commission's attempts to resolve the tensions over prioritising economic and social interests through the 'Monti I' and forthcoming 'Monti II' regulations that seek to clarify the right to strike over cross-border operations. She argues that the Europlus pact in response to the Eurozone crisis impacts on labour law through proposed monitoring systems for wage and productivity levels. She also notes the impact of the Memoranda of Understanding for bail-out countries that have cut minimum wages and imposed other liberalising measures such as ending collective sectoral agreements.

Prof Claire Kilpatrick gives a detailed examination of the background to the controversial Posted Workers Directive (PWD) and its implications for the single market and EU employment law. She uses the case to illustrate the role of the European Court of Justice (vis-a-vis the Commission and Council) in the implementation of EU employment and social law, exploring how it can alter the established understanding of directives by asserting the primacy of treaty obligations. She shows how thinking at the Court has moved over time from taking a position reinforcing host state employment rights in the *Rush Portuguesa* case to one that supports home state suppliers in the more recent *Laval* and *Rüffert* cases. She puts forward a number of areas where the PWD should be strengthened and clarified in light of the recent court rulings.

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[18] It is difficult to get an accurate assessment of the situation in the 2005 and 2007 new member states as their cases took time to feed through to the court, leaving gaps in the data.

[19] EU Curia, Statistics concerning the judicial activity of the Court of Justice http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf The ECJ however classifies cases by thematic areas drawn from the treaties which do not directly tally with the subject areas covered by individual DGs at the Commission.

[20] Over the last 5 years as of accessing records on the ECJ website. This figure includes a number of cases that were inadmissible such as Butler vs United Kingdom, and Dehn vs United Kingdom where individuals attempted to obtain aid from the court. The pattern of cases for many other member states will be similar.

[21] Judgment of the Court (Third Chamber) of 14 June 2007. Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. Failure of a Member State to fulfil obligations - Social policy - Protection of the safety and health of workers - Directive 89/391/EEC - Article 5(1) - Employer's duty to ensure the safety and health of workers in every aspect related to the work - Employer's liability. Case C-127/05.
http://curia.europa.eu/juris/fiche.jsf?id=C%3B127%3B5%3BRD%3B1%3BP%3B1%3BC2005%2F0127%2FJ&pro=&lgrec=en&nat=&oqp=&dates=%2524type%253Dpro%2524mode%253D5Y%2524from%253D2006.12.06%2524to%253D2011.12.06&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&mat=or&parties=United%2BKingdom&jge=&for=&cid=91124

Lord Monks gives a brief history of the concept of 'Social Europe' from the Delors era to the present day and outlines the main legal developments in EU employment and social law. He sets his remarks in the context of the current economic crisis and calls for 'Social Europe' to be at the heart of the EU's response.

Karen Clements sets out the position of the British Chambers of Commerce, re-iterating the importance of the single market in this time of economic crisis but pointing out the growing public criticism of it. She argues that the EU has sought public favour by bringing in employment regulation but that this has had unintended consequences. She puts the case for retaining the Working Time Directive opt-out and argues for smarter regulation based on better impact assessments, conducted by all bodies including the European Parliament and Council.

Ariane Poulain puts forward the pro-European business perspective on the development of the European Social Model, making the case for a measured EU role in employment and social law. She argues that, particularly in light of the financial crisis, any measures in this field must pass the tests of subsidiarity and proportionality. She discusses the balance between preventing fragmentation and protecting different social settlements in different states. She argues for the retention of the Working Time Directive opt-out, for the development of the European Globalisation Adjustment Fund and for 'flexicurity' to be the model to follow across the EU.

Mats Persson argues that extensive EU involvement in labour markets and employment law is running out of supporters on both left and right. From the Laval case to EU-driven austerity, the left, in particular, has cause to re-evaluate the merits or otherwise of EU involvement in this policy area.

Clare Moody gives an overview of some of the issues about the EU that are straining the once close relationship between unions and the EU from the austerity consensus to Viking, Laval, Ruffert and Luxembourg, and the current pre-eminence of the Centre-Right across Europe. However, she argues that all is not lost and that UK trade unions should make greater use of the Information and Consultation Directive and the European Works Councils legislation and explore the opportunities provided by the German economic model.

What is the EU's role in employment law?

Prof Anne Davies

When the European Economic Community (EEC), the EU's predecessor, was first set up, its main objective was to create a 'common market' (now called the 'internal market') between the Member States. Firms would be able to trade freely in any Member State without discrimination on grounds of their nationality. At first sight, it does not sound as if this has very much to do with employment issues. But nowadays, quite a lot of our employment law comes from the EU.

What gives the EU the right to make laws on employment?
The EU only exists because of Treaties agreed by the Member States. It can only legislate on a given topic when the Treaties give it the power to do so. This is usually known as the EU's 'legislative competence'. The Treaties are agreed by all 27 Member States, so ultimately it is the Member States (including the UK) who decide what legislative powers the EU should have. The Member States have given the EU legislative competence over most areas of employment law except pay, freedom of association (which covers issues to do with trade union membership) and the right to strike.

How does the EU use its legislative powers?
The EU exercises its legislative competence on employment matters by agreeing Directives, which must be implemented by the Member States. A proposal for a new Directive always comes from the European Commission. It is accompanied by a report explaining why the Commission thinks it would be a good idea for the EU to legislate on the matter.

The EU has two main routes for legislating in the field of employment law. One option is for the Commission's proposal to be passed (usually after a lot of discussion and amendment) as a Directive by the Council (made up of one government minister from each Member State) and the European Parliament. The other option is for the Commission's proposal to be debated and agreed by the social partners, the European Trade Union Confederation and various European-level employers' associations. The social partners' agreement may then be given legal effect as a Directive by the Council.

In both these cases, the interests of the Member States are represented in the Council, so it is not the case that new EU legislation can be imposed on the Member States without their agreement. Often, the Member States reject the Commission's ideas for new employment laws. However, in many areas the Council votes by a specially-weighted majority (known as 'qualified majority voting') which means that opposition from one Member State is not enough to block a proposal.

Are there any limits on the EU's use of its legislative powers?
The EU's use of its legislative competence is regulated by some general principles. One is 'subsidiarity': the idea that the EU should only legislate where the matter cannot be dealt with satisfactorily by the Member States at national level. Another is 'proportionality': the idea that the EU's intervention should not go beyond what is necessary to solve the problem being addressed. In theory, these principles should ensure that the EU only legislates where it is necessary for it to do so.

A new Directive which infringed these principles could be annulled by the Court of Justice. However, the big problem with 'subsidiarity' and 'proportionality' is that there is no real agreement on what they mean. It is hard to say with any certainty whether an employment problem, such as unfair treatment of part-time workers, is better dealt with by the EU or by the Member States. And although the Court of Justice can rule on these principles, it rarely finds that they have been breached.

So what role does all of this leave to the UK government and Parliament?
EU employment legislation usually takes the form of Directives. A Directive does not automatically become part of the law in the UK. Instead, the government is obliged to implement it by a set deadline. If a government does not implement a Directive properly, it can be the subject of infringement proceedings before the Court of Justice.

In theory at least, Directives tell the Member States what goals they need to achieve, whilst leaving them some discretion in how best to go about doing so. For example, the Directive on Fixed-Term Work required Member States to address the problem of people on successive fixed-term contracts, but gave them a range of options, such as limiting the number of times someone's contract could be renewed on a fixed-term basis, or limiting the number of years someone could be expected to work on a series of fixed-term contracts. This means that governments have an important role in choosing how best to implement some provisions in Directives.

However, not all provisions in Directives work like this. Often, they make it very clear exactly what national governments must do, though there is still room to adapt the drafting of the provisions so that they make sense in national law.

Importantly, most EU employment Directives just set minimum standards for the Member States. So, if the UK government wanted to provide workers with more protection than the EU minimum, it could decide to do so. And, of course, the UK government has a free hand to formulate policy as it sees fit in areas where the EU does not have legislative competence, like the minimum wage.

So is the EU's involvement in employment law just about enacting Directives?
No. There are a few other ways in which the EU gets involved in employment law. The task of interpreting EU law falls to the Court of Justice. It hears various different kinds of cases but one of its most important jobs is to answer questions from national courts where those courts are faced with an issue of EU law but are not sure how to interpret it. Like any other court, the Court of Justice sometimes develops the law in an incremental way through its decisions. For example, an important aspect of EU employment law deals with equal pay for men and women. The Court of Justice has developed this area of law by interpreting 'pay' broadly to include pensions and other benefits provided by employers. Many important aspects of EU employment law can be found in the Court's case law.

Another way in which the EU gets involved in employment law is where its other activities overlap with employment law. This is what happened in the well-known *Viking* and *Laval* cases. These cases were about employers' freedoms to move around the EU internal market, either setting up businesses or providing services in other Member States. The Court of Justice found that strike action to protest at these employers' actions was potentially unlawful because it might restrict the employers' freedoms in a disproportionate way. This shows how the EU's creation of an internal market can sometimes have unexpected effects on national employment law.

Another kind of involvement is through what is known as the Europe 2020 strategy. The EU has set some targets for job creation and employment levels in the Member States, to be achieved by 2020. Every year, the Member States hold discussions with the European Commission in which they set national targets and assess their progress towards achieving those targets. Although this exercise is about employment policy rather than employment law, it has also prompted the Commission to think about how employment law might support or hinder job creation.

So what's the theory behind EU employment law?
So far, our focus has been on the mechanics of the EU's involvement: on what powers the EU has and on how they are exercised. Let's step back from the detail now and think about why – in the context of creating an internal market for trade between the Member States – it might be a good idea to have EU-wide legislation on employment law.

One reason for including employment law among the EU's responsibilities is the fear that if we don't, a 'race to the bottom' might take place. In the internal market, firms are free to set up anywhere in the EU. This means that states are in competition with each other for investment from firms. They might decide to compete by cutting back on protections for workers. This might create a downward spiral in which one country reduces its labour standards, then others follow suit, and so on. Countries which sought to maintain strong protections for workers would be at a competitive disadvantage in the market. On this view, the EU should set minimum standards for employment law in order to prevent a 'race to the bottom'.

Of course, this theory is controversial. Not everyone agrees that countries will inevitably take part in a 'race to the bottom' as a result of the internal market. Domestic political pressures might prevent a government from

cutting back on worker protective legislation. And not everyone agrees that cutting labour standards, or 'deregulation', is the best way to create a thriving economic environment. So the 'race to the bottom' theory may not be the best way of thinking about the EU's role in employment issues.

Another way of explaining the EU's role in employment law is to consider the position of the EU in the global marketplace. Competition for investment from firms between the EU and other countries around the world is much more fierce than competition between the different Member States of the EU. And the EU starts at a disadvantage: although there are big variations in wages around the EU itself, it is generally a more costly location than, say, a developing country. So how can the EU compete? According to the Commission, the EU should focus on offering firms a highly-skilled, flexible workforce. In other words, the extra cost to a firm of locating in the EU should be more than made up for by the quality and productivity of the workers it can employ.

Various different policies are needed to support the creation of a highly-skilled, flexible workforce, but employment law is a big part of the story. There are many possible examples of this. Family-friendly policies like parental leave make it easier for parents with young children to combine work and family life. This may encourage more parents to work, thus ensuring that their skills are not lost to the labour market. Rights for workers to be consulted when their employer proposes changes to the business, through trade union or other representatives, may help workers to adapt to new circumstances and to suggest ways of minimising the impact on jobs.

So, where does the balance lie between the EU and national governments in employment law?
It is certainly the case that the EU has the power to legislate on most aspects of employment. But it does so by setting minimum standards for national governments to implement, so the UK government still has a role in choosing how best to give effect to EU employment law in the UK. And where the EU has not legislated or has no power to legislate, the UK government still has the freedom to set its own employment policies.

Importantly, though, the EU only has the power to legislate for employment law because the Member States agreed to this in the Treaties. And, whenever a new Directive is proposed, the Member States get the chance to vote on it. So it's not as if EU employment law is imposed on the UK without its consent.

The only problem with this way of looking at things is that each Member State is bound regardless of the preferences of its current government. So if a Member State signed up to a Directive in 2010, and gets a new government in 2011, it remains bound by the Directive even if the new government would not have signed up to it. As a result, it might sometimes seem as if the EU is out of kilter with the preferences of some governments, and voters. Equally, though, it is hard to imagine how the EU would work if everything had to be renegotiated every time one of the 27 Member States got a new government.

Social policy in the dock

Prof Catherine Barnard

Introduction

When the Treaty of Rome was signed in 1957, its main focus was creating a single market where free movement of goods, persons, services and capital could be ensured. It therefore regarded labour, above all, as a resource of production in respect of which the principle of free movement was to apply. The Treaty did contain a Title on Social Policy but its content was derisory with only one substantive provision which labour lawyers would recognise as an employment right – on equal pay for men and women. The reasons for this reticence were two-fold: first, that labour law was seen as a domestic issue, not to be interfered with by the EU. Second, the development of social policy was seen as a consequence of the realisation of the single market, not an essential component of that single market.

Subsequent Treaty amendments and the emergence of a body of secondary legislation in the form of various directives and other instruments helped to adjust this perspective on labour issues, but nevertheless, by the late 2000s, no comprehensive labour code had emerged at EU level. Whole areas of labour law which were intensively regulated at Member State level, in particular the right to strike, were formally excluded from the legislative competences of EU law-making bodies.[22] Other areas of labour law, including individual rights on termination of employment, were within the competences of the Union, but had failed to become EU directives because of a lack of political will. Despite this, it could be convincingly argued that European labour law was a distinctive body of norms and principles which had achieved 'an identity going beyond [EU] law and national labour law systems'.[23] The patchwork of rules at EU level, which can be brought under the broad umbrella of EU social policy, complemented and supplemented by domestic rules, is something that the EU has become proud of and the Commission regularly talks of the 'European Social Model' which is an important element of connecting the EU with its citizens.

However, that very social model is under threat. The threat stems from a variety of sources. First, there have been concerns expressed for over a decade that the existing social model is too rigid, that it is not capable of adapting to the changing nature of production, that it prioritises 'insiders' (those on a standard, permanent contract) over outsiders (those on atypical contracts and those without work altogether).[24] The Commission itself has led attempts to achieve the holy grail of reconciling flexibility with security (so-called flexicurity).[25] While the Commission is adamant that security should not be sacrificed in the name of flexibility, many think the reality is somewhat different. This challenge is ongoing and continues to be underpinning the reforms to national social policy required by the EU in response to the Eurozone crisis (as set out later in this contribution).

Second, a further broadside has been launched on national social legislation by the application of the Treaty provisions on the four freedoms (the very provisions intended to further the development of social policy at national level) to the provisions of national labour law. This can be seen in the now (in)famous cases of *Viking* and *Laval*[26] which will be discussed below.

Third, the Eurozone crisis has exposed the vulnerability of national labour law systems. The caps on government expenditure combined with excessive government debt have tied the hands of national governments to spend their way out of the crisis. This has forced them to look to other sources to deliver cost savings: labour law has become a prime target.

Viking and Laval

The decisions in *Viking* and *Laval* and their progeny, *Rüffert* and *Luxembourg*,[27] unsettled the general deference by the Court to national labour law rules. In *Viking* a Finnish employer challenged a threat by Finnish trade unions to take industrial action protesting about the re-registering of a Finnish vessel in Estonia as being contrary to Article 49 TFEU on freedom of establishment. In *Laval* a Latvian service provider refused to respect

[22] Art. 153(5) TFEU.
[23] B. Bercusson, *European Labour* Law (Cambridge, CUP, 2009), 2nd ed., 15.
[24] See e.g. COM(2006) 708, COM(2007)359.
[25] See e.g. COM(2007) 359.
[26] Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.
[27] Case C–346/06, *Dirk Rüffert v Land Niedersachsen* [2008] **ECR** I-1989; Case C-319/06 *Commission v Luxembourg* [2007] ECR I-4323.

Swedish collectively agreed terms and conditions in respect of the Latvian workers it was 'posting' to Sweden to fulfil a building contract it had won. Laval would respect only Latvian terms (which gave it a competitive advantage). The Swedish trade unions called their members out on strike (in accordance with Swedish law) and the Latvian service provider (supported by the Swedish employers) argued that the industrial action contravened Article 56 TFEU on free movement of services.

The facts thus presented an incendiary cocktail: (1) a collision between EU fundamental economic rights on the one hand and national fundamental social rights on the other; and (2) a collision between the rights and expectations of workers from the new Member States as opposed to the interests of those from the old Member States. The Court of Justice could have avoided the problem by saying, as it had done in previous cases, that EU law did not apply in these situations. It refused to take this easy route and insisted that Articles 49 and 56 TFEU did in principle apply. Furthermore, and more controversially, it said that these Treaty provisions, traditionally viewed as being applied to states, also applied to trade unions. It then applied the so-called *Säger* [28]market access approach and found that the collective action was a 'restriction' on free movement in both cases and so breached Article 49 TFEU (*Viking*) and Article 56 TFEU (*Laval*). The collective action could possibly be justified on the grounds of worker protection (although this was unlikely on the facts in *Viking*) but, in the view of the Court, the collective action was probably not proportionate in *Viking*, and was definitely not in *Laval*.

There is now an extensive body of literature considering every aspect of these cases.[29] For the purposes of this contribution I want to highlight three points about these judgments. First, although the Court claimed to be striking a balance between economic and social rights,[30] in practice the structure of the *Säger* market access approach inevitably prioritises the economic right over the social interest. Once a rule is found to be a restriction it is presumptively unlawful. The burden then shifts to the defendant (i.e. the trade unions) to show not only that the collective action or law in question can be justified in principle, now according to significantly tightened criteria, but also that its application in the particular context in question is proportionate.

Second, the Court applied the proportionality principle to industrial action. While some systems do consider whether the strike action is proportionate, the proportionality principle is applied by labour courts against a constitutional context which guarantees a right to strike. Other systems, such as the British system, which lay down strict procedural conditions before strike action can take place, do not then apply the proportionality principle. Many in the trade union movement are concerned that the application of the proportionality principle, now required by *Viking* where a transnational dispute is at issue, makes it even more difficult to call their members out on strike. They worry about the paradox that the more disruption the strike action causes, and thus the more successful it is from the perspective of the trade union, the less likely it is to be proportionate. They worry, too, that if they misread the rules laid down in *Viking* and do take action which proves to be disproportionate, they will be liable in uncapped damages which is likely to bankrupt the union. This is why *Viking* and *Laval* are seen as having a chilling effect on industrial action.

Third, in these cases the Court identified the right to strike as a fundamental right. However, it then appeared to strangle that right at birth. It did this in two ways. On the one hand, it did not protect the right to strike as such. Rather, it protected the 'notion – inherent in that fundamental right – of protection of workers'.[31] On the other hand, the Court interpreted the limitations on the right in such a way as largely to subsume the right. The limitations, as identified in Article 28 of the Charter, are that the right to strike is subject to the rules laid down by national law *and* EU law. The limitations laid down by national law rules relate to, for example, balloting and notice requirements. Following *Viking* and *Laval*, the limitations laid down by EU law are potentially more difficult for a trade union to satisfy: the strike can be justified only where jobs or conditions of employment are 'jeopardised or under serious threat' (*Viking*) or where the terms of the complex Posted

[28] This test, derived from cases like Case C-76/90 Säger [1991] E.C.R. I-4221, focused only on the effect of the national rule on the out-of-state actor (and not on how the in-state actor would also treated).
[29] See e.g. chapters 17-22 of (2007-8) 10 *CYELS* as well as J. Malmberg and T. Sigeman, 'Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 *Common Market Law Review* 1115; C. Kilpatrick, '*Laval's* regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) 34 *ELRev.* 844; P Syrpis & T Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 *ELRev.* 411.
[30] E.g. *Laval*, para. 105.
[31] Trstenjak AG, Case C-271/08 *Commission v Germany* [2010] ECR I-000, para. 181.

Workers Directive 96/71 are satisfied (*Laval*)), and where the trade unions must have exhausted all other means (*Viking*). As the British Airline Pilots Association (BALPA) discovered to its cost in the High Court of England and Wales, it is difficult to satisfy these thresholds and the liability in damages is potentially enormous.[32] No wonder John Monks, then General Secretary of the European Trade Union Confederation (ETUC) said to the European Parliament in February 2008 that '…we are told that the right to strike is a fundamental right but not so fundamental as the EU's free movement provisions. This is a licence for social dumping and for unions being prevented from taking action to improve matters'.[33]

There has been ongoing concern at all levels about these decisions. For the trade union movement, they have become totemic of the threat to social policy by the EU, an EU which has as an express objective of raising the standard of living. Employers, especially from the EU-8, are now faced with an unpalatable dilemma: take advantage of their competitive position and the rulings in *Viking* and *Laval* to challenge the labour market rules of the host Member States or avoid the burden of litigation and industrial unrest and accept the rules of the host state. There is evidence that many adopt the latter approach.

The Commission has been well aware of these concerns and has organised various conferences to discuss what can be done. The trade unions have called for a social clause to be included in the Treaties giving primacy to social interests over economic ones, but the employers have rejected this. The intractability of these problems was summed up by Mario Monti in his 2010 report on the single market:[34] the Court rulings exposed "the fault lines that run between the single market and the social dimension at national level". They did no more than revive "an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and breaking up regulatory barriers is code for dismantling social rights protected at national level". The Commission therefore committed itself in the Single Market Act 2011 to presenting two proposals in this field.[35] The first, an enforcement directive, is intended to improve the application and enforcement of the Posted Workers Directive. The second, a Monti II Regulation, inspired by the so-called Monti I Regulation in the field of free movement of goods that would clarify the extent to which trade unions may use the right to strike in the case of cross-border operations, without reversing the EU jurisprudence. It would confirm that the right, or freedom to strike, should not be a 'mere slogan or a legal metaphor'. This Monti II Regulation could:

- Explicitly recognise that there is no inherent conflict between the exercise of the right to take industrial action, including the right or freedom to strike, and the freedoms of establishment and to provide services, or primacy of one over the other;
- Recognise the key role of social partners to take action to protect workers' rights, including through industrial action;
- Stress the important role of national courts in applying the proportionality test on a case-by-case basis, while reconciling the exercise of fundamental social rights and economic freedoms; and
- Confirm the role and contribution of established alternative dispute resolution mechanisms (such as mediation, conciliation and/or arbitration) at national level, also in case of disputes in trans-national situations.

Furthermore, Monti II could, like the Monti I Regulation, contain a clause establishing an information and notification obligation (an alert mechanism) for situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned. The fate of these two proposals currently hangs in the balance.

The Eurozone crisis

The other threat to labour law comes from the Eurozone crisis. For trade unions and for workers, the crisis has been devastating for jobs and has had a disproportionate effect on the young, especially in countries such as Spain. Yet, the EU's response to the crisis that has also posed a threat to workers: EU or EU/IMF-sanctioned deregulation of employment rights at national level. Space precludes a detailed consideration of the many and

[32] K. Apps, 'Damages claims against trade unions after *Viking* and *Laval*' (2009) 34 *ELRev.* 141.
[33] http://www.etuc.org/IMG/pdf_ETUC_Viking_Laval_-_resolution_070308.pdf accessed 26 August 2008.
[34] http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf
[35] What follows is taken from the Commission's press release:
http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/478&type=HTML

complex issues surrounding the crisis but I shall focus on two examples. First, the 'Euro Plus pact' (EPP) which was agreed at the European Council meeting of 24/25 March 2011.[36] 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 9 December 2011). 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.' Yet, three of the Pact's objectives actually have a direct impact on labour issues. The provisions under the 'Fostering competitiveness' objective are particularly contested. 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:

1. *respecting national traditions of social dialogue and industrial relations, measures to ensure costs developments in line with productivity, such as:*
   (i) 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;
   (ii) 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.[37] 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'.[38] 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:

> *Each country will be responsible for the specific policy actions it chooses to foster employment, but the following reforms will be given particular attention:*
> 1. *labour market reforms to promote "flexicurity", reduce undeclared work and increase labour participation;*
> 2. *life long learning*
> 3. *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.*

While many raised concerns about the potentially deregulatory effect of the EPP, the final version of the Pact 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 (MoU) which those countries receiving a 'bail-out' have signed

[36] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf
[37] 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.
[38] L. Phillips, 'Competitiveness pact "was never the blueprint people thought it was' *EU Observer*, 11 March 2011.

up to. Take the case of Ireland.[39] 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[40] 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 SMEs from adjusting wage costs downward in order to maintain viability and improve competitiveness; and*
> *- 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 also 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.*[41]

While a number of these agreements had been around for over 50 years and could result in arbitrary geographical divisions,[42] 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.

Other countries, like the UK, have followed suit. Even though not part of the Eurozone or the EPP, they have been directly affected by the crisis. They have used it as a cover to engage in some labour law reforms of their own: for example, increasing the length of service period (from one year to two) before an individual can bring a claim for unfair dismissal and possibly removing the right to claim unfair dismissal for all those employed by micro-firms.

Conclusions

Social policy is in the firing line. *Viking* and *Laval* subjected national labour law regimes to a new form of scrutiny, carried out in the name of free movement for economic resources. But as the dust settles and the nature of the response to the judgment starts to become clear, it can be seen that they are unlikely to lead to the marginalisation of labour law within the wider European project. Individual Member States are not about to abandon their distinctive approaches to social policy, as a result of these judgments. The euro-zone crisis may prove to be far more disruptive to national labour law and cause real anger, as the strikes in Italy, Belgium and Greece already testify. Social policy, once seen as integral to make European citizens feel part of the EU, may well be the domain that unleashes popular discontent with that very project.

[39] 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).

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

[41] P.37.

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

Institutional actors and internal market architecture:
Some insights from posting of workers

Prof Claire Kilpatrick

Posting of workers has been central to recent controversies on accommodating labour rights with internal market freedoms.[43] This analysis explores how internal market architecture affects conflicts in this area and their possible resolution. Posting of workers occurs when an employer based in one Member State sends (posts) its workers to another Member State, called the host state, to deliver services in the host state. Under Article 56 of the Treaty on the Functioning of the European Union (TFEU), workers who move cross-border with their employers to carry out projects are called 'posted workers', emphasising that their base remains that of the state they have come from (the home state) rather than the state where they are carrying out the project (the host state). This raises a choice as to which employment standards should be applied to posted workers: those of the home state, those of the host state, or some combination of the two. Key features of the architecture are:

- The primary Treaty freedom, Article 56 TFEU, guaranteeing freedom to provide services.
- Legislation adopted under Articles 53 and 62 TFEU, which provide the legal basis to adopt services legislation. In the case of posting of workers, one significant piece of legislation has been created, the 1996 Posted Workers' Directive (PWD).[44]
- Interpretation and review of that legislation in light of the primary Treaty freedom by the Court of Justice.

The utility of services legislation is best thought about by considering the governance of posting of workers in its absence. The legal position will be governed by Article 56 TFEU. State rules and practices in relation to posting will be examined by the Court to see if they constitute a restriction on freedom to provide services. Where they do, the Court will then examine whether that restriction can be justified by a legitimate objective and whether the test of proportionality is satisfied. Accretions of case law will provide a more detailed picture of the rules and principles to apply in posting workers.

Given this alternative, judicial Treaty elaboration, the desirable legal features which legislation can offer become apparent. It can offer a *structure* for service market participants. Secondly, it can offer valuable *detail and certainty* on what can and cannot be lawfully done by public authorities and market participants. For instance, those posting workers, as well as the receiving host state, will ask themselves: what host state labour rights can be applied to posted workers? Which collectively agreed standards can be applied to posted workers? Answers to such questions can be set out in legislation. Third, it allows for *adaptation* by constructing special regimes such as transitional, or distinctive, rules for defined sectors. Fourth, legislation provides a vehicle for *consolidation and codification of Court of Justice jurisprudence*: legislation generally purports, at least in part, to consolidate or codify previous Court case law. Fifth, and rather differently, legislation allows for *reaction to Court of Justice jurisprudence.* Often something much more elaborate and creative than simple codification is at work in the secondary legislation process. Legislation in fact provides an opportunity to react to Court of Justice jurisprudence as well as attempting to steer future interpretative developments in the area at issue by signalling to the Court of Justice the views of other institutions as expressed in the legislative output. Finally, all these aims could be achieved through non-legislative means, through, for example, guidance in Commission Communications. Yet legislation has a *democratic imprimatur* that these other means lack. This alters its reception by the Court of Justice.

However, these valuable aims (structure, detail, certainty, adaptation, consolidation/codification, reaction, democratic legitimacy) are at best imperfectly fulfilled. For a start, it is clear that the aims are in themselves at odds with each other: reacting to Court of Justice jurisprudence is necessarily different from consolidating Court of Justice jurisprudence.

Secondly, the Treaty freedom's constitutional relationship with internal market legislation means those legislative settlements inevitably have a provisional or incomplete quality. Article 56 TFEU is a constitutional

[43] C-341/05 *Laval* [2007] ECR I-11767; C-346/06 *Rüffert* [2008] ECR I-1989; C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323.
[44] Directive 96/71/EC, OJ 1997, L 18/1.

trump card in relation to services legislation. Where there is a divergence between the legislation and Article 56 TFEU, the latter will always prevail. Moreover, any such divergence gives the Court the power to strike down as invalid the relevant legislative provisions.

Thirdly, the actors and processes creating legislation are not the same as the actors and processes structuring the interpretation of Article 56 TFEU and that legislation. This difference between creation and interpretation creates an important space for mismatches and tensions over time.

Fourthly, the virtues promised by internal market legislation (such as structure, certainty, detail) are particularly seriously compromised in case of inter-institutional disagreement. This, in turn, is most likely to occur in areas of controversy, such as the appropriate relationship between labour rights and internal market provisions. For internal market purists, labour rules should not normally affect the operation of the market freedoms; for domestic purists, national labour settlements should be given extensive insulation from the internal market freedoms. Both have vocal and powerful constituencies, both outside and within the EU institutions. This affects the operation of the legislative process and its outputs.

Creation of the PWD – Institutional interplay

The European Parliament has generally played a key pro-labour protection role in the creation of services legislation. The move to the co-decision legislative procedure for services legislation has emphasised and expanded this role, set to expand further with the ordinary legislative procedure introduced by the Lisbon Treaty. By contrast, the Commission has shown persistent commitment to an 'internal market purist' stance in relation to posting of workers, as a legislative actor, as a law enforcer in infringement proceedings against Member States, and as a disseminator of guides to EU law. Finally, the position of States in the Council may be strongly divergent. In relation to posting of workers, for instance, States' positions tend to be sharply divergent depending on whether the State views itself as primarily an importer or primarily an exporter of posted workers.[45]

Though not explicitly institutionally involved, the Court of Justice provides an important input into the content of internal market legislation. Hence, the drafting of the Posted Workers' Directive was heavily influenced by the Court of Justice's decision in 1990 in *Rush Portuguesa*.[46] In *Rush* the Court famously stated,

"Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means."

By granting a very broad freedom to host states to impose their labour standards on employers of posted workers, this case put host states voting in the Council very much in the driving seat in the drafting of the Directive. Hence, the Commission fought in vain to exclude postings of less than three months from the central obligations to apply host state minimum pay and holidays. Had this succeeded, posted workers would have been subject to home state standards for postings of less than three months. Instead, what made it into the directive were permissions (not obligations) for host states to exempt various short-term postings. But given that host states generally wish to apply their labour standards to posted workers, they are hardly likely to use these permissive provisions. For these reasons, the PWD on adoption was widely viewed as providing a supra-nationally co-ordinated set of *non-exhaustive minimum rules* for host states and service-providers. The minimum rules in Article 3(1) PWD provide a floor of protection for posted workers, a nucleus of mandatory rules for minimum protection on matters including minimum pay, rest and holidays.

Collective setting of these minimum standards in host states was a particularly controversial issue during passage of the PWD. Fearing protectionist application of collective agreements, the Commission was keen to restrict collective standard setting as much as possible in the Directive. Its original proposal only allowed

[45] Beautifully illustrated by the States' interventions in *Laval*. 15 Member States, as well as Iceland and Norway, participated in *Laval*. For a good example of the split in positions, see AG Mengozzi's Opinion in *Laval*, paras 167 and 169, arguing for a generous (host-state or importer friendly) interpretation of the Directive (Article 3(8)): the Austrian, Danish, Finnish, French, German, Icelandic, Norwegian, and Spanish governments; for a restrictive (home-state or export friendly) interpretation: the Estonian, Latvian, Lithuanian, Polish, and Czech governments.

[46] Case C-113/89, [1990] ECR I-1417.

collective agreements which have been declared universally applicable, the closest kind to statutory norms, to set host state standards. In the course of the legislative process, a push to authorise a broader range of collective agreements to set minimum standards was successful, but at the cost of restricting the occupational coverage of the areas where collective agreements could set minimum standards to the construction sector, where posting of workers is most strongly established. Hence, in the construction sector, as well as collective agreements which are universally applicable, that is binding, Article 3(8) of the Directive allows national and regional agreements which are applicable in fact or which are agreed between the most representative employers' and labour organisations at national level to set minimum host state standards.

These minimum rules, however set, were viewed as *non-exhaustive* because Article 3(7) PWD provides that this floor 'shall not prevent application of terms and conditions of employment which are more favourable to workers' and Article 3(10) PWD permits application (on a basis of equality of treatment between foreign and national undertakings) of terms and conditions of employment beyond the minimum for 'public policy provisions' as well as those in the same kinds of collective agreements set out in Article 3(8) for the minimum core of host state standards. That is to say, the PWD appeared, via Article 3(7) and/or 3(10), to give host states a significant freedom to apply their labour legislation and collective standards to posted workers on their territory.

Interpreting the PWD

The controversial nature of the internal market-labour rights interface also makes it likely that the Court's position will be less stable, and more high profile, than it is on other issues. Examination of posted workers shows that the Court has flip-flopped between positions close to internal market purism and reassuring interested constituencies, such as the Member States, trade unions, even the 'peoples of Europe', that it will ensure labour rights are not threatened, and can even be bolstered, by the internal market. The new approach to posted workers, including in postings as part of a public procurement exercise, examined in more detail in the next paragraph, lies firmly at the internal market purist end of the spectrum, while the *Rush* case on posted workers is at the labour rights' insulation and promotion end.

Legislation may not mean what it says (or what most thought it said). The open texture of language and the obscure wording and complex architecture resulting from legislative compromises facilitates the introduction of new meanings. This legislative feature facilitates the Court in maintaining the form of internal market legislation while altering its substance. It would be difficult to get a better example of this than the Court's new approach to the Posted Workers' Directive. Though the meaning of Article 3(7) of the Directive was assumed by the Advocates General in both *Laval* and *Rüffert* to mean that the minimum core in Article 3(1) 'shall not prevent application of terms and conditions of employment which are more favourable to workers' in the *host state*, clearly the words can bear the opposite, *home state* focused, meaning placed on them by the Court in *Laval* and *Rüffert*. Similarly, Article 3(10) PWD had been assumed to offer a broad, albeit not unlimited, scope for host-states to impose higher labour standards on grounds of 'public policy'. In *Commission v Luxembourg*, the Court effectively buried that assumption, but in a way which drew on the meaning of public policy developed in the not entirely unrelated context of free movement of (undesirable) persons in the EU.

Time and the broad scope of the Treaty freedom also matter. The legislation adopted at any given moment in a services sub-field such as posting of workers will reflect, albeit in mediated fashion, the Court's understanding at that time of Article 56 TFEU. However, as the Court's understanding of Article 56 TFEU evolves or just changes, these legislative artefacts can come to seem out of kilter or an awkward fit with the Treaty freedom. The new approach to the Posted Workers' Directive introduced in *Laval*, *Rüffert* and *Commission v Luxembourg* can usefully be viewed in this light.

Is the Court best seen as an irredeemably flawed institutional interlocutor, and unacceptably judicial activist, when it acts as it has done in relation to posted workers? Should it respect much more carefully legislative bargains struck? Yet we need to avoid sanctifying legislative bargains too. Legislative outputs and the legislative process can be, especially at EU level, sub-optimal: slow or absent responses to changing circumstances and unclear, contradictory, legislative bargains are central and well-known problems.

Revising the PWD

Moves are currently afoot to revise the PWD in light of the controversy created by the Court's new case law. Here are some examples of issues reform needs to address:

- Most centrally, how long can a worker be subject largely to home state standards under the new approach? A short, clear, period would make the Court's new approach much less controversial and more legitimate;
- Ensuring a cross-border posting is actually occurring rather than corporate manipulation to avoid the labour standards of the state of establishment;
- When collective standards can set host state standards, including the central issue of how (the many different) collective bargaining regimes can set a minimum standard;
- When host states can apply labour standards to posted workers under the 'public policy' heading;
- Extensive clarification of the interface between posting of workers and public procurement. For instance, are domestic tenderers and foreign service-providers equally treated when one tenders on the basis of the full gamut of domestic labour standards and the other tenders on the basis of a minimum core of those standards?
- Strengthened mechanisms, involving unions and public authorities, to ensure posted workers enjoy the rights and benefits to which they are entitled.

Yet institutional interplay, and sharply divergent institutional stances, make it by no means certain, or even probable, that these central issues will be addressed. Hence, the Commission's initial proposals made evident its reluctance to modify the Court's more internally market purist stance reflected in its Laval case law, proposing instead improved PWD implementation as interpreted by the Court in *Laval* et al alongside 'clarification' of how collective labour rights interact with the internal market.[47] However, differences in the stances taken by those Commission directorates concerned (employment and social affairs; internal market) may prove significant, as well as the priorities of the State holding the Presidency of the European Council.[48] Additionally, the European Parliament, despite a rightward shift in 2009, may maintain its well-established pro-labour stance in the legislative processes.[49] The resulting legislative output will then set in motion a new cycle of response to that legislation by the Court in its role as an interpreter or judge of the validity of that legislation.

[47] Commission Communication, *Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another* COM (2010) 623, 27 October 2010,'Proposal No 30: In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market.' This proposal draws on a report by former Commissioner Mario Monti of 9 May 2010 (*A New Strategy for the Single Market*, 9 June 2010, 107pp).

[48] No proposals were produced in 2011 with proposals now expected in February 2012. A Monti II Regulation (modelled on Monti I ie Regulation 2679/98 OJ [1998] L337/8 in the free movement of goods) will be accompanied by a directive on enforcement of posting rules. Monti I was a response to C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959. It introduced an intervention mechanism to safeguard free movement of goods in the Single Market which allows State A to complain to the Commission about State B about its creating, through action or inaction, serious free movement of goods disruption causing serious loss to affected individuals and requiring immediate action. Article 2 Regulation provides: 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights, as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.' Denmark has pledged to make the posted workers' proposals a priority during its Presidency in the first half of 2012.

[49] See also the diametrically-opposed viewed of the European Social Partners*, Report on Joint Work of the European Social Partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases*, 19 March 2010.

Social Europe RIP?

Lord Monks

There are many questions about whether the EU in general and the Eurozone in particular will survive the present economic tsunami which has knocked the Western economies for six.

In these debates, the concept of 'Social Europe' has been absent. The crisis has absorbed the attention of Prime Ministers and Finance Ministers and no one else in government has had a look-in. Trade unions in Europe have also found it hard to secure a hearing for their sensible warnings that the Greek crisis needed Marshall Plan- generosity rather than an approach resembling the Treaty of Versailles' provisions on reparations and punishments. The EU managed to ignore the concept of 'moral hazard' when the banks were in trouble but has applied it in a Calvinistic way to distressed states. The banks were judged too big to fail. Countries, strangely, were not.

The European Trade Union Confederation (ETUC) has warned consistently that deflationary policies will make a bad situation worse, just as they did in the 1930s. Yet no one in governments has responded to the warnings about a return to the 30s and, instead, they pay careful attention to the excited warnings of the three credit rating agencies. These organisations should be wholly discredited after their award of top ratings to Enron and sub-prime mortgages but now they are compensating with blood curdling warnings about individual countries. It was cheering to see that markets do not always follow their tips. When the USA was downgraded recently, the American bond rate actually fell.

At the moment, the European Union's route to recovery is based on deflationary, anti-Keynesianism policies. This is evident from the so-called rescue packages imposed on Greece, Ireland and Portugal – and the same philosophy underpins the new intergovernmental treaty involving 26 countries (minus the UK).

Germany which does most things right at home is not grasping that their virtues of high exports, high productivity, and low unit labour costs cannot be applied universally. It is Germany which is calling the shots and in a way which is a disaster for Europe. To be fair, Germany did not seek a leading role but, to misquote Shakespeare, 'some have leadership thrust upon them'.

In all this, where stands the future of Social Europe? The rest of this paper recalls the origins of Social Europe, its achievements and looks at its future prospects.

Origins

The Treaty of Rome, the founding treaty of the EU, was all about establishing a free market among member states. But included in that treaty was a commitment to equal pay between men and women, the foundation for the subsequent growth of Social Europe.

For 25 years, the social dimension of Europe was relatively quiet with two notable exceptions – a directive on transfers of undertakings and another consultation on mass redundancies. These two provisions have been extremely important in the UK with the first directive providing the basis for the (TUPE)[50] regulations which govern the transfer of employment rights of workers whose roles have been affected by privatisation, as so many have been.

Social Europe really hit its stride when Jacques Delors became President of the European Commission in 1983. He believed that the single market needs to be accompanied by social regulation to protect workers' interests. He defined the EU not just as a businessmen's market but a place where workers' standards should be levelled up, not subjected to downward competitive pressures. It was a vision which persuaded many trade unions in Europe (including the TUC) to adopt pro-European positions, and to change their initially hostile views of the Common Market.

[50]Transfer of Undertakings (Protection of Employment) Regulations 2006 which provides protection for workers' terms of employment when their job is transferred from one company to another.

What followed was a surge of measures to develop Social Europe. Delors kicked along the member states to agree the Single European Act, setting up the single market, which was supported enthusiastically by Mrs Thatcher until she realised, too late, that it included potential for enhanced social provision. He then included in the Maastricht Treaty of 1992, a Social Protocol which allowed unions and employers to negotiate European-wide agreements. The UK Government disgracefully opted out of the so-called Social Chapter until 1997 when the incoming Labour Government ratified it.

The important constitutional changes were accompanied by an EU Social Action Programme which generated a range of new measures in the health and safety, equality and consultation/information fields. Around 60 directives on these subjects have been adopted. The Labour members of the European Parliament have played a conspicuous part in securing these changes. The most prominent include:

- 40 directives on health and safety including the controversial (in the UK, not elsewhere) Working Time Directive which provides for a minimum of four weeks paid holiday and a normal maximum working week of 48 hours. Most are less controversial such as iconic regulations on asbestos and the protection against dismissal for 'whistleblowers' on health and safety issues;
- Equal pay for work of equal value which amended the UK's Equal Pay Act of 1970;
- The Equal Treatment Directive which extended the UK's Sex Discrimination Act;
- The Pregnant Workers Directive which extended rights for pregnant women and opened the way for rights of parental leave;
- Equal treatment for fixed term workers, and just recently for agency workers;
- A voice at work through the Information and Consultation Directive. This requires employers to inform and consult workforce representatives about the organisation's development, prospects for employment and likely substantial changes to work organisation or contractual relations;
- European Works Councils of which there are around 800 in the largest European companies. These now have the power to be consulted in advance about 'proposed' decisions; the Posting of Workers' Directive which aims to stop employers using migrant labour to undercut terms and conditions of employment.

This last provision is relevant to some recent landmark European Court of Justice cases (Laval, Viking and Rueffert), where the Court has ruled in effect that posted workers need not receive equal pay nor their employers comply with collective agreements paying above minimum rates. This was, until the economic crisis, the most important issue on the agenda of the ETUC.

Future prospects

Apart from the outstanding issues about posted workers, the social agenda of the EU is slim compared to the Delors years. There is no agreement, including among unions, on whether European minimum wages should be established, or whether there should be a European-wide right to strike. But the pressures of the economic crisis are leading to new thinking in the ETUC about these and other matters.

This is more powered by the actions of the EU in the present crisis than by trade union initiative. The EU rescue packages include new fiscal rules which are based on the following deflationary approaches:

- Comparisons of unit labour costs using Germany as the benchmark;
- Hostility to wage indexation and centralised bargaining;
- Downward pressure on public sector pay and, in some cases, on minimum wages;
- Attacks on negotiating arrangements at national level;
- Promotion of privatisation.

What is to be the response of Europe's trade unions? Is it to fight nationally to preserve what has been achieved in the post-war period? If so, this action would lead to a clash with the concept of membership of the Eurozone – except for those countries which can, and do, benchmark their labour costs with Germany. Or is it to try to forge a Europe-wide approach based on the following principles:

- Wages are the motor for the economy, promoting growth and jobs;

- Better co-ordination of collective bargaining with the aim of boosting purchasing power to generate demand and to reduce income inequality.

More generally, the approach can include a campaign for a Europe which deals with economic crises by forging social pacts between governments, employers and unions. The purpose of such pacts would be to share the burdens of the crisis across all sections of society, with the broadest shoulders carrying the heaviest burdens. This is an approach used, formally or informally, in some of Europe's most successful economies. It is surely the best basis for a new European Social Model. If this can be done, Social Europe can develop new impetus towards growth and greater equality.

A fine balance

Karen Clements

Before taking on the arguably greater challenge of restoring Italy's finances to health, Mario Monti wrote a report about how to complete the Single Market and make it work better. It was an important report. As the EU's only source of endogenous growth, an effective Single Market holds the key to helping Europe grow again (Eurozone problems notwithstanding). Professor Monti's report rightly identified key areas for future growth such as the digital and energy sectors but he also exposed an important contradiction: "the Single Market is today less popular than ever, while Europe needs it more than ever".

There is no doubt in the minds of the business community across Europe that, reforms to the Eurozone aside, EU policy makers and politicians must concentrate on completing the single market if Europe is to escape the downward spiral towards mediocrity and lower standards of living for all. It is also vital that the new EU budget better reflects the central role that the single market plays in delivering growth. If Professor Monti's assertions regarding the erosion of popular support are correct, how do politicians go for growth and take the people with them?

The Commission's response – its Single Market Act – is a traditional balancing act that nods at the extreme economic circumstances through which we are living. Its solution to securing popular support for further market integration is to balance market opening measures with more social protection or increased employment rights, regardless of the impact on the economy or on jobs that each proposal may have in its own right. The British Chambers of Commerce (BCC) fully understand the motivations that underpin the Commission's selection of priority issues but we do not believe that this particular balancing act is sustainable, nor will it lead to greater acceptance of the single market by the citizens of Europe.

It is a policy that is even less likely to succeed in the UK where 'Europe' has become a dirty word, even if most businesses that trade will grudgingly admit to the need to make a decent fist of being in a single market. There is no doubt that Britain's attitude towards the EU has changed over the past few years and the growing hostility of the press has significantly contributed towards that. The picture that elements of the British press and media love to paint of a Brussels as a Stalinist super-state wishing to crush the British people and rob them of their identity bears little relation to reality. However the perception that the EU is interfering unnecessarily in the lives of both people and businesses is widely held and does find its roots in reality.

Clearly legislation was and is required to build a single market and to ensure the free movement of goods, services, capital and people. Moreover, with regard to people, it is undisputed that all EU citizens should enjoy a single set of employment rights in order to be able to move freely across Europe and to ensure that no member state has an unfair competitive advantage over another. Nevertheless, the EU, and here I refer to the European Commission, the European Parliament and the Council, has form in either legislating for its own sake in order to win votes at elections or legislating with the best of intentions but resulting in unintended consequences. I am sure, for example, that when the European Commission published its draft directive on Agency Workers it was not intending to shrink the agency market and destroy jobs in the UK. But that is sadly what has happened, as evidenced by a recent survey carried out by the Recruitment Employers Confederation[51] which shows that the hiring of temporary staff has fallen for the first time in almost two and half years. The report links the decrease to economic uncertainty. That is undoubtedly a factor but the decrease also coincides with new rules on equal pay for agency workers kicking in. This decrease has been predicted by several employment surveys including the CBI Employment Trends Survey in November where 20% of employers said they would reduce their use of temps and the BCC Workforce Surveys from December 2011 which said that 22% of medium and large companies (50 employees and over) using temps said they would use fewer and 20% of micros and smalls (0-49 employees) said the same.

In much the same way, the European Parliament and some unions want to do away with the opt-out to the Working Time directive because they do not want workers to be forced to work longer hours than they want or than is healthy. Nor do businesses.

[51] http://www.rec.uk.com/press/news/1930

Employers use the opt-out because it enables them to keep costs down (both direct costs through having to employ more people and indirect costs through finding space to put them, for example); because it gives them the flexibility they need to meet customer demand; because there is an acute shortage of labour and skills in some regions and some sectors; because the opt-out is the only straightforward part of the regulations; because they wish to avoid industrial disputes over the interpretation of the extremely complex regulations; because many do not have the infrastructure in place to make collective or workforce agreements in order to make the reference period more flexible; and because the definition of autonomous workers in the UK is unclear (unlike in the Netherlands where they are defined as anyone earning three times the national minimum wage which is equivalent to £19,000 per annum). Equally, many employees not only like but rely on the opt-out because overtime ensures that they can maintain their living standards in a fragile economy. Until such time as the definitions of 'working time' and 'autonomous workers' are clarified and the regulations are less complex; until such time as there is an infrastructure in place for collective bargaining and workforce agreements on a scale similar to our continental neighbours; until we have overcome acute labour/skills shortages in certain sectors in this country, the opt-out should remain in place.

That does not mean that the opt-out should remain in place unaltered. It is absolutely essential that any abuse of the opt-out is curbed. To coerce employees into signing an opt-out is to go against the spirit of the directive; indeed BCC supported an amendment to the directive that requires a length of time to elapse between an employee signing a contract and signing an opt-out. We also need to look at record keeping requirements and enforcement. And BCC members would also be happy in principle to see an overall cap on working hours above 48. Business does not support a long hours culture for the sake of it. And it fully supports more efficient practices in the workplace.

The bottom line is that the opt-out provides a degree of flexibility that many BCC members (half of all firms surveyed last year with more than 50 employees use the opt-out[52]) and their employees rely on to survive and thrive but it does not stop many others changing their work practices where appropriate. Indeed, working hours in the UK have dropped since the introduction of the regulations, opt-out notwithstanding (from 38.1 hours in 1992 to 36.3 in 2010[53]).

So how do we ensure that the rules we need to build a single market, in order to raise employment levels and to help the UK and Europe grow again are fair? How do we achieve the fine balance between the needs of employers and employees with the ultimate aim of maintaining and hopefully increasing living standards for all?

The BCC believes that one of the key solutions lies in smart regulation. Rather than offset one set of rules with another, or legislate according to political hue, we need an infrastructure in place that improves the operation of rules to make them fair but not does introduce rights for their own sake. Back in 2003, the Commission set up series of hoops through which draft laws had to jump before they could be published and sent to the Parliament and Council for sometimes drastic amendment. The so-called impact assessment system is becoming comprehensive and effective in ensuring that the rules are necessary in the first place and then that the projected costs outweigh the projected benefits. Sadly, there is no such routine assessment of Parliament and Council amendments which is often where the original purpose for the law gets lost.

There have been notable exceptions, which is why it is vital that the new Parliament Impact Assessment unit is fully resourced, and why Council must institute similar structures, however politically unpalatable. A recent example is the draft Pregnant Workers' directive where a rare Parliament impact assessment calculated that the changes proposed by the Women's Rights Committee would cost the UK alone some £3billion per annum at a time when the Government had announced cuts in public expenditure of some £80 billion. As a result, member states are thinking again. It was clear that the draft directive went too far down the road of creating new rights at a time when governments could least afford them and, arguably, existing rights were sufficient. There is no doubt that as the workplace and social expectations change, laws need to be updated accordingly but they need to take account of the economic circumstances that prevail and the ability of business to provide jobs.

[52] BCC Workforce Survey December 2011
[53] Hours worked in 2011, Office for National Statistics

Indeed the BCC would go further. There should be a jobs test in all Impact Assessments both at UK and European levels that sits alongside the SME test. If there is evidence that jobs will be lost as a result of new regulation, or that it will make it more difficult for employers to create jobs then that rule should not be allowed to see the light of day. In the same way that fiscal and monetary policy adapts to the economic cycle, so should regulatory policy; lighter when unemployment is high; heavier when it is low.

As the Economist pointed out in an article last October, there is precedence: last September, President Obama refused to approve a new emissions standard because the costs were unacceptable in these 'economically challenging times'.

We do not suggest in any way rowing back on existing rights and commitments; legislators must continue to simplify rules where they can but above all we must ensure that any new rules binding business do not threaten its ability to survive, thereby pushing unemployment beyond already unacceptable limits.

EU employment and social policy

Ariane Poulain

From the outset, it appears obvious to argue that the best way to destroy employment is to protect it because a liberal free market operates best when it can benefit from a liberal free labour market. However, as with most political and economic debates, there is a strong argument towards the middle ground regarding EU employment and social policy.

There are three main propositions set out in this essay: a choice does not need to be made between labour protection rights or the free movement of services because both can co-exist, the EU must seek to ensure it regulates in the most effective areas and EU social policy must look beyond the crisis towards building a more innovative, competitive Europe.

As European Council President, Herman Van Rompuy said, *"We must overcome the short-term challenges linked to the crisis […].We need more economic growth now, in order to finance on a lasting basis our social model, to preserve what I call our 'European Way of Life'. This is a matter of survival […]."*[54]

Where did European social policy come from?

The 'European Social Model' refers to the belief in both economic and social progress, whereby high economic growth co-exists alongside good living standards and worker protection rights. Whilst this EU-level approach to employment and social policy has been gradual and somewhat fragmented over the years, it has certainly expanded - beyond the Single European Act and Maastricht Treaty - and its evolution can be traced back over some key milestones, from the European Commission's White Paper on Social Policy[55] in 1994 to the signing of the Charter of Fundamental Rights in 2007.

The former clearly identified the European Social Model vision and outlined the key objectives for the future development of European social law and the latter heralded a new era for the European Social Model by legally recognising employment and social rights at the EU level. More recently, the EU2020 strategy demonstrated a continued commitment to the European Social Model vision by setting employment targets under the new 'European Employment Strategy' scheme, such as the aim of a 75% employment rate amongst 20-64 year olds by 2020.

This clear commitment to the European Social Model has considerable merit. Firstly, minimum standards for basic working and living conditions are a fundamental right. Secondly, whether you are a SME or a large corporation, a distorted and unequal market is bad for business.

It is little surprise that the impetus behind the creation of European social laws coincided with the early stages of the single market - the EU wanted to prevent any unfair labour market competition between member states now operating in a free trade area. The introduction of minimum standards in working and employment conditions not only reinforces the level playing field of the single market across EU member states, but is also vital in strengthening it.

In fact, ensuring the effective role of European social law, specifically employment and worker protection, is more important than ever for both individuals and businesses. The financial crisis - and resulting austerity measures - are having an unprecedented negative effect on EU labour markets. Unemployment in the EU has reached an historical high of nearly 10%, construction and industrial sectors have lost approximately 8.5% of their jobs and youth unemployment has reached a new high of more than 22%. With EU GDP in 2012 forecasted to grow by only 0.6%, analysis[56] shows that the labour market will not improve without support from EU-level employment and social policies.

[54] European Council (2010) Speech: Remarks by Herman van Rompuy, President of the European Council after the meeting with Mr Fredrik Reinfeldt, Prime Minister of Sweden. Brussels [Available from: http://tinyurl.com/7jegmmw]

[55] European Commission (1994) European Social Policy - A Way Forward for the Union. A White Paper. COM (94) 333 Final. Brussels [Available from: http://tinyurl.com/82spb4m]

[56] European Commission (2011) EU Employment and Social Situation. Quarterly Review December 2011. [Available from: http://tinyurl.com/6o2ysgn]

However, whilst the EU has an important role to play in employment and social policy - a role that cannot be fully performed by individual member states - it must play its cards right.

This essay will examine three key issues surrounding EU employment and social policy but before that, it is important to remember the fundamental principles guiding EU law-making: the principles of subsidiarity and proportionality.

Subsidiarity and proportionality

In short, the principle of subsidiarity states that decisions are taken as closely as possible to the citizen. The principle of proportionality refers to the weight of the regulation in comparison to the value of the objective based upon three central indicators: suitability, necessity and reasonableness. The principles of subsidiarity and proportionality are distinct but mutually beneficial: *"each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union"* which states that *"the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States".*[57]

1. Free markets vs. labour protection – A false dichotomy

There does not need to be a conflict between the free movement of services and labour protection rights because this is not a case of 'either/or' as is often portrayed.

The 'either/or' problem is well demonstrated in the aftermath of the European Court of Justice's (ECJ) controversial Viking[58] and Laval[59] rulings in December 2007. The very existence of the European Social Model was called into question because the ECJ ruled on the side of the right to collective action in one and on the side of economic freedoms in the other. Leading academic in European labour law, Brian Bercusson, prioritised social protection rights over pure free movement of labour, and subsequently argued that the draft Treaty for establishing a Constitution in Europe should be revised to prevent economic freedoms being invoked against collective action. Bercusson's position is a good example of the prevalence of the view that primacy must be given to one or the other in the *acquis communitaire*.

However, in the long run, Bercusson's recommendation would be a fleeting enhancement of 'social Europe' because it would undermine the importance of economic growth, and the related impact on employment and living standards. Striking the balance between adhering to collective agreements and maintaining free movement of labour is always going to be extremely challenging. The solution has to lie in rigorously enforced rules for minimum protection. This means ensuring every EU member state has a clear minimum wage or universally applicable collective agreements, as is required by the Posted Workers Directive[60]. The solution is not to insulate wages in host countries from the competition provided by a free movement of labour.

Labour and employment conditions in EU member states will continue to develop rapidly - mainly due to globalisation and technological advancements - but at slightly different speeds. This is not to say, though, that we should halt European employment and social policy, nor choose between economic freedoms and social protection. When attempting to strike the right balance, one should return to the principles of subsidiarity and proportionality for guidance. The EU is the best actor to achieve certain European Social Model objectives that override domestic self-interest issues and provide European Added Value (EAV) - criteria which are both covered by the governing principles.

2. Where should the EU get involved?

Secondly, whilst EU-level legislation should not be avoided on the basis of fragmentation, the EU must seek to ensure it regulates in the most appropriate areas, and at the same time, ensure it does not unnecessarily tamper with the social settlements across different member states. Bearing this in mind, there is undeniably a role for the EU to play in setting the framework and the minimum standards in employment and social policy.

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[57] Official Journal of the European Union (2010) Protocol (No 2) on the application of the principles of subsidiarity and proportionality. [Available from: http://tinyurl.com/7y7g28b]

[58] Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti [2007]

[59] Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others [2007]

[60] Official Journal of the European Union (1997) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. [Available from: http://tinyurl.com/8yxw4x7]

The trickier task is identifying - or prioritising for that matter - the areas where it is most appropriate to regulate.

On the wider issue of the European Social Model, the EU should not aim to have a 'one size fits all' policy and the difficulties surrounding the ability to reach agreement on the complex negotiations of the Working Time Directive (WTD)[61] are a good example of this. The 2003 WTD provided common minimum health and safety standards for workers, including maximum working hours, minimum rest periods and annual leave.

However, due to national labour market differences, the directive was agreed with an 'opt-out' which sixteen EU member states, including the UK and Germany, now use. The opt-out allows member states to let individuals choose to work more than a forty-eight hour week if they wish. However, just a year after the 2003 adoption, the European Commission proposed an amendment to revise - or preferably phase out - the opt-out clause but this proposal was fraught with disagreements that harked back to the economic freedoms versus social protection arguments.

There are two key reasons why the EU's WTD has been so difficult to get right. Whilst we do not believe that the EU should avoid regulation in policy areas that are significantly varied amongst EU member states, it appears that in the case of the WTD, for example, the minimum standards of employment and social protection were already provided for in the 2003 agreement. Following on from this, the failings of the Commission's 2004 - 2009 attempts at reform can be best understood in light of the guiding EU principles noted above.

The proposed reforms did not meet the proportionality and subsidiarity principles. Renegotiating the terms of the opt-out was unnecessary because action here would not be mutually beneficial for all workers and employment sectors. Individual member state action also has more weight in terms of suitability and added value, and the current principles of the opt-out provide room for reasonable discretion on the part of individual member states, known as their "margin of appreciation."

On the other hand, the European Globalisation Adjustment Fund (EGF) is a strong example of where the EU provides added value. The EGF became operational in 2007 and was set up to support workers who are the victims of large-scale redundancies due to the effects of globalisation in specific sectors, such as the automotive industry, but following the onset of the 2008 financial crisis, the EGF's remit was expanded in 2009 to include redundancies that were caused by the impact of the crisis.

The EGF supplemented active national labour market policy measures by providing one-off financing to help redundant workers get back into work. For example, the EGF assisted with job search costs or further training. Demand for EGF funding has been increasing at a rapid rate. In 2011, there were nearly 80 applications by member states for EGF assistance compared to 30 in 2009 and only 5 in 2008. Successful applications in 2011 included, for example, €9.6 million given to assist nearly 2,000 redundant workers get back into employment in 2011 in Denmark, Germany and Portugal.[62]

The EGF is exactly the kind of EU-level employment and social policy that we should be seeking in present times – it can help businesses keep staff by temporarily co-financing their salaries with the member states, reduce the time it takes for redundant workers to find new employment and provide funds to help the redundant worker learn new skills and increase their employability. Furthermore, the EGF clearly meets the subsidiarity principle. It provides critical targeted financial support for national labour market policies that are under increasing pressure to cope with the historic levels of unemployment. Financing under the EGF scheme is essential/necessary for these domestic-level policies to continue.

At present, the EGF has technically ended as it was only supposed to run until the end of 2011 but a draft regulation is recommending it continues until the end of 2013. Furthermore, negotiations on the Multi-annual Financial Framework (MFF) 2014 -2020 (the EU's long-term budget) are under way and it is proposed that the

[61] Official Journal of the European Union (2003) Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organization of working time. [Available from: http://tinyurl.com/7rusuyp]
[62] European Commission (2011) News: Employment, Social Affairs and Inclusion [Available from: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1135&furtherNews=yes]

EGF budget should be increased from €500 million to €3 billion for 2014-2020. This increase - if supported - would be a great boost during the present crisis, benefitting individuals, businesses and governments, by speeding up the economic recovery.

3. European social policy after the financial crisis

Thirdly, one must seriously consider the impact of the financial crisis across all European labour markets and recognise that employment and social policy has a vital role to play in the EU's future growth. This is highly political and there are diverse views on this issue. For example, Alain Supiot argues the onset of the crisis caused "unprecedented disruption" to the European Social Model, going on to say that European policy-making in the area of employment and social policy was side-lined, and the original vision of the European Social Model started to become undermined as "ultra liberal ideology" developed, but not to the benefit of the economic recovery.[63]

Business for New Europe firmly believe that member states must work to ensure the EU maintains and further strengthens its ability to remain competitive in the global political economy. This undeniably includes effective employment and social policy at the EU level because, after all, it is inherently linked to the completion of the single market. Whilst boosting competitiveness in the EU requires practical recognition of the two main points above, it also critically requires looking ahead to long-term issues vital to the EU employment sector, namely bridging the skills gap in Europe, supporting 'green jobs' and the promotion of greater labour market flexibility in Europe.

The skills gap in Europe must be addressed now - particularly across science, technology and engineering – because otherwise there is no doubt that the future competitiveness of the EU will be damaged. By 2020, statistics[64] show that 35% of all jobs will require high-level qualifications and less than 10% of jobs will not require computer skills. Beyond the skills gap, the EU must lead in employment policies that support the creation of 'green jobs' which focus on sustainable growth through low-carbon energy efficient technologies. As the price of conventional energy sources increase, a greener economy will be a more competitive economy.

Also, policies that promote greater flexibility whilst considering the importance of job security - 'flexicurity' - must be supported across all EU member states. A highly flexible market is most conducive to long-term competitiveness and the notion of flexicurity refers to combining liberal policies for the employer alongside security of employment for the worker.

Denmark is an excellent case study to promote flexicurity and represents the kind of labour market that the EU should strive to achieve - it is best for businesses and workers. Denmark has no restrictions on working time, the second most competitive salary levels in Europe and high productivity. At the same time, it also guarantees 5 weeks holiday, minimal social security contributions and provides good, free education whereby 80% of their labour market has attained upper secondary education. Denmark's highly flexible labour market has allowed it to manage the effects of the crisis and despite not being able to wholly avoid the impact of the downturn, Denmark's unemployment levels remain below the OECD average. Denmark's unemployment rate in Q3 2011 was 7.5% compared to the OECD total average of 8.2%, and the OECD Europe average of 9.5%.[65]

Last word

An ultra liberal approach to employment and social policy is not what we should be seeking but, as the Denmark case highlights, we will damage employment by over-protecting it. The future of EU employment and social policy depends on an honest recognition of this.

The middle ground is not always straightforward to achieve but we have solid guiding principles in place, a financial crisis to recover from and a clear vision of what is required from European employment and social policy to help guarantee our long-term growth and prosperity. A little bit more flexibility now could lead to a lot more security for European employees in the future.

[63] Supiot, A. (2011) Conclusion: Europe's Awakening in Before and After the Economic Crisis: What Implications for the 'European Social Model'? Edward Elgar Publishing Limited, UK

[64] Devoine, L. (2011) An agenda for new skills and growth. European Commission. [Available from: http://tinyurl.com/7xqkzp4]

[65] OECD (2011) Labour Force Statistics: Harmonised unemployment rates and levels. [Available from: http://tinyurl.com/7yylhot]

EU employment law: The left's gamble

Mats Persson

Employment law is inextricably linked to the 'social contract' that exists between governments and citizens, an evolutionary process resulting from decades of domestic political debate. The development of EU-level social policy has therefore at different times clashed with both the right and left sides of the political spectrum. The former has been anxious over the potential negative impact on business-led growth, while the latter has worried about the possible deterioration of established working practices and hard-won concessions, for example on wage setting.[66]

Under former Commission Presidents Jacques Delors and Romano Prodi, the EU moved broadly towards the so-called 'Social Europe' model.[67] However, this agenda has lost some momentum in recent years – although it re-asserts itself intermittently through some Commission proposals and ECJ case law.

In the past, many people on the left – including several national unions – championed greater EU competence over areas of labour market regulation because they saw it as an opportunity for aspects of the social model to be 'locked in' at the European level, and safeguarded from possible future revision by centre-right and liberal governments at the national level. The big prize was always EU competence in wage setting, and, ultimately, an EU-wide minimum wage – seen as the perfect tool to combat the perceived threat of wage dumping. However, as social policy has become increasingly blurred with other areas of EU competence, such as health and safety and the single market – in particular the free movement of workers – as well as policies to address the Euro crisis, a number of cases have shown that allowing extensive EU involvement in this area can backfire on the left.

Proponents of the 'European social model', who see commitment to high levels of social protection as an economic asset, are likely to be in favour of EU-wide social law in order to make the single market more competitive in global terms.[68] From this point of view, the EU is a useful vehicle for ensuring high levels of social protection across Europe. However, the argument from this angle – that social policy jurisdiction should be progressively transferred to the EU-level – is increasingly difficult to make as EU officials, alongside their counterparts at the International Monetary Fund, are actively pushing labour market liberalisation in the likes of Greece, Portugal, Spain and Italy, in order to boost their competitiveness.

This development, it appears, has led many unions to quietly drop their demand for a comprehensive minimum wage structure at the EU level (a previous demand has been that workers should be paid at least 60% of the average national or sectoral wage in their member state).[69] Far from acting as a safeguard, EU competence in this area could in fact contribute to push wages down; for example, in the interests of competitiveness, the EU recently urged Greece to lower its minimum wage, which is higher than in countries with a similar standard of living.[70] In other words, inviting the EU to set wages would amount to a huge gamble.

Similarly, the series of ECJ rulings involving the right to strike and posted workers have focussed minds on the left. In particular, the *Laval* case – the most important of these rulings – caught many unions off guard. The 2007 ruling, concerning Latvian workers posted in Sweden, illustrated the tension between EU law on the freedom of movement and the Scandinavian labour market model.[71] The ECJ ruled that Swedish unions had been wrong to demand that a Latvian construction company had to sign a collective agreement with the

[66] For a wider discussion, see *Open Europe* "Repatriation of EU social law: the right choice for jobs and growth?, 9 November 2011, http://www.openeurope.org.uk/research/2011EUsocialpolicy.pdf

[67] European Council Nice 7 – 10 December 2000, Conclusions of the Presidency, Annex 2; Modernising and improving the European social model http://www.europarl.europa.eu/summits/nice2_en.htm

[68] Trubek, D.M. and Trubek, L.G., 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', *European Law Journal*, Vol. 11, No. 3, May 2005, p 343–364

[69] See for example Thorsten Schulten 'A European Minimum Wage Policy for a More Sustainable Wage-Led Growth Model 8 June 2010 http://www.social-europe.eu/2010/06/a-european-minimum-wage-policy-for-a-more-sustainable-wage-led-growth-model/

[70] Cited in *AFP*, 'Greece urged to lower minimum wage to boost jobs' 13 October 2011 http://www.google.com/hostednews/afp/article/ALeqM5jbLF6iyghsVwHgcsMW1P2TIeDDzw?docId=CNG.0b47324644de1b191c44ad6aa1b85137.1e1

[71] Case C-341/05, available here: http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070098en.pdf

Swedish unions, stipulating that the Latvian company was required to pay its workers, posted in Sweden, the local going rate, rather than the wage agreed in a national collective agreement. The Court's ruling emphasised that member states *can* impose minimum rates of pay on posted workers, either via legislation or collective agreement, but this must take place in accordance with the terms of the Posted Workers Directive. Though confirming the right to strike (now enshrined in the Lisbon Treaty's Charter of Fundamental Rights), the ECJ simultaneously extended its powers by effectively defining when unions in member states have the right to take strike action in cross-border disputes. The ruling therefore had a huge impact on member states which rely on voluntary and autonomous collective bargaining by the social partners (employer and employee organisations) for the regulation of pay and working conditions.[72] But by implication, it also had an impact in the EU as whole.

We can have different views on whether the ECJ ruled the correct way – and the case has been subject to plenty of misunderstanding – but what we cannot object to, if we accept EU involvement in this area, is the *principle* of the ECJ intervening in what clearly was a labour market/employment conditions issue. The fact that the Court was effectively interpreting a Single Market law – the posting of workers directive – rather than employment legislation, is beside the point. It is the impact on national legislation that counts. To be consistent – and there are plenty of people on the left who have been – unions either have to accept the ruling on the basis that this is an EU competence, or argue that the ECJ should have sent the case back to the Swedish court. Unions cannot have it both ways. The case is also interesting as Sweden has managed to combine high levels of economic growth with strong union presence and workers rights – by leaving the state out of collective bargaining and in determining key working conditions (such as working hours). EU labour market law therefore, by definition, meddles with a model that clearly has served unions well.

There are other examples which serve as a reminder that EU involvement can backfire on best labour market practice. For example, the European Commission has proposed to increase the amount of time aircraft pilots can operate to 13 hours 55 minutes per day, a significant increase on the 10 hours 15 minutes currently allowed by UK rules. Similarly, in 2007, the UK introduced a new system of licencing boatmasters in order to comply with an EU Directive on the harmonisation of national boatmasters' certificates.[73] While it was acknowledged that the new licence would push up overall safety standards, significant concerns were expressed that the new licence would have a detrimental impact on the standards of boatmasters' qualifications on the Thames – a *local* issue which needed no EU involvement in the first place.

All of this, of course, links back to democracy. Taking into consideration the combined effects of ECJ case law and EU-led austerity drives, it is hard not to conclude that heavy EU involvement in labour market law and wage setting has significantly strained national democratic settlements. This was unintentionally summed up by the President of the European Council, Herman Van Rompuy, when he remarked in a recent speech that "Italy needs reforms, not elections."[74] While many would agree that Italy desperately needs a whole range of economic reforms, is it sustainable to have a system in which economic and labour market policy remain the same irrespective of who's in power? This is not only a matter of principle, but a practical point too. First, reforms decided by technocrats or judges without a proper popular mandate are less likely to be implemented and to stand the test of time. Second, and most importantly, if pushed too far, such practices risk undermining public support for the entire European project, as voters – frustrated by having their voice ignored – turn to far more radical alternatives at the polls.

As Monika Arvidsson, an economist at the Swedish Trade Union Confederation – an organisation which has 1.8 million members (of the country's total population of 9 million) – put it:

[72] See *Open Europe*, 'Strikes over foreign labour – what's really going on?', 4 February 2009; http://www.openeurope.org.uk/research/postedworkers.pdf and *Institute of Employment Rights*, 'Understanding Viking and Laval', May 2008; http://www.ier.org.uk/system/files/Understanding+the+Viking+and+Laval+cases.pdf

[73] House of Commons Transport Committee 'The new National Boatmasters' Licence' Sixth Report of Session 2006–07, Volume I http://www.publications.parliament.uk/pa/cm200607/cmselect/cmtran/320/320i.pdf

[74] Quoted in *Reuters*, "EU's Van Rompuy says Italy needs reforms, not elections", 11 November 2011, http://www.reuters.com/article/2011/11/11/italy-rompuy-idUSR1E7GD01Q20111111

> *"Democracy is a philosophical question. There must be differences between member states depending on which political parties the citizens vote to have as their representatives."*[75]

Along with fiscal policy, labour market governance is one of the core competencies of democratically elected governments. For practical, democratic and political reasons, limiting the EU's involvement in this policy area should very much be in the left's interest.

[75] Quoted in *Svenska Dagbladet*, "Demokratin krisens första offer", 18 December 2011, http://www.svd.se/opinion/brannpunkt/demokratin-krisens-forsta-offer_6717161.svd

Are unions turning their backs on Europe?

Clare Moody

The European Union was born as a consequence of the traumatic 20th century history of the continent. The need to ensure peace through co-operation and co-ordination has been forgotten as those war experiences have stopped being personal and have slipped into the pages of the history books, but this does not make those reasons any less valid. More recent experience has also emphasised the need for countries working together at a supra-national level in the face of globalisation and climate change.

Through the 1980s and the 90s, UK trade unions learnt to appreciate the practical benefit of membership of the European Union. As the last Tory government ripped up rights at work and attempted to dissolve any sense of the collective in society, the EU was the only means of advancing the rights of workers and the ability of unions to promote them. The question that now hangs in the air is whether the EU will once again provide support to unions defending and progressing rights in the UK while we endure another Tory onslaught.

The recent experience of trade unions has, at best, been mixed. The now infamous ECJ rulings in Viking, Laval, Ruffert and Luxembourg, in their various ways, served to prioritise the freedoms of capital over the rights of people and to undermine the principle and underpinning for collective bargaining.

Too frequently when trade unionists write or speak on collective bargaining we can sound as if we are defending structures or bureaucracies. However, this couldn't be further from reality – the need for strong collective bargaining is evident in countries across Europe today. The undermining of strong collective bargaining has led to the fall in real wages that is causing hardship and worry for so many people, but it is also damaging the economy as a whole. Consumer spending is necessary for growth. Unionised workplaces enjoy 16.7% higher salaries than those without collective bargaining.

This effect is now being exacerbated by the ferocious austerity measures being inflicted on people. Here lies another area where unions are looking with concern at the direction of the EU. Cameron's near religious devotion to austerity, whatever the cost, is not out of place across the EU at the moment – even if his arrogant and shrill lectures to Eurozone countries are not welcomed by them.

The direction of recent talks at EU level about a new Treaty on economic governance could have a devastating impact on growth and jobs across the EU and *even if*, a big *even if*, the UK is not covered by the Treaty, the consequences will be deeply felt here. The inflexibility of putting tight deficit rules into a Treaty is a way of embedding the austerity principle of transferring the burden of responsibility for financial crises from governments to the people. Those responsible for pursuing this course are also wilfully fuelling the disconnection of the EU and its institutions from the people of Europe.

Enforcing a deficit reduction programme based purely on cuts and privatisation is prolonging problems in the Eurozone. It is also further undermining, both directly and indirectly, collective bargaining structures. Meanwhile, the ECB is standing on the sidelines and there is little sign of giving it a wider remit in the proposed Treaty and extending its responsibilities to include promoting growth and boosting employment, features of the remit of other central banks.

The combination of the current financial choices being made at EU level (although it is the UK that is resisting the implementation of the Robin Hood Tax) and the failure to adequately rectify the imbalance caused by the ECJ cases weigh heavily against the previous fulsome trade union support for the EU.

Indeed, with the current backdrop, it is hard to see why trade unionists would at any point have had an ardent admiration for the European project. But look at the achievements that have been gained through the EU – part time workers and fixed term contract workers regulations, agency workers regulations (it isn't the EU's fault that these don't go as far as we wanted), dramatic extensions in discrimination legislation and parental rights and the right to 28 days' paid holiday to name a few. These haven't gone away.

In addition, there are two pieces of legislation that UK unions could put to better use – the Information and Consultation Directive and the European Works Councils legislation. In particular, the Information and Consultation Directive could be used to effectively extend collective bargaining.

So are we now witnessing the end of the European social model as an alternative to the dominant Anglo Saxon model in the UK? And with this the demise of trade union support for engagement in Europe? The evidence of its previous success should point away from this but will the right-wing politics of many European countries' governments ensure they entrench the supremacy of the rights of capital at an EU level?

There are a number of factors that mitigate against the depressing outlook outlined above. One of the leading forces pushing austerity at an EU level is Germany. There are numerous historic reasons why this position is being taken but it is also true that the German economy has weathered the economic crisis more successfully than most. The reason for this is the social economic model that ensures unions are integral to decision-making in companies. A recent TUC report 'German lessons: developing industrial policy in the UK' highlighted the effectiveness of this approach in ensuring the resilience of the German economy and promoting growth.

There has been a changing political balance in countries across Europe, many giving right-wing parties power. But Denmark recently elected a social democratic government and in the next few months France will have its presidential elections. If the polls are to believed, Francois Hollande may well take power. He has already outlined a manifesto that promotes growth and taxation as a means of dealing with the current financial position. Fundamentally, he is focusing on fairness and the impact of government decisions on people. His election could change the balance of argument in the EU.

We are also seeing increasing noises from extraordinary quarters, such as the IMF and the ratings agencies, saying that unadulterated austerity is damaging economies. After Gordon Brown rightly led both the EU and the G20 to pursue Keynesian policies of investment for growth, the pendulum has swung back ferociously but importantly there is growing recognition that unemployment is not a price worth paying for politicians. The European Parliament has not sufficiently flexed its muscles but this could also change as the 2014 elections loom.

We must also remember what trade unions do. We fight. Most particularly we fight hard when times are hardest. Individual trade unions, national confederations and international union bodies are using the full variety of tools available to them to resist the pressures on working people and to change the frame of the debate. It is not in the nature of trade unions to walk away from the fight. Turning our backs is neither our style, nor a way to restore the focus of the EU away from a neo-liberal trend back towards its roots of socially responsible economics.

And what if we raise our eyes to the horizon, to the world beyond this economic crisis? Would we be better off without the EU? The answer has to be an emphatic no. So many of the existing rights that British workers have are derived from EU legislation. There would be no backstop of protection for British people from the devastating excesses of a Tory administration.

Both now and into the future of the EU, unions must engage wholeheartedly in the battle to restore the social model to the heart of the EU. It is our role to fight for the restoration of a confident Europe, demonstrating the success of people at the heart of economic and social policy decisions.

Conclusion:
A UK perspective on EU employment and social law

Adam Hug and Owen Tudor

The impact of the economic crisis has undeniably encouraged greater political scrutiny of employment and social rights, whether at a national or European level. Working people can be understandably confused as to why what started as a banking crisis and became a crisis of public sector deficits, has now become a crisis of competitiveness. Some are arguing that to solve the problem caused by risky bank lending to workers whose wages had failed to keep up with the economy, the solution is to reduce ordinary workers' employment and social protections still further, in effect using the current crisis to advance long-held political positions. However, clearly the gravity of the global crisis necessitates a root and branch re-examination of the foundations of the economy to ensure that European countries can return to sustainable growth. As part of that, the balance between protections for workers and flexibility for firms needs to be assessed to ensure that benefits for society as a whole can be maximised.

Despite the new economic environment, there is little to suggest that the removal of existing protections would assist UK or EU firms to compete on grounds of cost with emerging markets at the lower end of the value chain, or that there has been a real shift in the terms of trade in the longstanding debate over whether such protections inhibit rather than enhance productivity. Nick Clegg pointed out that 'this year (2011) China will register more patents than the whole of Europe' to showcase the impact of the EU's 'inflexible workforces' and the 'red tape that strangles business' without explaining exactly how reducing employment and social rights for workers would encourage them to be more creative in a way that would help in a patents arms race.[76]

Similarly, increasing worker insecurity at a time of economic slowdown is unlikely to encourage them to spend. The major problem facing the EU at the moment – according not just to trade unions, but the IMF, OECD and so on – is a lack of demand, and higher wages mean more demand, particularly for those on lower incomes who would be likely to spend a higher proportion of their earnings in the UK economy.

This is not to argue that policy makers should avoid examining the impact of regulations on small firms and start-ups, where BIS and others should work with the EU to simplify compliance processes and provide greater assistance to small business to meet their requirements. While maintaining, and as appropriate extending, rights that protect and support working people (and can also benefit employers), there needs to be an openness to new thinking about ways in which those rights can be protected with fewer unintended consequences and at a lower cost to business– continuing to make 'better regulation'.

Despite the generally critical media coverage that EU employment and social law receives, there is evidence that the UK public sees a role for the EU in this area. A 2010 YouGov poll for the Fabian Society and FEPS found that of 2,144 British people who were asked, 'Do you think the European Union should agree minimum levels of workers' rights so EU countries cannot undercut each other with cheaper labour or lower regulation, or should each country be able to make their own decisions about what regulations are best for their workers?,' 55% said the EU should agree minimum levels of workers' rights compared with only 27% who said they should not.[77] A recent Eurobarometer survey of 1,318 UK adults somewhat supports these findings. When asked to what extent the EU has, overall, a positive or negative impact on employment policy, 52% of respondents stated that it has a positive or somewhat positive impact compared to 32% who held a negative view. For the same question on social policy, the difference was 51% compared to 34%[78].

[76] Public Service Europe Daniel Mason, Clegg: The greatest danger for EU is division
http://www.publicserviceeurope.com/article/1100/clegg-the-greatest-danger-for-eu-is-division

[77] Fabian Society, New poll reveals what the British really think about the European Union, December 2010
http://www.nextleft.org/2010/12/new-poll-reveals-what-british-really.html

[78] Eurobarometer 176, UK Factsheet Employment and Social Policy
http://ec.europa.eu/public_opinion/archives/ebs/ebs_377_fact_uk_en.pdf It is worth pointing out for example that for polling purposes the phrase employment policy is a bit broad and the explanation the pollsters gave was 'e.g. helping people find a job'- it of course would be possible to believe overall the EU assisted with job creation whilst disagreeing with employment and social regulation.

Scepticism on the left

Conservative Eurosceptic hostility around too much EU employment and social law is sometimes matched by a left-wing Euroscepticism, touched on by a number of contributors, which argues that, on the contrary, there is too *little* regulation, too much liberalisation, or that recent EU law has promoted the interests of firms over workers. Several of our authors have argued that in recent years, the EU has pursued a Better Regulation agenda, and that the Commission has prioritised liberalisation for some time now, as typified by the ill-fated Lisbon strategy of 2000. The fiscally-conservative nature of the Euro-plus pact, that seeks to limit Government spending with the aim of reducing debt levels, strongly underlines this overall political direction and has led to the ETUC condemning the agreement.

However, 'socialism in one country' is no more likely to work than the autarchy promoted by right-wing Eurosceptics. The argument over repatriation made to a left-wing audience – as Open Europe have valiantly attempted – is unlikely to convince many beyond those trade unionists and others already opposed to the EU . The opposition in the trade union movement to what the EU and its institutions have done about labour law has focused not on the principle of European-level action as much as the content, and that has rightly been ascribed to the political views of national governments. The suggestion that a British Government might replace European labour laws with something more beneficial to British workers or unions is undermined by the resistance of even the past Labour Government to social legislation proposed by Europe. If the EU is now seen as a driving force for neo-liberalism across Europe, it has very much been because the UK has often had its hands on the wheel. No-one expects the current UK Government to push for stronger labour law than the EU does, and putting the cart before the horse by pushing for withdrawal from the EU or repatriation currently would be far more likely to find a UK government removing rather than strengthening the protections those on the left would seek to support.

The truth is that the EU is often found holding the ring between the competing demands of trade unions and businesses, often unloved by either side. While the Commission has taken a decidedly more (neo) liberal approach in the last 10 or so years, it still, for good or ill, gives greater consideration to employment and social rights in most areas than would be desired by many on the British centre-right, or many in other regions of the world such as Asia or North America. However, the EU is more legitimately open to critiques on the grounds of democratic deficit (from all sides of the political spectrum).

Moving forward

However, the democratic deficit argument can only go so far. The UK has been party to innumerable international agreements[79] and treaties over the centuries from Utrecht to Lisbon that bound not only the signatories but their successor administrations in the cause of international goals. Britain's membership of other global organisations such the UN, WTO, NATO, the Council of Europe, the Commonwealth and the OSCE place requirements on the country whose provisions are deemed to apply in perpetuity. At an EU-level, the single market is full of requirements shaping the operations of capital, goods and services that remain binding irrespective of the change of national government. In many (though not all) cases, there has been some degree of cross-party support at the time of participation in a particular international agreement, but successive Conservative Governments have sought to challenge the extent of the EU's competence in employment and social law as the opt-out from the 'social chapter' of the Maastricht Treaty showed. But, put bluntly, a major repatriation of employment and social rights, even if deemed desirable, remains off the table without presaging a much more fundamental breach with other member states as set out in the introduction.

So centre-right governments such as the current coalition will continue in practice to concentrate on retaining the Working Time Directive opt-out and reversing the ECJ's SIMAP and Jaeger judgments that have led to 'on-call' time being counted as working time for the purposes of the application of the Directive (so that 'inactive' on-call time ceases to count towards the statutory 48 hour limit), if on the latter point the European Parliament can be won over[80]. At a domestic level, the Coalition can go about ensuring that they meet their agreed objective of 'limiting the impact on business of posted workers directive' if they so choose through the

[79] Utrecht seems to be the most serviceable example of international treaty obligations after the Act of Union though Caen appears as an early example for England.

[80] Currently the EP argues for a reclassification of inactive time rather than its removal in full from the scope of the WTD http://www.unison.org.uk/file/Workers%20Required%20to%20Sleep%20In%20(WTD).pdf

nature of UK implementation, though we would argue that similar concern should be given to the impact on workers.

At an EU level, there should be some scope for agreement to fill in the gaps in the existing social and employment legislation, rather than leaving it to the courts. The ECJ has attempted to resolve situations when directive and treaty requirements clash. Where the Court has decided issues in unexpected ways, the onus falls on the political institutions to provide clarity and provide a more effective resolution that should give greater credibility to the overall framework of EU employment and social law. The debate around the design, utility and use of impact assessments is a matter for detailed debate beyond the scope of this publication, but there is a need for a consensual approach, improved consistency of their use across EU law-making bodies and effort to ensure non-monetary benefits are better reflected in the process.

There may also be scope for further exploration of how to assess the long-term social and economic impacts of EU legislation. One example is the current debate about the effect of the Temporary and Agency Workers Directive. Karen Clements' contribution to this collection argues that it has reduced the employment of temporary agency workers, while the TUC argues that the general economic climate is a better explanation. Such analysis needs to explore whether, as business lobbyists such as the FSB argue, the introduction of the directive is making it less likely for micro-businesses to take on temporary staff, potentially necessitating an opt-out for very small firms, or whether it is making it more likely that workers will be offered the permanent contracts in the first place that the majority consistently favour when asked. Measures should also be developed to make it easier for temporary workers to become permanent members of staff in their place of employment.

This publication goes to print as the Monti II announcement is imminent. Claire Kilpatrick suggests that there is a need for the Commission to respond to the actions of the European Court over implementation of the Posted Workers Directive by making clear how long a posted worker should remain subject to home state standards, when it is appropriate to use the 'public policy exemption', what mechanisms could be developed to enforcement that cross-border posting is actually taking place and define how many different host state collective bargaining regimes can form a minimum standard. Fundamentally, she argues, the Commission and other European institutions need to be clear what had been intended when the directive had been framed to assess whether the Court was correct to overturn the widely-held perception that it was referring to host state standards and instead change the interpretation to apply to home state rule on the basis of the Treaty.

Ariane Poulain argues that the EU's little-known Globalisation Adjustment Fund could be extended and deployed in the UK to help tackle the challenges of restructuring, and that is certainly a sensible proposal. However, one reason why the Fund has not been better used (across Europe, not just in Britain) is because the barriers to use are set too rigidly or too high, so it is in need of revision, for example, by reducing the number of workers whose jobs have to be affected before it can be used, in order for it to fulfil its potential.

At a UK level, further work could be done to Improve scrutiny of EU legislation at Westminster, particularly in the Commons, to address the allegation of gold-plating, improve understanding of the issues at a UK political level and provide opportunities for more informed analysis of European debates. Understandably, there is also a considerable amount of confusion amongst both employers and employees (as well as the media) about which regulations are European and which are national in origin, with Brussels often getting the 'blame', so further development and dissemination of plain English versions of EU regulations may help.

Overall, if there is to be a shift towards giving greater flexibility for firms in response to the economic crisis, this should not simply be a code for reducing workers' rights. Employer flexibility needs to be balanced by measures to increase flexibility for employees over issues including parental leave, opportunities for remote and part-time working, as well as greater security when possible. As Anne Davies argues, developing workplace consultation mechanisms may help workforces manage the process of change and adaptation with a reduced impact on jobs and wages.

Recommendations

Where some see rights, others see regulations, benefits and burdens, so as Single Market, Equal Rights is a collaborative project comprising a range of different viewpoints, so the recommendations listed here are those of the editors, unless stated, with which some contributors may disagree. Nevertheless we would argue that:

- Action from the EU's political bodies is required to resolve conflicts in different areas of EU law, rather than relying on the ECJ
- There is a need for improved consistency of impact assessments across EU law-making bodies, but the EU should also ensure non-monetary benefits are better reflected in the process
- Moves to create greater flexibility for firms that are currently taking place across Europe should be balanced by measures to increase flexibility for employees over issues including parental leave and opportunities for remote and flexible working. A race to the bottom in labour standards will not drive growth
- For small businesses, there is further work to be done to simplify implementation processes and support them in compliance, but there is a need for caution about adopting blanket opt-outs of important social protections
- The European Globalisation Adjustment Fund should be reformed and extended so that it can be more flexibly applied
- Further efforts are needed to improve UK parliamentary scrutiny and public information on matters relating to EU employment and social law
- Claire Kilpatrick calls on the Commission to make clear how long a posted worker should remain subject to home state standards; define when it is appropriate to use the 'public policy exemption', explore mechanisms to provide enforcement, ensure cross-border posting is actually taking place and define how many different host state collective bargaining regimes can form a minimum standard
- Anne Davies and Clare Moody argue for improving workplace consultation mechanisms, and using existing mechanisms better to help workforces manage the process of change and adaptation
- Catherine Barnard argues that the 'Monti II' proposals could explicitly recognise that there is no inherent conflict or hierarchy between the right to strike and the right to provide service
- John Monks argues for the use of co-ordinated collective bargaining across Europe to boost purchasing power to generate demand and reduce income inequality and encourages the development of social pacts between governments, unions and employers

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Single Market, Equal Rights? UK perspectives on EU employment and social law gives a wide-ranging assessment of the contentious British debate over Europe's role in determining the level of employment and social rights. It explores:

- The UK-specific dimensions of the debate, both in terms of the party politics and the impact it has on the wider relationship between Britain and the EU
- The extent of EU involvement in employment and social protection compared to national action
- The relationship between the single market and EU employment and social law
- The balance between the role of the European Commission and the European Court of Justice
- The Posted Workers, Working Time and Agency Workers directives and other contentious issues

The publication is edited by Foreign Policy Centre Policy Director Adam Hug and the the TUC's Head of European Union and International Relations Owen Tudor. It features contributions from a range of leading experts including: **Prof Catherine Barnard** (Trinity College, Cambridge), **Karen Clements** (British Chambers of Commerce), **Prof Anne Davies** (Brasenose College, Oxford), **Prof Claire Kilpatrick** (European University Institute), **Lord Monks** (formerly TUC and ETUC), **Clare Moody** (Unite), **Mats Persson** (Open Europe) and **Ariane Poulain** (Business for New Europe).

The Foreign Policy Centre

The Foreign Policy Centre
Suite 11, Second floor
23-28 Penn Street
London N1 5DL
United Kingdom
www.fpc.org.uk
events@fpc.org.uk

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