Department for Business Innovation & Skills

Review of the Balance of Competences

GOVERNMENT REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Call for Evidence: Social and Employment Review

OCTOBER 2013

Department for Culture Media & Sport

HSE

Department for Work & Pensions

Contents

Call for evidence

On the Government Review of the Balance of Competences between the United Kingdom and the European Union

Opening date: 29th October 2013

Closing date: 17th January 2014

Introduction

1. The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. This call for evidence takes forward this commitment in relation to social and employment competence. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It will not be tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

What is competence?

2. For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

3. The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

4. There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, and certain social policy aspects defined in the Treaty,[1] either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, and coordination of Member States' strategies for employment[2] both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

5. The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and equal treatment) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

Call for evidence

6. This call for evidence sets out the scope of the review of the balance of competences on social and employment. We request input from anyone with relevant knowledge, expertise or experience. This is your opportunity to express your views.

1 Art 4.2(b) Treaty on the Functioning of the European Union (TFEU)

2 Arts 5 and 145-150 TFEU, including 147(1) that Member States retain competence as regards employment policy

7. Your evidence should be objective, factual information about the impact or effect of EU action in your area of expertise. We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out at the end of this document.

How to respond:
A response form is published alongside this document at: UUhttps://www.gov.uk/review-of-the-balance-of-competences#semester-3.
Please send your response to **balanceofcompetences@bis.gsi.gov.uk** by 17th January 2014.
Consultation events on this call for evidence are being held on the **5th and 19th November**. If you are interested in attending, please contact us at **balanceofcompetences@bis.gsi.gov.uk**.

Scope of this review

8. This is a wide ranging review covering article 19 and articles 145-161 of the Treaty on the Functioning of the EU (TFEU). This review also deals with instances where the EU acted on the basis of alternative legal bases, but with the broad goal of furthering social or employment aims. As such, it covers the main areas of regulation that impact on the workplace: equal treatment, regulation of the employment relationship, social protection and health and safety at work. It also covers those areas of competence that are focussed on improving coordination between Member States on social and employment issues including employment promotion, social protection and the labour market aspects of the European Semester process.

9. This review **does not include**:

- a full discussion of the European Semester, which will be dealt with under the upcoming review of the Economic and Monetary Union, the call for evidence for which is due to be published in Spring 2014;
- vocational training, which falls within the scope of the Education review the call for evidence for which is due to be published in Spring 2014;
- portability of pensions, which will be included in the Free movement of persons review and which is expected to be published in Winter; or occupational pensions, which will be included in the Financial Services and free movement of capital review; the call for evidence for which will be published alongside this one.

10. These areas of competence raise fundamental questions about the role of the EU and the interrelationship between the purely economic goal of achieving a fully functioning single market with wider EU values and objectives to support social progress. This call for evidence seeks views on the relationship between and necessity of social and employment policy to the functioning of the single market as well as the balance of competences between the UK and EU on social and employment policy, how that competence is exercised, and what the implications of EU action are for Member States wanting to take their own action. For the purpose of brevity, the remainder of this document uses the term social policy throughout as a catch all phrase for all of the areas in scope.

Box One: Links to other Balance of Competence reviews

Single Market Reviews: The Balance of Competences Review opened with an overarching report on the single market, led by the Department for Business, Innovation and Skills. The full report and summary of evidence was published on 22 July 2013. In addition, there has been a call for evidence on **free movement of persons**, led by the Home Office and Department for Work and Pensions, which will pick up issues relating to the portability of pensions. This is now closed and the report is expected to be published in Winter at the address below. Alongside this call for evidence the Government is publishing one on the **free movement of services**, led by the Department for Business, Innovation and Skills, including public procurement, certain establishment provisions, and the digital single market; and one on **financial services and the free movement of capital**, led by HM Treasury, which will include occupational pensions.

Economic and Monetary Union: led by HM Treasury; the call for evidence for this review is due to be published in Spring 2014. This review will cover the coordination and surveillance of economic and fiscal policies in the EU, in particular the broader European Semester process and issues relating to the operation of the single currency. We would welcome input in response to this call for evidence on the specific social and employment aspects of the European Semester.

Fundamental Rights: led by the Ministry of Justice; the call for evidence for this review has been published alongside this call for evidence. This review deals with the 'architecture' of fundamental rights, including the Charter of Fundamental Rights, with individual rights being considered under more subject specific reviews. In particular, we would welcome specific feedback on the right to equal treatment in response to this call for evidence.

Asylum and Immigration: led by the Home Office; this review looks specifically at the immigration and asylum competences that affect nationals

from outside the EU/EEA, those not exercising EU/EEA rights and the control of the UK's borders. The call for evidence is now closed and the report is expected to be published in Winter.

Cohesion: also led by the Department for Business, Innovation and Skills; this review looks at structural funds and will in particular be covering the European Social Fund and the European Globalisation Fund. The call for evidence for the Cohesion review has been published alongside this call for evidence.

Education: led by Department for Education; the call for evidence for this review is due to be published in Spring 2014. It will cover the skills and education aspects of social policy.

This review of social and employment competence will deal with social policy issues at the national level. Where there are specific sectoral impacts, these will be picked up in the relevant sectoral reviews. This includes a number of EU-level instruments that impose specific health and safety requirements on Member States that were not made under the health and safety at work legal base in Article 153 TFEU. In particular, the worker-related aspects of the Euratom directives (including those pertaining to ionising radiation) will be covered by the **Energy** report, which is being led by the Department for Energy and Climate Change, and the call for evidence for which is due to be published alongside this one.

The impact of employment regulation on the health sector is covered by the report on **Health** led by the Department of Health. This call for evidence has now closed. The full report and summary of evidence was published on 22 July 2013.

All Balance of Competence Review documents are available at the following web address: https://www.gov.uk/review-of-the-balance-of-competences.

Development of Competence

11. Social policy is one of the most controversial areas of EU competence and the debate about whether or not the balance is right goes to the heart of what the EU is about. On the one hand it is argued that social objectives are central to the European project as a good in their own right; on the other, the EU is a fundamentally economic union and social policy should only be brought in to the extent that it is necessary to achieve those economic aims. Some of the arguments are philosophically driven such as the belief that there is such a thing as a common European social ideal, but for many, the fundamental debate about EU competence in this area centres on whether or not social policy is in itself an intrinsic element of the single market. This gives rise to the question of whether EU social policy sets minimum standards that facilitate the functioning of the Single Market or whether it is driven by political concerns that the completion of the single market would contribute to a lowering of social protection in the race to achieve increased competitiveness.

12. The development of competence over social and economic policy was not symmetrical. The Treaty of Rome, which was aimed at creating a common market covering the whole of the EEC, did not contain much on social policy beyond provisions on the European Social Fund and free movement (which is not strictly speaking social policy but is relevant because it sets out the principle of equal treatment on the basis of nationality); both of which are covered by separate reviews. It was not until the 1970s that there began to be a move towards more European level social policy. From this point onwards there has been a gradual development and extension of European social competence.

13. Initially the focus was on putting in place protections for individuals (workers and their families) and early directives covered collective redundancies,[3] transfers of undertakings[4] and a small number on health and safety at work.[5] In the absence of a

3 Directive 75/129

4 Directive 77/187

5 Directives 77/576/EEC, 78/610/EEC, 79/640/EEC, 80/1107/EEC, 82/605/EEC, 83/477/EEC, and 86/188/EEC.

dedicated social policy legal base, these directives were all adopted under legal bases[6] which were aimed at the completion of the single market. At around the same time the European Court of Justice stated in a case about equal pay called Defrenne v. Sabena[7] that the EU "*is not merely an economic union, but is at the same time intended, by common action to ensure social progress and seek the constant improvement of living and working conditions of their peoples*…"

14. The Single European Act in 1986, which committed the EU to creating a functioning single market by the 31st December 1992 and provided for qualified majority voting for single market measures, also marked a formal extension of social competence by inserting a new legal base for health and safety.[8] The Single European Act was followed, in 1989, by the adoption of the Community Social Charter, which the UK did not sign up to. Although not legally binding on any Member States, the Social Charter marked a shift in philosophy towards more EU intervention in social policy alongside achieving economic goals. In the period following its adoption, further EU social legislation based on existing Treaty provisions (on health and safety at work and completing the single market) was adopted that applied to all Member States (including the UK). This included the Working Time Directive[9] which was challenged by the UK on the grounds that the Directive was actually intended to achieve social objectives and so should not have been adopted under the health and safety at work legal base (see box two). One reason that this was felt to be significant was because this legal base is subject to a qualified majority vote rather than unanimity.

Box Two: The Working Time Case

The Pregnant Workers, Young Workers and Working Time directives were adopted under Article 118a EEC. The Working Time Directive was the most controversial. It contains restrictions on night work, requirements for regular rest breaks and four weeks paid annual leave. It also introduced the

6 Article 100 Treaty establishing the European Economic Community (EEC) and/or Article 235 EEC (Article 94 and 308 EC, now Articles 115 TFEU and 352 TFEU).

7 Case 43/75 (No.2) [1976] ECR 455

8 Article 118a EEC, now Article 153(1)(a) TFEU

9 Directive 2003/88

requirement for a maximum working week of 48 hours.

The UK challenged the choice of legal base of the original Directive,[10] arguing that the Directive was intended to achieve social policy and job creation objectives, and as a result should have been based on either Article 100 EEC (now Article 115 TFEU) or Article 235 EEC (now Article 308 TFEU) which, unlike Article 118a EEC, require unanimous voting. The European Court of Justice disagreed.

The UK also argued that the link between working time and ensuring health and safety at work was too tenuous. The Court favoured a broad reading of the term health and safety. It said:

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

It took the view that the Directive's principal aim was the health and safety of workers; the fact that the health and safety impact of certain of the working time restrictions had not been "scientifically demonstrated" did not prevent them from being health and safety measures for purposes of Article 118a.

15. The Social Chapter – which must be distinguished from the Community Social Charter in name, content and impact – was attached to the Maastricht Treaty (1992). However, unlike the Community Social Charter, the Social Chapter was legally binding. It gave greater powers to the EU to legislate and envisaged a greater role for the social partners (employee and employer representatives) to be consulted on and to implement social policy legislation, as well as to adopt European-wide collective agreements. The UK initially did not participate in the Social Chapter (and so was not originally bound) but decided to "opt in" in 1997. As a result, it was incorporated into the

10 Case C-84/94 UK v. EU Council [1996] ECR I-5755; [1996] 3 CMLR 671.

main body of the EC Treaty through the Treaty of Amsterdam and it no longer exists as a separate entity. This means that from 1999 the EU has had the ability to use the wider powers in the Treaty - following the incorporation of the Social Chapter into the mainstream of the Treaty - to adopt legislation that applies to all Member States. The Community Social Charter still exists as a separate and non-legally binding agreement.

16. The Treaty of Amsterdam also widened the scope of competence on equal treatment through the addition of a new provision for the EU to promote equal treatment for men and women in employment and the introduction of a new legal base, Article 19 TFEU, which gave competence to the EU to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Prior to this, the only express provision in the EC Treaty relating to equal treatment was the requirement for Member States to make provision for equal pay (now Article 157 TFEU).

17. The Lisbon Treaty (2007) represents a further evolution in the position on social policy. In particular, it framed existing social objectives more proactively so that, amongst other things, there is a commitment to work for full employment and social progress, and to combat social exclusion.[11] It also inserted a new 'horizontal' social clause[12] according to which the EU must take employment and other social goals into account in the definition and implementation of all its policies and activities. In addition, it reiterated the importance of social partners by committing the EU to facilitate dialogue between the social partners.

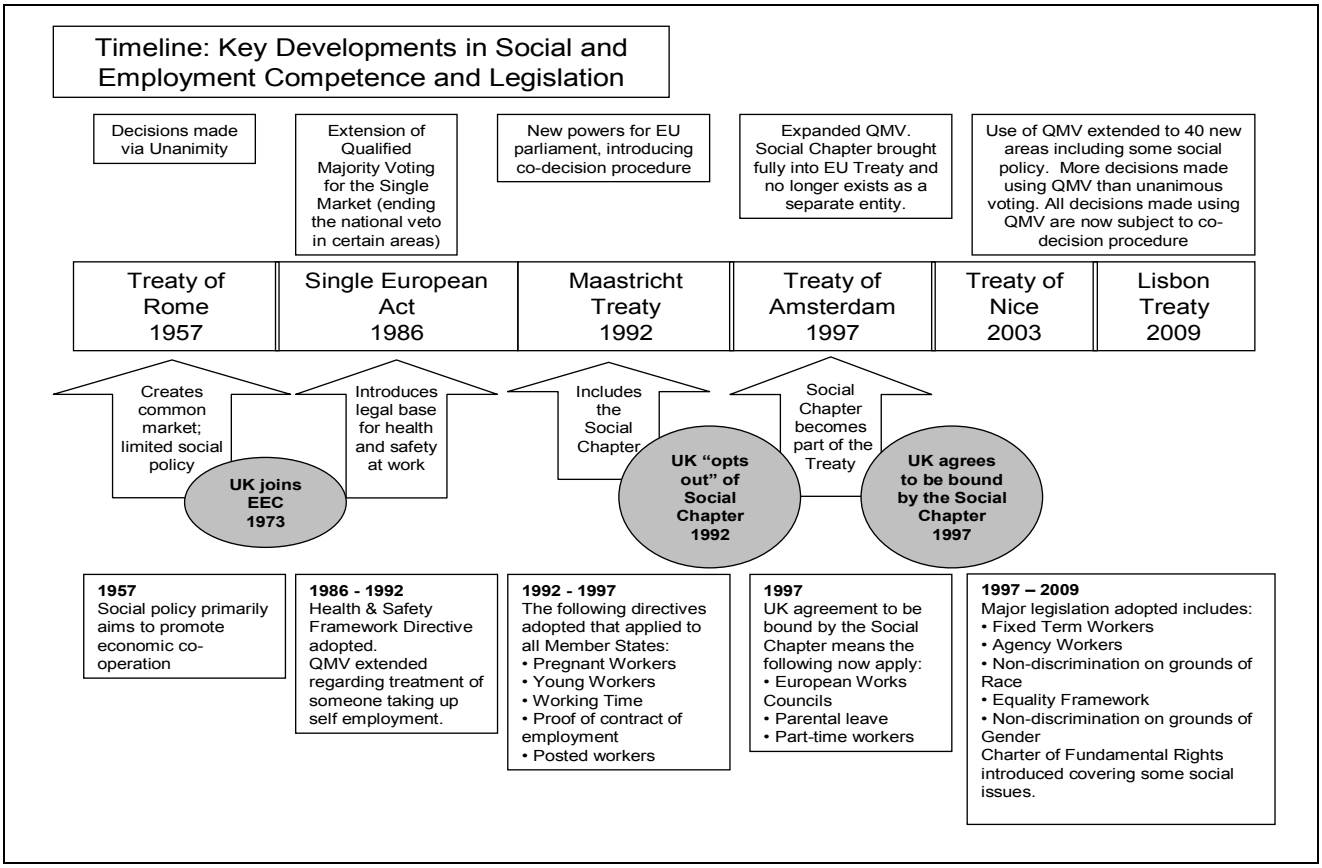
18. These most recent developments, alongside the changing economic climate, signalled a move away from new measures to promote individual protection and towards an increasing emphasis on the wider impact that social policy – and in particular structural labour market issues – can have on growth. More recently, the flow of new legislative action has slowed. Accordingly, we have seen greater use made of the option of coordinated action by Member States, facilitated by the Commission, rather than "hard" legislation. EU competence in this area is currently limited to encouraging cooperation,

11 Now in the reworked Art 3 Treaty of the European Union (TEU) (formerly Art 2 TEU).

12 Article 9 TFEU

supporting and complementing Member State action[13], and to adopting guidelines[14] that Member States shall take into account. The recent Communication from the Commission on the social dimension to the Economic and Monetary Union,[15] suggests that this linking of economic and social goals will continue to be a focus. The Communication focuses on reinforcing surveillance of employment and social challenges and strengthening policy coordination under the European Semester, enhancing solidarity and reinforcing job mobility, and strengthening social dialogue.

19. The timeline below summarises the key developments in this field. More detail can be found in the annex to this call for evidence.



13 Articles 147 and 156 TFEU

14 Article 148 TFEU

15 http://europa.eu/rapid/press-release_IP-13-893_en.htm

Policy Landscape: UK and Member State context

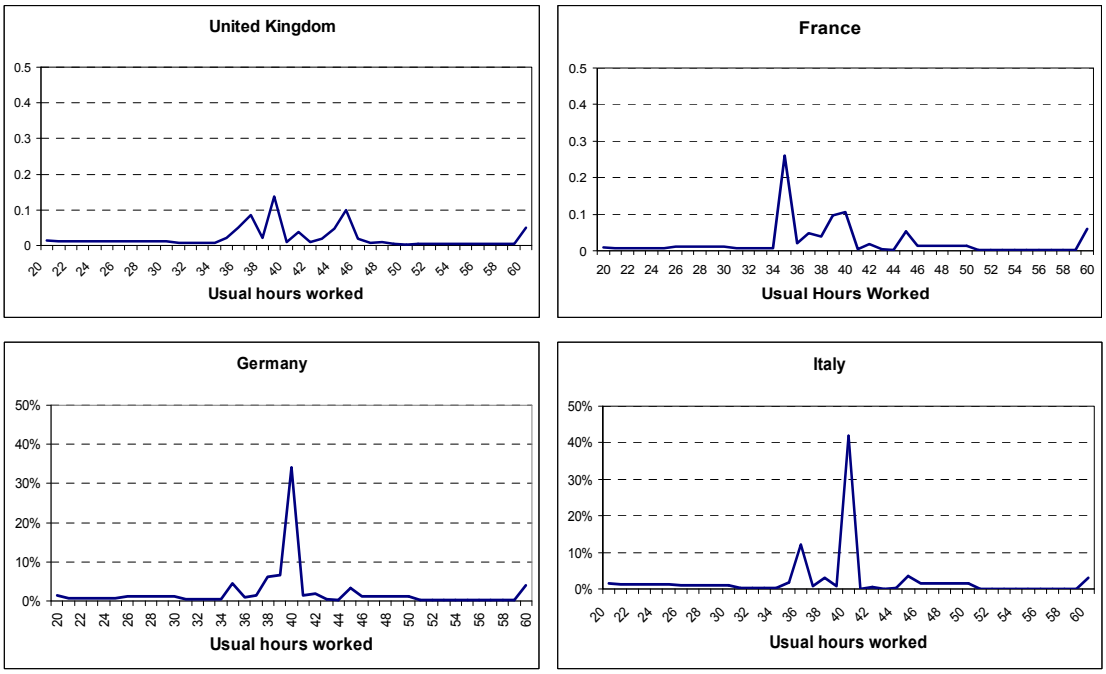
20. Across the spectrum of social policy issues, Member States have existing national traditions that predate the development of EU competence. As a result there are significant variations between Member States in relation to labour market models, culture and approach to social policy and regulation. This means that all Member States, including the UK, would have some social policy legislation even if the EU never exercised its competence. It also means that both the drivers for action on social policy issues and the potential solutions or mechanisms for addressing these issues can be either domestic or European in their nature. For example, in the case of social protection schemes, their financing and organisation remains primarily a matter of national competence and Member States have not ceded power to the EU to harmonise national schemes. That said, the exercise of competence in other areas, such as equal treatment, has led to some convergence of social protection, for example towards equal pension ages between men and women at a national level (but not a single EU-level pension age).

21. These differences between Member States is one of the reasons why getting agreement on social policy files can be challenging as Member States including the UK seek to ensure that EU action fits within or does not impose challenges for their existing national systems. For example, the UK has a very different system for enforcing legislation on working conditions. In general, we ensure that individuals have recourse to the necessary means to enforce their own rights, for example through Employment Tribunals. In many other Member States, a labour inspectorate is responsible for enforcing legislation on working conditions. However, in the UK there are enforcing authorities for those issues where they are considered necessary, such as health and safety at work and the national minimum wage.

22. The UK in particular has a different model of labour market regulation than much of the rest of Europe. This has an impact on how the labour market operates and can put us at odds with other Member States when it comes to deciding how to intervene in the labour market and what outcomes are desirable. For example, the fact that the UK model enables individual employers and employees to define mutually agreeable terms

(as opposed to the more collective systems in other Member States) means that there is a much wider range of patterns of work in the UK (see graph below). In 2012, 27.2% of the UK workforce was part time compared to the EU average of 19.9%.[16] Part time work is also less likely to be temporary than in other Member States; demonstrated by the fact that in 2012 94% of the UK workforce was in permanent work, one of the highest rates in the EU.[17] As a result, the UK does not consider part time work to be inherently more precarious than full time work in the same way that some other Member States do.

Graph 1: Usual Hours Worked in the United Kingdom, France, Germany and Italy[18]



23. One way to manage the challenges caused by these differences in national traditions is to help shape EU law. For example, the EU model of an overarching health and safety at work Framework Directive, with subordinate directives setting out more detail, mirrors the approach of our own Health and Safety at Work etc. Act 1974 and its underlying regulations. However, the Framework Directive also introduced elements of regulation that were at odds with existing UK practices. In particular, the concept of risk

16 Eurostat Labour Force Survey data (based on annual averages for 2012).

17 Eurostat Labour Force Survey data (based on annual averages for 2012) state that the % of UK workers on temporary contracts to be 6.3%

18 Eurostat data (Quarter 4, 2012)

assessment was something that UK businesses and enforcing authorities used in high hazard sectors such as the chemical industry, but it was not spelled out in our law in general. This was overridden by the EU's prescriptive approach requiring all businesses to have a written risk assessment. We have also seen the adoption of directives not in line with the UK's domestic risk-based philosophy, for example on artificial optical radiation and electromagnetic fields. This aspect was picked up by Lord Young of Graffham and Professor Ragnar Löfstedt in their recent reviews of the UK health and safety system for the Government. [19] Both felt that there is a need for EU rules to be more proportionate and risk-based.

24. These differences in national systems also have a direct impact on businesses trading and employing staff across borders because, as a result, they have to comply with more than one system of regulation. This has the potential to increase business costs and may act as a disincentive to trade across borders or establish sites in other Member States. It has led some to argue that setting minimum social standards across the EU is important to the single market in order to make it easier for business to operate internationally. On the other hand, the fact that these standards are implemented at national level and in line with existing national traditions might mean that in practice these benefits are minimal as there remain local differences and resulting costs.

25. Others have pointed out that these differences mean that firms in less heavily regulated markets have a comparative advantage over their rivals because their costs are lower. This leads to concerns about the lack of a level playing field, social dumping – generally considered to be the practice of locating a business in a particular location in order to take advantage of the lower costs associated with lower standards of labour protection – and the exploitation of workers.

26. A useful comparison might be to look at other large single trading markets such as the USA and Canada. Although not direct comparators to the EU, both of these countries

19 Common Sense, Common Safety, 2011, HM Government, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf, and Reclaiming

have systems that set a framework for social policy at federal level but allow a degree of autonomy at state or province level. This model could be interpreted in different ways. On the one hand it could suggest that there is no compelling economic need for full harmonisation of social standards; on the other it could be interpreted as meaning that some degree of minimum standards are important. One thing that is interesting to note is that we currently see greater variation in labour market outcomes in the EU than in either of these markets. For example, in 2012 the unemployment rate across states in USA ranged from 3.1% in North Dakota to 11.1% in Nevada[20] and in Canada from 4.6% in Alberta to 11.3% in Prince Edward Island.[21] In comparison, the unemployment rates across the EU in 2012 showed higher variation – for example, the unemployment rate in 2012 ranged from 4.3% in Austria to 25% in Spain.[22] Of course, labour regulation is not the only factor that is likely to have had an impact on these figures. For example, one relevant factor might be the fact that there is a common language in the USA as opposed to the EU.[23]

EU Action on Social Policy: Legislation

27. EU action in this area covers a wide range of areas but it can broadly be broken down between those areas where it is legislative in nature (such as employment regulation, equal treatment and health and safety at work) and those where action is focussed on cooperation, coordination and best practice. As set out above, earlier EU action that might broadly be considered as social legislation was initially adopted under economic legal bases. As competence expanded, this broadened out to health and safety, working conditions and equal treatment, and the number of measures increased.

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safety for all: An independent review of health and safety legislation, Cm 8219 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf

20 http://www.bls.gov/lau/lastrk12.htm

21 http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labor07a-eng.htm

22 Unemployment – LFS adjusted series. http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/main_tables

23 It is also worth noting that the variation in the EU labour market was much lower before 2008. Note that even a well functioning labour market might be expected to take time to react to an economic shock, and this perhaps partly explains the current high variation in unemployment rates across the EU at the moment. There may be an expectation, that over time, when economic growth returns, that EU unemployment rates will begin to converge again.

Therefore, whilst some legislation in this area can be directly linked to the functioning of the single market, and most of it has the potential to impact on the single market, arguably a lot of it is aimed at achieving wider social goals.

28. EU legislation has the potential to impact on Member States including the UK in a number of ways. Firstly, it can confer rights on individuals. Where these go beyond existing national legislation they increase protection and aim to improve individuals' situations. Often, these rights impose corresponding responsibilities. In the context of workplace rights, it can also increase costs for employers by impacting on the organisation of work and creating administrative requirements associated with employing staff. Secondly, it has the potential to impact on the UK's ability to define its own social policy, for example by setting standards or ways of regulating the market. There are some features of how the EU legislates that are particularly relevant to this second impact:

- **Minimum requirements**: for traditional employment and health and safety at work regulation, the Treaty only confers competence on the EU to adopt "*minimum requirements for gradual implementation, having regard to the conditions and technical rules … in each of the Member States*".[24] Member States have to ensure their own domestic legislation complies with these rules as a minimum and once EU legislation is adopted can no longer apply previously lower standards. In theory this practice ensures that the EU respects the principles of subsidiarity and proportionality by ensuring that regulation set above the national level is the minimum necessary but some have questioned whether this is what happens in practice. It is open to Member States to exceed these requirements if they wish. This practice in the UK is often referred to as 'gold plating'.

- **Non regression clauses** are not included in all EU directives, but where they are included they mean, in very general terms, that it is not possible for a Member State, when implementing the directive, to row back from the existing domestic legislation if the EU measure being implemented is less generous. Case law sets out some important exceptions to this general rule meaning that it is possible to

reduce specific protections in a given area provided that the overall level of protection is not lowered. It may also be possible to make a change if it can be shown that the change is in no way connected to the implementation of the relevant directive. These clauses have led to some debate about how far they tie the hands of Government to take action in the future.

- **The role of the social partners in legislation** is a unique feature of social competence which derives from the national systems of other Member States. Social dialogue mechanisms give social partners a formal role in defining labour market rules at a national level by reaching mutual agreement. This is then aligned to the legislative process. In the UK this sort of collective agreement has been predominantly made at company level rather than national level. This means that these company agreements do not have formal implications for national social legislation. At the EU level however, the social partners have the right to adopt Europe-wide collective agreements which can be given legal effect by the relevant Council of Ministers. Where such an agreement is concluded by the social partners, the Council can accept or reject the proposal (using either qualified majority voting or unanimity as set out in the relevant treaty base) but it cannot amend it. To date no social partner agreement put to a Council has been rejected. The fact that such agreements have not been negotiated by the UK Government (or those of other Member States) could be politically controversial.

29. The role played by the **European Court of Justice** in social policy is particularly controversial. It has played a significant part in shaping EU law, most notably in the fields of employment regulation and discrimination, where there is a significant amount of case law. For example, it has articulated a general principle of equal treatment and non-discrimination, establishing it as a fundamental right for which secondary legislation such as the equality directives are considered to be an expression. This means that in certain instances, the equality directives have been interpreted broadly to encompass groups and situations that might not, on the face of the directives, appear to be covered and in other instances have created a direct right for individuals. Some commentators have argued that the Court's judgments, in effect, extend the scope of

24 Article 153 (2) TFEU

EU social legislation beyond the initial intentions of the Member States. There are a number of high profile cases that are often cited as examples of this, particularly in relation to working time (discussion of these is included in paragraph 30) and gender discrimination legislation (see box three for a case study on the Test Achats litigation).

Box Three: Test Achats[25]

In this 2011 case, a Belgian Consumer association, Test Achats, asked the European Court of Justice to consider whether Article 5(2) Council Directive 2004/113/EC (the Gender Directive), which permitted Member States to allow proportionate differences in insurance premiums and benefits between men and women, was compatible with the principle of equal treatment of men and women, protected as a fundamental right in the EU Treaty on European Union (TEU) and Articles 21 and 23 of the Charter of Fundamental Rights.

The European Court of Justice ruled that the provision allowing for proportionate differences in insurance premiums and benefits between men and women was invalid. The impact of this ruling was that the derogation permitted by Article 5(2) of the Directive ceased to have effect from 21 December 2012. This means that insurers can no longer take gender into account when determining premiums and benefits.

This case has the potential to have unfair consequences and possibly to create perverse incentives. For example, it could result in cross-subsidisation of premiums between the genders: if a (generally more careful) female driver had to pay the same price for motor insurance as a (generally less careful) male driver, then she would be subsidising the cost of his insurance.

It could also incentivise riskier behaviour, which would lead to the cost of insurance rising to compensate. For example, if gender neutral pricing was introduced into life assurance, men (who have on average a lower life

25 Case 236/09

expectancy) would find life insurance to be good value and women (who have on average a higher life expectancy) would find life insurance poor value. This could lead to fewer low risk people taking out life assurance, resulting in the insurer's portfolio becoming increasingly risky and corresponding rising costs.

Employment Regulation

30. Following the incorporation of the Social Chapter into the main body of the Treaties, the primary legal base for adopting employment regulation is now article 153 TFEU. This article confers competence on the EU to adopt minimum standards in the areas of working conditions, protection of workers where their employment contract is terminated, information and consultation and collective representation. Prior to the Treaty of Amsterdam, directives that regulated the employment relationship were adopted on the basis of legal bases on health and safety at work and completing the single market.

31. Employment regulation is often cited by business as one of the main sources of costly regulatory burdens. For example, the Commission's 2012 consultation to identify the most burdensome regulations for SMEs[26] picked out labour market-related legislation (covering health and safety at work as well as employment regulation) as one of the top ten most burdensome areas. The directives singled out as part of this exercise were:

- **Working Time Directive**[27]: adopted in 1993 at EU level, this was introduced in the UK in 1998 following a failed attempt to challenge its legal base by the UK government of the time (see box two). The Directive contains restrictions on night work, requirements for regular rest breaks and four weeks paid annual leave. It also sets a 48 hour limit on the working week, which individuals can opt-out of. In the past decade, there have been several significant European Court of Justice cases which have had a marked impact on the effect of the Directive. The judgments

26 http://ec.europa.eu/europe2020/pdf/top10_en.pdf

27 Directive 2003/88

known as SiMAP/Jaeger[28] mean that time spent on-call at the workplace counts as working time and that compensatory rest periods, to make up for missed rest breaks, must be taken immediately after the end of the working period to which it relates. In addition, the Court has ruled on the interaction between annual leave and other types of leave, principally sick leave.[29] As a result of these rulings, workers are entitled to reschedule any period of annual leave which coincides with a period of sickness and if necessary, carry annual leave over into subsequent leave years. Attempts to renegotiate the Directive in recent years have been unsuccessful. Most recently, the Commission invited European social partners to renegotiate the terms of the Directive at the end of 2011; however it was announced in February 2013 that the social partners were not able to reach agreement on a new proposal.

- **Agency Workers Directive**[30]: gives all agency workers equal treatment entitlements in relation to access to facilities and information on vacancies from day 1 and creates rights to the same basic working and employment conditions in certain areas, including pay and annual leave, as directly recruited employees. As a result of an agreement between the TUC and the CBI, these latter rights apply in the UK after a 12 week qualifying period. The majority of EU Member States have implemented the Directive without a qualifying period, so agency workers will have the right to equal treatment from day 1. The European Commission is currently reviewing the implementation of the Directive and the Department for Business, Innovation and Skills is undertaking a review of the paperwork obligations created by the Directive.

- **Posting of Workers Directive**[31]: a single market measure to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. The Directive entitles posted workers to certain core employment rights available in the country they are posted to, including minimum rates of pay, maximum work periods and equal treatment provisions. Concerns about abuses led to a Commission proposal in 2012 to improve

28 Cases C-303/98 and C-151/02

29 Stringer and others v HMRC C-350/06 and C-520/06 and C277/08

30 Directive 2008/104

enforcement of the Directive. The proposal includes provisions on the information that has to be shared with the receiving Member State when workers are posted and a system of joint and several liability. Negotiations on this proposal are still ongoing.

32. Another significant piece of legislation in this area is the **Pregnant Workers Directive**[32] which sets the minimum levels of maternity leave and pay which Member States must provide (14 weeks' maternity leave with an "adequate allowance" paid at least at the rate of statutory sick pay), alongside health and safety at work protections. The Commission brought forward a new proposal to revise the existing directive in October 2008. The proposal sought to extend the minimum period of maternity leave from 14 to 18 weeks paid at least at the same rate as statutory sick pay during maternity leave. The European Parliament's position on the Directive seeks to amend it to include, amongst other things, 20 weeks leave on full pay. Negotiations are currently stalled.

33. Two directives create rights for employees to be consulted. The **Information and Consultation Directive**[33] provides employees in organisations with 50 or more employees the right to be informed and consulted on a regular basis about issues in the organisation for which they work. This includes the provision of information on the organisation's economic situation, to be informed and consulted about developments in the workplace and in particular on anticipatory measures envisaged where there is a threat to employment. The **European Works Council Directive**[34] provides for the establishment of European Works Councils (EWCs) or for a procedure to inform and consult employees on transnational issues affecting the workplace (i.e. those which concern all the operations of the business in Europe, or which concern undertakings and establishments in at least two different EEA countries). Only larger multi-national employers fall within the scope of the EWC rules and there is no obligation to set up a EWC in the absence of a request from at least 100 employees in two or more countries.

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31 Directive 96/71

32 Directive 92/85

33 Directive 2002/14

34. There are also directives that provide rights to workers in the event of specific events in the lifecycle of a business. For example, the **Collective Redundancies Directive**[35] guarantees a minimum standard of treatment for employees in the event of collective redundancy. The **Acquired Rights Directive**[36] protects employees' rights in the event of a transfer of an undertaking, business or part of one. It was implemented in the UK in 1981, and updated in 2006, through the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). The Government's recent consultation on the TUPE Regulations concluded that businesses find the absence of clear rules that expressly facilitate post transfer harmonisation of terms and conditions as a barrier to effective transfers. This could lead to inefficiencies in business operations which can ultimately harm their competitiveness and undermine long term job security. As a result the Government committed to engaging with European partners to demonstrate the potential benefits of a harmonisation framework for individuals and the economy.

35. The Commission recently conducted a policy evaluation, also known as "fitness check", of the Collective Redundancies Directive[37], the Acquired Rights Directive[38] and the Information and Consultation Directive. The review reported in July 2013 and found that the three EU directives are generally relevant, effective, coherent and mutually reinforcing, although it did identify some shortcomings. It also found that the benefits they generate are likely to outweigh the costs.

36. A small number of directives have also been implemented as a result of social partner negotiations. Once adopted they are not materially different from other types of legislation. The **Parental Leave Directive**[39] entitles workers to at least four months parental leave on the birth or adoption of a child until a given age, suggested as being up to the age of eight; whilst the **Part Time and Fixed Term Workers Directives**[40] mean that, in respect of employment conditions, part-time workers may not be treated

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34 Directive 2009/38
35 Directive 98/59
36 Directive 2001/23
37 Directive 98/59
38 Directive 2001/23
39 Directive 2010/18

in a less favourable manner than comparable full-time workers solely because they work part-time and fixed-term workers may not be treated in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds.

37. Article 153(5) TFEU provides that the competences in Article 153 do not apply to pay, the right of association, and the right to strike or impose lock-outs. However, the European Court of Justice has ruled that whilst this provision means that there can be no direct interference in these areas (the case law referred particularly to the determination of pay), the EU can adopt measures that have an impact on them. For example, there are provisions regulating pay in a range of situations such as pregnant workers, posted workers, part-time and fixed-term workers. The Court has ruled that such provisions on pay cannot concern the type of pay, the level of pay or the setting of a minimum or guaranteed wage.[41]

Equal Treatment

38. As has been referred to previously, EU anti-discrimination law was originally confined to the issue of sex equality in the employment context. Originally, Member States were concerned with competitive disadvantage hence the original provision in the Treaty of Rome[42] concerning equal pay. A significant development in the equality field was the adoption of the Equal Treatment Directive[43] requiring Member States to ensure equal treatment in relation to employment and vocational training. Although this measure was adopted under a single market legal base, it was subject to expansive interpretation by the European Court of Justice, resulting in its application to pregnancy and maternity and gender reassignment.

39. For several decades EU action in this area remained confined to sex equality in the employment sphere, however following the introduction of the Article 19 TFEU legal base, two directives were adopted which expanded the application of EU directives to

40 Directive 97/81 and Directive 99/70

41 Joined Cases C-395/08 and C-396/08 INPS v Bruno [2010] ECR I-000, para 37

42 Article 119 EEC now article 157 TFEU

race (the Race Directive) and to sexual orientation, age, disability and religion or belief (the Employment Framework Directive[44]). Notably, in respect of the Race Directive, the scope was extended beyond the field of employment and vocational training to the fields of access to the supply of goods and services including housing and social protection for the first time.

40. The primary legal bases for adopting equal treatment measures are now Articles 19, 153 and 157 TFEU. Article 19 TFEU confers competence on the EU to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 153 TFEU permits the EU to support and complement the activities of the Member States to achieve equality between men and women with regard to labour market opportunities and treatment at work. Article 157(3) permits measures to be adopted to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including on equal pay. The main directives that have been adopted under these legal bases are:

- The **Race Directive**[45] implements the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive prohibits discrimination on the grounds of race in employment, training, social protection, including social security and healthcare, education, access to and supply of goods and services which are available to the public.

- The **Employment Framework Directive**[46] combats discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

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43 Directive 76/207

44 Directive 2000/78

45 Directive 2000/43

46 Directive 2000/78

- The **Gender Directive**[47] implements the principle of equal treatment between men and women in the access to and supply of goods and services. This Directive prohibits discrimination on the grounds of sex in the provision of goods and services.

- The **Recast Gender Directive**[48] (which amended and consolidated earlier directives relating to gender equality) implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This recast directive contains provisions to implement the principle of equal treatment in relation to employment, training, working conditions, including pay and occupational social security schemes.

41. The above EU measures have been transposed into law in Great Britain by means of the Equality Act 2010.

Health and Safety at Work

42. Although health and safety at work was one of the first areas of social policy where the EU took action, up until 1989 only nine directives[49] had been made in this area. However, from 1989 to 1994, the Council adopted 19 new directives,[50] some of which have since been repealed or codified with other directives.

43. The first significant directive introduced under Article 118a EEC (now Article 153(1)(a) TFEU) was the health and safety at work **'Framework Directive'**[51] (as distinct from the aforementioned Employment Framework Directive) which sets out the general obligations of employers concerning the protection of the health and safety of workers and is accompanied by a series of subordinate or 'daughter' directives setting out more

47 Directive 2004/113

48 Directive 2006/54

49 See footnote 5 plus Directives 88/364/EEC, and 88/642/EEC.

50 Directives 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC, 90/679/EEC, 91/382/EEC, 91/383/EEC, 92/29/EEC, 92/57/EEC, 92/58/EEC, 92/85/EEC, 92/91/EEC, 92/104/EEC, 93/88/EEC, 93/103/EEC, and 94/33/EC.

51 Directive 89/391/EEC.

detailed provisions. There are now 19 subordinate directives[52] in total, covering specific groups of workers, risks and sectors. In addition, there are directives covering asbestos in the workplace,[53] medical treatment on board vessels,[54] and the health and safety of temporary or fixed-contract workers[55] as well as the protection of young people at work.

44. Since 2003, action has largely concentrated on recasting and codifying existing directives and making technical amendments, rather than introducing wholly new measures. The exceptions have been two directives on **protecting employees from 'electromagnetic fields'**[56] (radiation emitted from radio, microwave etc transmitters and from some sorts of welding equipment, but also found at lower levels wherever electricity is used) in 2004 (but recently repealed and replaced by a new directive[57] covering the same issue) and **'artificial optical radiation'** (bright light sources, such as lasers, welding arcs and so on) in 2006.[58] The latter was identified by Professor Löfstedt, in his review,[59] as an example of a measure that is not proportionate to the actual risk of harm and which, in the UK, has not generated any benefits above the protections that were already afforded to workers before the Directive became law. In addition, the social partners in the healthcare sector negotiated an agreement on **preventing injuries from sharp instruments** that was implemented by a directive in 2010. So far, this is the only health and safety at work directive resulting from a social partner agreement.

45. The European Commission is currently undertaking a review of all health and safety at work directives which is due to finish in 2015. It has stated that this review is regarded

52 Directives 89/654/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 92/57/EEC, 92/58/EEC, 92/85/EEC, 92/91/EEC, 92/104/EEC, 93/103/EEC, 98/24/EC, 1999/92/EC, 2000/54/EC, 2002/44/EC, 2003/10/EC, 2004/37/EC, 2006/25/EC, 2009/104/EC and 2013/35/EU.
53 Directive 2009/148/EC
54 Directive 92/29/EEC
55 Directive 91/383/EEC
56 Directive 2004/40/EC.
57 Directive 2013/35/EU.
58Directive 2006/25/EC
59 Common Sense, Common Safety, 2011, HM Government, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf, and Reclaiming safety for all: An independent review of health and safety legislation, Cm 8219 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf

as part of the Commission's Regulatory Fitness and Performance Programme,[60] which seeks to identify opportunities for improving EU legislation.

Social Protection of Workers

46. Article 153 TFEU gives the Council the power to adopt directives setting out minimum requirements in relation to social security and social protection of workers. However, this power has not been used. If it were used, Article 153(2) excludes any harmonisation of national laws. Unanimity in Council is required for any such Directive. Furthermore, such a Directive would also be subject to the limits in Article 153(4) that prevent the adoption of any provision that would affect the right of each Member State to define the fundamental principles of their social security system, or significantly affect the financial equilibrium of the Member State.

47. However, some EU legislation that impacts on the social protection of workers has been introduced to achieve other policy goals, such as equal treatment, or where the exercise of Member State competence impacts on one of the fundamental freedoms,[61] such as the right to free movement under Article 48 TFEU. For example, **Regulation 883/2004** is a traditional free movement regulation which seeks to achieve its aims by providing for social security coordination between Member States. Likewise, **Council Directive 98/49** supports employed and self-employed workers moving within the Community by safeguarding their supplementary pension built up in one Member State when the scheme member leaves to work in another Member State.

EU Action on Social Policy: Non legislative

48. Non legislative action is driven by the commitment to full employment and social progress, set out in Article 3 TEU and carried forward to the Lisbon Treaty. These

60 Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis, 2013, European Commission, http://ec.europa.eu/smart-regulation/docs/reg_fitn_perf_prog_en.pdf

61 The European Union's Single Market seeks to guarantee four fundamental freedoms: the free movement of goods, capital, services, and people within the EU's 27 member states.

goals arguably have both an economic and a social dimension, although the impact on the single market is likely to be less direct. The primary effect of non legislative action is through the sharing of ideas and good practice which may help shape the way a Member State chooses to develop national policy. It also offers an alternative to the Commission to proposing EU legislative action in certain areas. Any impact on business would be through the national policy choices that a Member State might make as a result.

49. Article 5 TFEU provides that Member States shall coordinate their employment strategies, and may coordinate their social policies. The activity in each area is broadly similar with the important exception that the EU only has power to make recommendations to Member States in the field of employment (see below for more detail). This activity is generally referred to as the **Open Method of Coordination** (OMC), the key features of which are that Member States' policy is guided by framework norms, the use of common indicators, peer review and reference to good practice. It is intended to facilitate a degree of policy coordination but at the same time to accommodate diversity between the Member States.

Employment Promotion

50. Rather than conferring significant legal powers, the Treaty sets up a process whereby the Council agrees **Employment Guidelines** which Member States take into account when formulating their national employment strategies. The Council also has the power to issue non-legally binding recommendations to Member States on their employment strategies. Article 145 TFEU sets the framework for this coordination process. It tasks the Member States and the EU to work together to develop a coordinated strategy for employment, in particular for promoting a skilled, trained and adaptable workforce and labour markets open to economic change. This is with a view to achieving the broader objectives set out in Article 3 TEU (of balanced economic growth, a highly competitive social market economy, full employment and social progress). Article 147(1) underlines that Member States retain competence as regards employment policy.

51. Article 148 TFEU sets out the process of reporting, collaboration and setting of recommendations. In particular, Article 148(2) provides for Member States "to take into

account" the Council guidelines and Article 148(3) provides for them to report on the implementation of their national policies. Moreover, the recommendations the Council can issue by virtue of Article 148(4) are based on the Member States' own reports and concern their national employment policies.

52. Article 150 TFEU provides for an **Employment Committee** (EMCO). This comprises representatives from the Member States and the Commission and is central to the employment strategy coordination process. EMCO is where much of the work underpinning co-ordination takes place. It monitors the employment situation and policy developments, facilitates exchange of information and experience, and prepares the formal "products" for the Council. EMCO also formulates Opinions on relevant issues at the request of the Council, the Commission, or on its own initiative. EMCO has a close working relationship with the EU's Economic Policy Committee as well as the Social Protection Committee. It also meets regularly with representatives of the Social Partners at EU level to discuss issues of shared interest.

53. Finally, Article 149 TFEU allows the European Parliament and the Council to adopt, using the ordinary legislative procedure, "incentive measures" designed to encourage cooperation between Member States and to support their action in the field of employment. Use of this power to harmonise laws is explicitly excluded.

Social Protection

54. Articles 153, 156 and 160 TFEU confer a mix of supporting and shared competence, covering social security and social protection of workers, the modernisation of social protection systems and the combating of social exclusion. However, Article 151 TFEU underlines that measures must take account of diverse national practices. Article 153(4) TFEU stresses that any provisions adopted shall not affect the right of each Member State to define the fundamental principles of their social security system, nor significantly affect the financial equilibrium thereof, nor prevent any Member State from maintaining or introducing more stringent protective measures.

55. As for employment promotion, the focus of EU activity here has been on taking measures to encourage cooperation and facilitate coordination between Member

States under the Open Method of Coordination (see paragraph 50). The process is also broadly similar to that for employment promotion with the main important exceptions being that the Commission does not have any power to make recommendations and there is no equivalent of the Employment Guidelines.[62] This activity includes engagement and dialogue with social partner organisations. A dedicated EU-level funding programme, the **Programme for Employment and Social Solidarity** (PROGRESS), established under what is now Article 153 TFEU, supports the Commission and sometimes Member States in relevant actions across the range of EU social policy interests.

56. Article 160 gives the power to establish the **Social Protection Committee** (SPC), which again comprises representatives of the Member States and the Commission, and promotes cooperation on social protection policies. The SPC's main tasks are to monitor the social situation and the development of social protection policies; promote exchanges of information, experience and good practice; and prepare reports and opinions to Council. Priority areas have been: combating poverty and social exclusion; ensuring adequate and sustainable pension systems; and ensuring accessible and sustainable healthcare and long-term care systems. The SPC works closely with the Employment and Economic Policy Committees, and meets periodically with representatives of the Social Partners and civil society.

European Semester

57. The **Europe 2020 Strategy** (EU2020) to support smart, sustainable and inclusive growth was agreed in 2010 and sets ambitious EU level objectives on employment, innovation, education, social inclusion and climate change/energy to be reached by 2020. The coordination of employment policy as part of EU2020 takes place under the broader umbrella of the European Semester. The European Semester is a yearly cycle of economic policy coordination and surveillance which was agreed in 2010 and first

62 Article 153 TFEU gives the Council the power to support and complement the activities of the Member States. Articles 156 and 160 TFEU provide the framework for this coordination and give a range of tools to support it. Article 156 provides for the Commission to work with Member States to produce a wide range of studies, opinions, consultations, guidelines, indicators, exchange of best practice, monitoring and evaluation.

undertaken in 2011. The operation of the European Semester as a whole will be considered in the Balance of Competences report being led by HM Treasury on the Economic and Monetary Union.

58. Member States and the Commission jointly report on progress against agreed Europe 2020 EU-level targets. This includes targets on employment, poverty and social inclusion; such as aiming to raise to 75 per cent the employment rate for women and men aged 20-64, including through the greater participation of young people, older workers and low-skilled workers and the better integration of legal migrants; and promoting social inclusion, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and exclusion.[63]

59. Following the submission of National Reform Programmes, as part of the European Semester process, the Commission prepares annual **Country Specific Recommendations** (CSRs) for each Member State. The CSRs are discussed by the relevant Council[64] and then endorsed by the European Council, before formal adoption at the end of June or in early July. This timing is intended to allow the recommendations to be available to Member States before they finalise their plans and draft budgets for the following year. CSRs are non-binding on Member States. As part of the annual cycle of the Semester process, Member States give an account of their progress in the areas covered by CSRs, as well as other developments and plans, in their National Reform Programmes, when these are published in the following year.

Conclusion

60. This call for evidence sets out the breadth of EU competence in social policy. It seeks views on the relationship between and necessity of social and employment policy to the functioning of the single market as well as the balance of competences between the UK and EU on social and employment policy, how that competence is exercised, and

63 The population is defined as the number of persons who are at risk-of-poverty and exclusion according to three indicators (at-risk-of poverty; material deprivation; jobless household), leaving Member States free to set their national targets on the basis of the most appropriate indicators, taking into account their national circumstances and priorities.

64 In practice this is most likely to be the Employment and Social Policy Council or the Economic and Financial Affairs Council.

what the implications of EU action are for Member States wanting to take their own action. In particular we are seeking views on the questions set out below. A response form is published alongside this document at the following web address: https://www.gov.uk/review-of-the-balance-of-competences.

Questions

The argument for social and employment competence

1. *To what extent is EU action in this area necessary for the operation of the single market?*
2. *To what extent are social and employment goals a desirable function of the EU in their own right?*
3. *What domestic legislation would the UK need in the absence of EU legislation?*

Impact on the national interest

4. *What evidence is there that EU action in social policy advantages the UK?*
5. *What evidence is there that EU action in social policy disadvantages the UK?*
6. *Are there any other impacts of EU action in social policy that should be noted?*
7. *What evidence is there about the impact of EU action on the UK economy? How far can this be separated from any domestic legislation you would need in the absence of EU action?*

Future options and challenges

8. *How might the UK benefit from the EU taking more action in social policy?*
9. *How might the UK benefit from the EU taking less action in social policy, or from more action being taken at the national rather than EU level?*
10. *How could action in social policy be undertaken differently? For example, are there ways of improving how EU legislation is made e.g. through greater adherence to the principles of subsidiarity and proportionality or the ways social partners are engaged?*
11. *How else could the UK implement its current obligations in this area?*
12. *What future challenge/opportunities might the UK face in this area and what impact might these have on the national interest?*

ANNEX A

Legal Annex - EU Competence in Social and Employment Policy

This annex to the social and employment call for evidence aims to provide a brief overview of EU competence in the social policy field (for the purposes of the Balance of Competence Review social policy covers employment and labour, health & safety and equality).

The first part of this annex looks at the development of social policy competence from the Treaty of Rome (1957) to the EU Treaties as changed by the Lisbon Treaty (2009). The second part looks at the exercise of the competence.

Part 1 - Development of the Competence

Treaty of Rome (1957) to 1980s

1. The Treaty of Rome contained a limited Title on social policy.

2. Article 118 EEC tasked the European Commission with promoting close cooperation between the Member States in the employment and social field. Legislative action was however not foreseen and the Commission was merely tasked to make studies, deliver opinions and to arrange consultations both on problems arising at national level and on those of concern to international organisations. Before delivering the opinions provided for, the Commission had to consult the Economic and Social Committee.

3. The Rome Treaty included a provision on equal pay (Article 119 EEC (now Article 157 TFEU) :

   Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

   The Treaty also included a provision on paid holiday schemes (Article 120 EEC (now Article 158 TFEU) and a general aspiration to improve living and working conditions.

4. There was no significant action in the development of an EU level social policy until the 1970s. The move to do so began in a summit of heads of state or government in Paris in 1972. This was developed by an Action Programme in 1974 established by the European Commission. Following the 1974 Action Programme development of EU social policy occurred on two fronts namely, case law and legislative activity.

5. A significant development occurred when the Court of Justice considered [Article 157 TFEU] in Case 43/75 *Defrenne v. Sabena.*[65] The Court recognised its economic significance and stated that the aim of Article 157 TFEU was to avoid a situation where undertakings in different Member States (with different levels of adherence to the principle of equal pay) could suffer a competitive disadvantage in intra-EU competition. Furthermore, the provision on equal pay formed part of the social objectives of the EU, intended by common action to ensure social progress and the improvement of living and working conditions.

6. The Court further held that Article 157 TFEU has direct effect, giving rise to rights that may be enforced by individuals in their national courts. The *Defrenne* case shows that the court saw Article 157 as a key pillar of EU social policy that had to be made meaningful for the victims of discrimination.

7. On the legislative front the absence of a dedicated social policy legal base did not prevent the EU from legislating in the social policy field. Article 100 EEC allowed the Council to adopt Directives proposed by the Commission in relation to areas affecting the operation of the Common Market. All the legislation below was adopted under general legal bases[66] (which were about completing the internal market):

    - Social security and equality directives:
        - Directive 75/117 on equal pay,[67] adopted under Article 100 EEC.
        - Directive 76/207 on equal treatment,[68] adopted under Article 235 EEC
        - Directive 79/7 on equal treatment in social security,[69] adopted under Article 235 EEC
        - Directive 86/378 on equal treatment in occupational social security,[70] adopted under Articles 100 and 235 EEC.

      Directives 75/117, 76/207 and 86/378 have been consolidated into Directive 2006/54,[71] adopted under Article 157(3) TFEU.

    - Employment related directives:
        - Directive 75/129 on collective redundancies,[72] adopted under Article 100 EEC (amended by Directive 92/56,[73] also adopted under Article 100 EEC, repealed and replaced by Directive 98/59,[74] adopted under Article 100 EEC)

65 (No.2) [1976] ECR 455.

66 Article 100 EEC and/or Article 235 EEC (now Articles 115 TFEU and 352 TFEU).

67 OJ 1975 L45/19. The Defrenne judgment more or less made the Equal Pay Directive redundant.

68 OJ 1976 L39/40, as amended by Dir. 2002/73 (OJ 2002 L269/15).

69 OJ 1979 L6/24

70 OJ 1986 L225/40.

71 OJ 2006 L204/23.

72 OJ 1975 L48/29.

73 OJ 1992 L245/3.

74 OJ 1998 L225/16.

- Directive 77/187 on transfers of undertakings,[75] adopted under Article 100 EEC (amended by Directive 98/50,[76] also adopted under Article 100 EEC, now repealed and replaced by Directive 2001/23,[77] adopted under Article 94 EC)
- Directive 80/987 on insolvency,[78] adopted under Article 100 EEC (amended by Directive 2002/74,[79] adopted under Article 137(2) EEC, now repealed and replaced by Directive 2008/94)[80]

- Health and Safety directives - In respect of health and safety at work a small number of measures were implemented through Article 100 EEC, but the need for unanimity in the Council meant that in practice few Directives were adopted in the field of health and safety at work. Until 1987 only six Directives had been made exclusively in this area. Notable examples introduced during this time, but now repealed, include:
  - Directive 77/576/EEC on safety signs at work
  - Directive 80/1107/EEC on chemical, physical and biological agents at work
  - Directive 82/605/EEC on metallic lead and its ionic compounds at work
  - Directive 83/477/EEC on asbestos at work.[81]

Box 1: - Euratom

The European Atomic Energy Community (Euratom) which was also created in 1957 to assist the development of a civil nuclear industry took a markedly different approach to social policy; particularly in the field of health and safety. Unlike the EEC Treaty the Euratom Treaty contained specific health and safety legal bases from the outset; in chapter III of Title II and in Article 2(b) the establishment of "uniform safety standards" was listed amongst the key purposes of the Treaty. Directive 1959/221[82] made under Euratom imposing basic safety standards in radiological protection represents the first Directive at European level focusing on improving worker safety. Euratom and health and safety in relation to ionising radiation is dealt with in the Energy Review led by the Department of Energy and Climate Change.

75 OJ 1975 L48/29.

76 OJ 1998 L201/88.

77 OJ 2001 L82/16.

78 OJ 1980 L283/23.

79 OJ 2002 L270/13.

80 OJ 2008 L283/36.

81 All of these directives have since been repealed and replaced with new directives that cover the same subject matters; see Directives 92/85 on safety signs; 2009/148 on asbestos, 98/24 on chemical agents, 2000/54 on biological agents; physical agents are now treated as separate risk categories such e.g. noise 2003/10 and vibration 2002/44 .

82 The "Directives laying down the basic standards for the health of workers and the general public against the dangers arising from ionising radiations" also known as the "BSS" (Basic Safety Standards); which has been repealed and re-enacted in a modernised on a number of occasions.

The Single European Act (1986)

8. The Single European Act (SEA) set the deadline of achieving the single market by 31 December 1992. SEA also contributed to the broadening ability of the EU to legislate in the social policy field. The main ways SEA did this was by introducing qualified majority voting in Council, in certain areas of EC competence, to enable the adoption of the legislation required to complete the internal market. It also introduced a new decision making procedure, the 'co-operation procedure' which gave a stronger role to the European Parliament than the consultation procedure. SEA also inserted a new legal basis (i.e. Article 118a EEC, now Article 153 TFEU) in the EEC Treaty in the field of health and safety. The role of the Commission was also modified to "encourage cooperation between the Member States and to facilitate the coordination of their action in all social policy fields" covered by the Chapter on social provisions. The list of policy areas covered – including social security – remained unchanged.

9. Of the reforms introduced by SEA its Article 118a was the most significant from the perspective of health and safety at work. It provided that member states should "pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers" and for the first time created a specific Treaty base for directives made to achieve this objective. It contained the qualification that the powers are to be used to impose minimum standards in relation to the health and safety of workers and that nothing in the Directives made under this article may prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties. It also contained a further qualification in relation to small and medium-sized enterprises. This provides that minimum requirements adopted must 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. Whilst certain procedural changes have been made to how this competence operates in subsequent treaty changes the competence itself has not undergone significant substantive changes since its introduction in the SEA.

10. The first significant directive introduced under Article 118a was Directive 89/391/EEC, the health and safety 'Framework Directive'. It sets out the general obligations of employers concerning the protection of the health and safety of workers and is to some extent modelled on the Health and Safety at Work etc. Act 1974 in the UK. The Directive remains in force and in substantively the same terms as in which it was first enacted.

11. This Framework Directive was followed by five subordinate or daughter" directives (together informally referred to as 'the six-pack') dealing with specific aspects of health and safety at work to be read in conjunction with and in addition to the obligations in the framework directive. These initial "daughter" directives, covering workplace health and safety[83], work equipment[84], personal protective equipment[85],

83 Directive 1989/654.

84 Directive 1989/655 (since repealed and replaced by Directive 2009/104/EC).

85 Directive 1989/656.

manual handling of heavy loads[86], display screen equipment[87], were all made under the Article 118a treaty base. There are now 19 "daughter directives" in total, covering a range of specific groups of workers, risks and sectors.

The Treaty on European Union (Maastricht Treaty 1992) and the Social Chapter

12. The Social Chapter (consisting of a Social Policy Agreement and Social Policy Protocol) was attached to the Maastricht Treaty. The UK secured an opt-out from the Social Chapter.

13. The Social Chapter did two things. First, it gave greater powers (competences) to the EU to legislate. Second, it envisaged a greater role for the social partners (management and labour) who were to be consulted on social policy legislation and have the option of implementing legislation. In addition, the Social Chapter gave the social partners the power to adopt European-wide collective agreements which could then be given legal effect by a Council decision. The main directives adopted via this route were:

    - Directive 94/45[88] on European Works Council (adopted under Article 2(2) of the Protocol, extended to the UK by Council Directive 97/74/EC,[89] adopted under Article 100 EEC (now repealed and replaced by Directive 2009/38/EC[90] adopted under Article 137 EC)
    - Directive 97/80[91] on burden of proof (adopted under Article 2(2) of the Protocol, extended to the UK by Directive 98/52[92] adopted under Article 100 EEC, and repealed and replaced by Directive 2006/54)
    - Directive 96/34/EC[93] on parental leave (adopted under Article 4(2) of the Protocol (repealed and replaced by Directive 2010/18/EU,[94] adopted under Article 155(2) TFEU)
    - Directive 97/81/EC[95] on part-time workers (adopted under Article 4(2) of the Protocol).

14. After the Maastricht Treaty entered into force the following directives were adopted which applied to all Member States, including the UK, as they were based on provisions in the Treaty rather than the Social Chapter:

    - Pregnant Workers Directive 92/85/EEC[96], adopted under Article 118a;

86 Directive 1990/269.

87 Directive 1990/270.

88 OJ 1994 L254/64.

89 OJ 1998 L10/22.

90 OJ 2009 L122/28.

91 OJ 1997 L14/6.

92 OJ 1998 L205/66.

93 OJ 1996 L145/9.

94 OJ 2010 L68/13.

95 OJ 1998 L14/9.

- Young Workers Directive 94/33/EEC[97] adopted under Article 118a;
- Working Time Directive 93/104/EEC[98] (originally adopted under Article 118a EEC, then amended by Directive 2000/34/EC[99] which was adopted under Article 137(2) EC, then repealed and replaced by Directive 2003/88/EC[100] which was adopted under Article 137(2) EC). See Box 3.
- Directive 91/533/EEC[101] on proof of contract of employment (adopted under Article 100 EEC, now Article 115 TFEU)
- Directive 96/71/EEC[102] on posted workers (adopted under Articles 57(2) and 66 EEC, Articles 53(1) and 62 TFEU).

The Treaty of Amsterdam (1997)

15. The Treaty of Amsterdam inserted a new Title on Social Policy into the EC Treaty. This Title incorporated both existing Articles in the EC Treaty for example, Article 117 (which became the renumbered Article 136 EC, now Article 151 TFEU) and the provisions of the Social Chapter (in which the UK had not participated) that was attached to the Maastricht Treaty. As a consequence of the incorporation of the Social Chapter into the mainstream of the EC Treaty its provisions applied to all States, including the UK.

16. Another consequence of the Social Chapter's incorporation in the EC Treaty was the need for all legislation adopted under the Social Protocol during the UK's opt-out to be readopted and extended to the UK. [103]

17. The Amsterdam Treaty introduced a new power for the EU to support and complement the activities of the Member States in the field of social security and social protection of workers (this was inserted in Article 118(1) EC which became the renumbered Article 137 EC, now Article 153(1)(c) TFEU). The cooperation procedure in Article 118(2) EC – now Article 153(2)(b) – was replaced with a power to adopt Directives. The Council in Article 118(3) EC – now 153(2)(a) TFEU – was given the power to adopt measures designed to encourage cooperation between Member States "through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion". Such power was to be exercised on the basis of consultation with the European Parliament and the Economic and Social Committee and unanimous voting in the Council.

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96 OJ 1992 L348/1.

97 OJ 1994 L216/12.

98 OJ 1993 L307/18.

99 OJ 2000 L195/41.

100 OJ 2000 L195/41.

101 OJ 1991 L288/32.

102 OJ 1997 L18/6.

103 For example, Directive 94/45 on European Works Council and Directive 97/80 on Burden of Proof.

18. In addition to the incorporation of the Social Chapter, the Treaty of Amsterdam made the following changes to Treaty provisions on social policy:

    - It strengthened the provision on equal pay (now Article 157(4) TFEU) to allow Member States to adopt positive action measures "in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers" with a view to ensuring full equality in practice between men and women in working life; [104]

    - It introduced a new legal base – Article 13 EC, now Article 19 TFEU – which gave competence to the EU to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This led to the enactment of Directive 2000/43 on equal treatment between persons irrespective of racial origin[105] and Directive 2000/78 the general framework Directive for equal treatment in employment and occupation;[106]

    - It included a new Title on Employment – Articles 125 to 130 EC, now Articles 145 to 150 TFEU – and added a new task for the Community of 'a high level of employment and social protection' in Article 2 TEU [now Article 3]. The key provision of the new Title was in Article 125 EC - now Article 145 TFEU - which signalled a new approach (referred to as the open method of coordination "OMC") to job creation, based on target setting, peer review and guidelines. Article 125 EC – now Article 145 TFEU - provides:

      > Member States and the Community shall, in accordance with this Title, work towards developing a co-ordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

19. Article 126 EC – now Article 146 TFEU – required Member States to coordinate their policies for the promotion of employment within the Council, but in a way consistent with the broad guidelines laid down within the Framework of EMU.

20. Article 127(1) EC – now Article 147(1) - called on the Community to contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary complementing their action (respecting Member State competence). Article 127(2) EC - now Article 147(2) TFEU - required that the objective of a 'high level of employment' was to be taken into consideration in the formulation and implementation of Community policies and activities.

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104 It should be noted that Article 2(4) of the old Equal Treatment Directive (Directive 76/207/EC) contained the first EU provision on positive action that provided that it was without prejudice to measures to promote equal opportunities between men and women. However, that Directive was adopted under an internal market legal base as referred to earlier. Article 3 of the Recast Directive (Directive 2006/54/EC) which consolidated the old Equal Treatment Directive, now contains the relevant provision which aligns itself to the positive discrimination provisions of the TFEU (Article 157(4)).

105 OJ 2000 L180/22.

106 OJ 2000 L303/16.

21. Article 128 EC – now Article 148 TFEU – gave the Council a power to adopt certain labour market policies (in the form of 'soft law') and to draw up employment guidelines which the Member States were to take into account in their employment policies. Such guidelines were required to be consistent with the economic policy guidelines adopted pursuant to Article 103 EC.

22. Article 129 EC – now Article 149 TFEU – gave the Council a power to adopt "incentive measures" to encourage cooperation between Member States and to support their action in the field of employment. Such "incentive measures" should not include harmonisation of the laws and regulations of the Member States.

23. Article 130 EC – now Article 150 TFEU - provided the legal basis for the Council, after consulting the European Parliament, to establish an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies.

Treaty of Nice (2003)

24. The Treaty of Nice,[107] inserted two new areas of cooperation in Article 137(1) EC (i.e. the list of fields in which the Community must support and complement the activities of the Member States) namely, the combating of social exclusion and the modernisation of social protection systems. The power in this area was given without prejudice to the existing power concerning social security and social protection and, importantly, the power to adopt Directives was excluded. A provision was added to clarify that provisions adopted pursuant to this Article should not affect the right of Member State to define the fundamental principles of their social security systems, must not significantly affect the financial equilibrium thereof and should not prevent Member States from maintaining or introducing more stringent protective measures compatible with the Treaties.

25. The Treaty of Rome contained an Article 121 EEC, which gave to the Council the power, acting unanimously, to assign tasks to the Commission in connection with the implementation of common measures, particularly as regards social security for migrant workers. The Treaty of Nice replaced this provision with a new Article 144 EC – now Article 160 TFEU - that gave the Council the power, after consulting the European Parliament, to establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission.

The Lisbon Treaty (2009)

26. In the field of social policy the Lisbon Treaty[108] made some important changes.

    - It included in the objectives of the Union, listed by Article 3 TEU, the 'well being of its people' (paragraph 1), the establishment of a 'highly competitive social market economy, aiming at full employment and social progress' and its

107 This Treaty entered into force on 1 February 2003.

108 The Treaty of Lisbon entered into force on 1 December 2009.

commitment to 'combat social exclusion and discrimination', to 'promote social justice and protection, equality between women and men, solidarity between generations and protection of rights of the child' (paragraph 3).

- It incorporated the Charter of Fundamental Rights into the primary law of the EU.[109] However, the Charter does not extend the EU's competence on fundamental rights[110]. Protocol 30 to the EU Treaties also makes this clear. Protocol 30 sets out general points on the application and status of the Charter. Article 1(1) provides that the Charter does not extend the ability of the CJEU or national courts to find UK laws, practices or acts inconsistent with its provisions.[111] Article 1(2) confirms that nothing in Title IV of the Charter, which contains social and economic provisions, creates rights except so far as those are provided for in national law. Article 2 states that Charter provisions that refer to national laws and practices apply to the UK only so far as the rights and principles concerned are already recognised in UK law or practice. The Charter is dealt with in the Fundamental Rights Review led by the Ministry of Justice.

Box 2: - Provisions in the Charter relevant for social policy

Chapter III: Equality including

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

Chapter IV: Solidarity including

- Art.27 information and consultation within the undertaking
- Art. 28 right to collective bargaining and collective action
- Art. 30 protection in the event of unjustified dismissal
- Art. 31 fair and just working conditions including in Art. 31(2) 'the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.
- Art. 33 family and professional life

109 The Charter of Fundamental Rights was first proclaimed by the European Parliament, the Council of Ministers and the European Commission in 2000. The Charter was not given any binding legal effect. Its object was to reaffirm rights, freedoms and principles already recognised in EU law and to make them more accessible. A revised version of the Charter became legally binding with the entry into force of the Lisbon Treaty in December 2009.

110 Article 6(1) of the TEU and Article 51(2) of the Charter

111 Cases C-411/10 and C-493/10 NS, paragraphs 116-122.

- It inserted a new article which acknowledged the role of the Union as regards employment policy coordination – Article 5 TFEU. Articles 5(1) and (2) contain mandatory provisions as regards the coordination of economic and employment policy. Article 5(3) sets out optional social policy coordination: "The Union may take initiatives to ensure coordination of Member States' social policies".

- It inserted a new 'horizontal' social clause in Article 9 TFEU, according to which the EU must take into account, in the definition and implementation of all its policies and activities, the 'requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

- It referred in Article 152 TFEU to the special role of the social partners at the EU-level. It commits the EU to facilitate dialogue between the social partners and refers to the 'Tripartite Social Summit for Growth and Employment'[112] as a contributor to this social dialogue.

Part 2 - Current state of the competence

27. For the purposes of this Call for Evidence, the main Treaty Articles relevant to EU and UK competence are:

    - **Article 19 TFEU** (action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation)

    - **Article 153 TFEU** (legal basis for the adoption of EU measures in the fields of health and safety, working conditions, social security and social protection of workers, and information and consultation of workers)

    - **Article 157 TFEU** (measures to ensure application of equal opportunities and equal treatment between men and women in matters of employment and occupation)

    - **Article 160 TFEU** (legal basis for the Social Protection Committee which is tasked with promoting cooperation on social protection policies between the EU and Member States. This Committee also prepares reports and provides opinions to Council and the Commission)

28. Article 19(1) TFEU confers power on the Council to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, acting unanimously in accordance with a special legislative

112 This takes place once a year, before the Spring European Council. It was established by a Decision of the Council 2003/174/EC of 6 March 2003 (OJ No. L70, 14.3.2003, 31-33).

procedure and with the consent of the European Parliament. The power is "without prejudice to the other provisions of the Treaties and within the limits of the powers conferred… on the Union". Competence in this field is shared between the Union and Member States.

29. Article 19(2) provides a procedure, by way of derogation from the legislative power set out in paragraph 1, for the Council and European Parliament to adopt non-harmonising incentive measures in furtherance of the objectives set out that paragraph.

30. Article 153 legislative measures in the fields of health and safety, working conditions and information and consultation of workers are adopted by the ordinary legislative procedure (which requires agreement from both the European Parliament and the Council acting by Qualified Majority Voting). However, unanimity is required in Council for legislative measures on: social security and social protection of workers; termination of employment; and conditions of employment for third-country nationals. Article 153 legislative measures may only be adopted through Directives, not through Regulations.[113]

31. Article 153 contains the qualification that the powers are to be used to impose minimum standards and nothing in the Directives made under this article may prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties. This means that the UK always has the option of imposing higher standards than those agreed at EU level if it wishes.

32. Additionally, Article 153(2)(b) contains a further qualification in relation to small and medium-sized enterprises. This provides that minimum requirements adopted must 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.

33. Finally, Article 153(5) contains a derogation that the competences in Article 153 do not apply to pay, the right of association, and the right to strike or impose lock-outs.

34. Article 157 TFEU is concerned with gender equality. Article 157(1) requires that men and women should receive equal pay for equal work or work of equal value. As Article 157(1) is directly applicable it overrides inconsistent national law.[114] The CJEU held in *Barber*, that the requirement that men and women should receive equal pay extends to occupational pension schemes, subject to the temporal limitation[115] that the Court imposed in that case. It means occupational pension schemes may not have unequal pension ages for men and women.[116]

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113 As Directives are implemented by the Member States they are generally less prescriptive than Regulation and usually allow some degree of flexibility in how the Member States meet the Directive's requirements.

114 In respect of direct applicability see the Defrenne judgment. In respect of inconsistent national law see Case 129/79 Macarthys v Smith [1980] ECR 1275, [1981] QB 180 (CA).

115 Now protected by in Article 12 of the Equal Treatment (Employment) Directive 2006/54/EC.

116 Case c-262/88 Barber v Guardian Royal Exchange [1990] ECR I-1889 and Art 5 of the Equal Treatment (Employment) Directive 2006/54/EC.

35. Article 157(2) defines "pay" as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."[117]

36. Article 157(3) provides a legal basis for the EU to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. This power is conferred on the European Parliament and Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee. It is an area of competence which Member States share with the Union.

37. The powers in Article 160 have been used to develop a series of non-binding measures, which, taken together, are generally referred to as the open method of coordination ("OMC") of Member States' social protection policies.

38. The operation of the OMC in the field of social protection has been centred around the Social Protection Committee ("SPC"). The purpose of the SPC, in broad terms, is to promote cooperation between Member States on social protection policies. An "Advisory Social Protection Committee" was first established on 29th June 2000 on the basis of Council Decision 2000/436/EC. This Decision was itself based on Article 202 EC (a power for the Council to ensure coordination of the general economic policies of the Member States, to take decisions, and to delegate under certain conditions decision-making to the Commission). When, however, the Treaty of Nice introduced Article 144 EC as a bespoke legal base for the Committee, a new Decision was adopted – using Article 144 EC - establishing the Social Protection Committee – Decision 2004/689/EC. The tasks of the SPC are set out clearly in Article 1(2) of the Decision, namely to:
    - Monitor the social situation and the development of social protection policies in the Member States and the Union;
    - To promote exchanges of information, experience and good practice between Member States and with the Commission; and
    - To prepare reports, formulate opinions or undertake other work within its field of competence, at the request either of the Council of the Commission or on its own initiative.

39. No power is given to the SPC to address recommendations to the Member States on the matters that fall within its remit.

Employment and Labour

40. While the EU has expanded its competence to adopt directives in the labour and employment field EU social policy is not comprehensive. Important areas of what is traditionally regarded as employment law in the Member States i.e. dismissal law (where the EU has competence but has not decided to act yet), redundancy, rules

117 Decisions of the CJEU over the years have defined pay quite broadly and elaborated on the definition, particularly with respect to the line between pay and social security. For example Case C-167/97 R v Secretary of State for Employment , ex p Seymour- Smith and Perez [1999] ECR I-623 to include compensation for unfair dismissal.

on collective bargaining, freedom of association and collective action (where the EU has no power to act in respect of strikes or 'lock-outs') have not been adopted at EU level. In these areas where there is no EU legislation the national rules remain the point of reference.

41. Articles 145 to 150 TFEU confer competence on the EU to coordinate Member States' strategies for employment. This is underpinned by Article 5 TFEU, which states that the Union "shall take measures" to coordinate Member States' employment policies. This is a supporting competence only and Article 147(1) TFEU, in particular, underlines that Member States retain competence as regards employment policy.

42. Rather than conferring significant legal powers, these provisions looked at together set up a policy process, within which Member States should take into account Council guidelines when formulating their national employment strategies and, moreover, which gives the Council power to issue recommendations to Member States on their employment strategies.

The National Semester

43. The National Semester focuses on the Member State responses to the employment guidelines and to the Country Specific Recommendations (CSR). Member States prepare their national reports on their national employment situation (in accordance with Article 148(3) TFEU). These national reports, which consist of two elements - a "National Reform Programme" and a "National Job Plan" - should indicate the measures taken, or those that the Member State proposes to take, in relation to the CSRs that have been addressed to it.

44. These national reports in turn feed into the preparation of the joint annual report by the Commission and the Council for the following year. And so the policy cycle starts again.

Major Pieces of EU Legislation

45. **Directive 91/533 EEC (informing employees of the conditions applicable to the contract of employment)** requires employers to provide their employees with certain specified information (including the place and nature of the work, rate of remuneration, and amount of paid leave). The information must be provided in writing within two months of the start of employment. Where the information changes subsequently, the employer must set out the changes in a written notice to the employee within one month of the change.

46. **Directive 96/71 (posting of workers)** is a single market measure, designed to provide a level playing field for the transnational provision of services. It provides for a core set of employment rights when workers are sent to another Member State. In response to perceived abuse of the directive and to ECJ judgments (*Viking and Laval*[118] - which ruled that strike action must be balanced against the

118 Case C-438/05 Viking [2007] ECR I-10779 and Case C-341/05 Laval v. Svenska.

EU's economic freedoms) European trade unions called for a wholesale renegotiation of the Postings Directive. This was rejected by Member States. The European Commission opted for a compromise and in February 2012 published a proposal for a new directive to clarify and improve the practical enforcement of the Postings Directive. The proposed Enforcement Directive is currently being negotiated in the Council and the European Parliament.

47. **Directive 98/59 (collective redundancies)** sets minimum standards to ensure that major redundancies are subject to proper consultation with worker representatives and that the competent public authority is notified prior to dismissal.

48. **Directive 2001/23/EC (transfer of undertakings etc)** provides for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded. It is intended to ensure, so far as possible, that the employment relationship continues unchanged with the new employer following a transfer. To this end it provides for the automatic transfer of the employment relationship to the new employer, together with rights and obligations arising from it. It also provides some protection against dismissals and changes to terms and conditions which, in either case, are motivated solely by the transfer. The other main area of protection is on information and consultation.

49. **Directive 2002/14/EC (Information and consultation of employees)** applies to an undertaking (such as a limited company, partnership or public sector organisation) with 50 or more employees that has its principal place of business in a Member State. The directive creates rights for employees to be informed and consulted about developments in the workplace on an ongoing basis. However, there is no automatic right to information and consultation; the right is either triggered by a valid employee request or the employer starting the process of its own volition.

50. **Directive 2008/94/EC (Insolvency Directive)** has dual objectives: to promote the approximation of laws and to improve living and working conditions by protecting employees in the event of the insolvency of their employer..

51. **Directive 2008/104 (temporary agency work)** provides that certain basic working and employment conditions (including those relating to working time, holidays and pay) of agency workers shall be, during their assignment at a hirer, at least those that would apply if they have been recruited directly by that hirer to the same job. The Directive also provides that agency workers shall be given access to amenities or collective facilities of the hirer (such as a canteen) on the same conditions as directly recruited workers unless a difference of treatment is justified. Agency workers are also to be given access to information on job vacancies in the hirer.

52. **Directive 2009/38 (European Works Councils** "EWC"s) provides for the establishment of EWCs or a procedure to inform and consult employees on transnational issues. Transnational matters are usually those which concern all the operations of the business in Europe, or those which concern undertakings or establishments in at least two qualifying countries (i.e. the EU plus Norway, Iceland and Lichtenstein).

Occupational Health and Safety

53. It has rarely been necessary to amend primary legislation to bring into effect EU health and safety law. The congruence between the developing EU law and the main domestic Act (the Health and Safety at Work etc. Act 1974[119]) has meant that there is little that comes from the EU that does not fit naturally within the existing domestic framework – although that framework is harder for the UK to change independently as a result.

54. EU health and safety at work legislation can broadly be divided into 3 topics – i.e. those dealing with:

    - risk-specific directives – addressing the dangers arising from specific hazards,
    - individual-specific directives – applying to specific groups of individuals, and
    - sector-specific directives – addressing risks in a particular sector.

55. In addition, **Directive 89/391/EEC** (health and safety Framework Directive) establishes a general framework for, and lays down the basic tenets of, requirements applicable to almost all workplaces. This Framework Directive establishes the core duties and principles in European Occupational Health and Safety law, and largely reflects arrangements established in the UK by the Health and Safety at Work etc. Act 1974.

56. The Framework Directive puts a duty on employers to "ensure the health and safety of workers in every aspect related to work". Employers are required to take measures to protect the health and safety of workers via a series of general principles of prevention; these include, avoiding risks, evaluating risks that cannot be avoided, combating risks at source, adapting to technological progress and as far as possible replacing the dangerous with the less dangerous. Employers are required to develop a coherent risk prevention policy and to pay particular regard to risks relating to work equipment and chemicals used in the workplace. Employers must also ensure that there are appropriate measures for the consultation, training and participation of workers in health and safety arrangements; the provision of information to workers; the use of protective and preventative services; the provision of health surveillance; first aid, and means of escape in the case of a fire or an emergency.

57. The Framework Directive also puts obligations on workers to take reasonable care for their own health and safety, and the health and safety of others who may be affected by their acts or omissions. In particular workers are required to use equipment and dangerous substances correctly, to not interfere with or remove safety devices, to use the personal protective equipment provided and to report serious or imminent dangers to their employer or other suitable person in the work place.

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119 1974 (c.37).

Risk-specific Directives:

58. **Directive 89/654/EEC (Workplaces)** provides basic health safety standards applicable to workplaces – ensuring appropriate emergency exits, fire detection equipment, toilet facilities, lighting and ventilation at a temperature that is 'adequate for human beings'.

59. **Directive 89/656/EEC (Personal Protective Equipment)** applies to all equipment designed to be worn or held by a worker to protect them from hazards likely to endanger their health and safety at work (with the exception of respiratory equipment – in relation to which, see Directive 98/24/EC, below). PPE should be used where the risks cannot be avoided or sufficiently limited by other means, must be appropriate for the risks and existing workplace conditions and should properly fit the worker and take into account any of their health or ergonomic requirements. PPE should generally be provided free of charge and employers should train their employees in its proper use and ensure that the PPE is properly maintained and hygienic.

60. **Directive 90/269/EEC (Manual Handling)** applies to the manual handling of loads that involves the risk of back injury. It seeks to avoid the risk of injury through manual handling, and requires that employees who are involved in such manual handing are given proper training on how to handle loads and the risks involved and places an obligation on employers to take appropriate organisational measures to avoid or reduce the risks from manual handling.

61. **Directive 90/270/EEC (Display Screen Equipment)** requires employers to have particular regard to the potential risks relating to upper limb disorders when analysing the health and safety of workstations with display screens. Employers are also expected to allow periodical breaks from working at the display screen. Every worker must receive training upon using the workstation prior to beginning this particular type of work and also whenever the organisation of the workstation is 'substantially modified'. In addition the Directive includes the right for workers to have an eyesight test before beginning the display screen work and at regular intervals thereafter.

62. **Directive 92/58/EEC (Safety Signs at Work)** requires employers to provide health and/or safety signs for certain hazards which cannot otherwise be avoided or adequately reduced by other methods. The Directive lays down certain requirements in relation to signs including colour coding, pictograms used and appropriate positioning.

63. **Directives 98/24/EC, 2005/54/EC, 2004/37/EC, 04/37/EC & 2009/148/EC (Dangerous Substances)** deal with exposures of workers to substances that have the potential to damage their health; they cover chemical agents, biological agents, carcinogens and mutagens and asbestos.

64. **Directive 98/24/EC (Chemical Agents)** requires that risk to workers from dangerous chemicals must be eliminated or reduced as far as possible by measures including, provision of suitable equipment, proper ventilation, minimising the number of workers exposed and the duration and intensity of exposures and by

implementing appropriate hygiene measures and safe working procedures. Employers must provide workers with appropriate training and information of the hazardous substances occurring in the workplace; they must also give workers access to any safety data sheet provided by the supplier of the chemicals. Employers are required to put in place action plans or dealing with accidents and emergencies related to hazardous substances, provide appropriate first-aid facilities and undertake safety drills. It is also worth noting that the Chemical Agents Directive covers all risks to occupational health and safety arising from chemicals – not simply 'health' risks..

65. **Directive 2004/37/EC (Carcinogens and Mutagens)** provides specific additional requirements for reducing risk where workers are dealing with substances with carcinogenic or mutagenic properties. Employers are required, as far as possible to use alternative, less dangerous substances, and when alternatives cannot be used carcinogens and mutagens must, so far as technically possible, be manufactured and used in closed systems. The Directive puts in place limit values for exposure to certain carcinogens and requires health surveillance of workers exposed to those specified substances. Health surveillance should also be provided for other workers exposed to carcinogens and mutagens where appropriate and all cases of cancer identified as resulting from occupational exposures to carcinogens or mutagens must be notified to the competent authority.

66. **Directive 2009/148/EC (Asbestos Worker)** consolidated a number of Directives, placing specific requirements on activities involving asbestos. Employers are required to identify presumed asbestos containing materials prior to beginning any demolition or maintenance work and to create appropriate plans for dealing with the asbestos. Workers dealing with significant amounts of asbestos must be given health assessments including chest examinations before beginning to work with asbestos and at least every 3 years thereafter.

67. The Asbestos Directive also places limit values on the amount of airborne asbestos that a worker may be exposed to and requires that sampling be carried out to determine the amount of asbestos in fibres in the air. In circumstances such as demolition or asbestos removal work where it is not possible to keep airborne asbestos levels below the limit values specific additional measures must be taken involving provision of respiratory equipment and preventing the spread of dust from the site where the work is being carried out.

68. **Directive 2000/54/EC (Biological Agents)** covers microorganisms, cell cultures and human endo-parasites which may give rise to infection, allergy or toxicity; divided into groups based on risk to health. Where biological agents in the 3 highest risk groups are going to be used the competent authority must be notified. Workers are required to report any accident involving a biological agent immediately and employers must quickly inform their employees of any accident or incident that may have resulted in release of a biological agent which could cause severe infection or illness.

69. **Directive 1999/92/EC (Explosive Atmospheres)** lays down requirements for the protection of workers at risk from potentially explosive atmospheres; which are defined as flammable substances (in the form of gases, vapours, dusts or mists)

which if ignited in a mixture with air would lead to combustion which spreads to the entire unburned mixture. The directive lays down the basic principles that operational measures must be taken to avoid the occurrence of explosive atmospheres where possible, to avoid the ignition of explosive atmospheres and to mitigate the effects of an explosion should one occur.

70. Where explosive atmospheres are likely to occur an employer must produce an explosion protection document before work begins detailing the zones where explosive atmospheres are likely to occur and relevant measures that are being taken to protect workers. The Directive also sets out minimum requirements for equipment that is used in explosive atmospheres.

71. **Directive 2002/44/EC, Directive 2003/10/EC and 2006/25/EC and 2013/35/EU (Physical Agents)** deal with protection from "physical agents" of vibration, noise electromagnetic fields and optical radiation. They all impose exposure limit values and requirements to risk assess and aim to reduce exposures through organisational practices, technical measures and PPE. Where the physical agent poses a risk to the worker's health the directives require that the worker is provided with health surveillance (where this is appropriate) and that the workers is given information and training about the risks involved and how to detect and report signs of injury associated with the relevant physical agent.

72. **Directive 2009/104/EC (Use of Work Equipment at Work)** consolidates a number of directives, laying down a general requirement that all work equipment provided to workers should be suitable for the work carried out and imposes certain minimum requirements for types of work equipment which are not regulated by other EU directives. Employers are required to ensure that work equipment is properly maintained and appropriately inspected for faults and deterioration and to provide appropriate training to staff on the use of work equipment.

Individual-specific Directives

73. So far the EU has legislated for two groups of individuals which it considers at greater risk and therefore in need of higher standards of protection in the workplace – as well as for the specific circumstances pertaining to temporary and fixed-term workers.

74. **Directive 91/383/EEC (Temporary and Fixed-Term Workers)** deals specifically with temporary workers and workers on fixed- term contracts with the objective of ensuring that they benefit from the same level of health and safety protection as other workers. The Directive imposes responsibility (in addition to any other duties that exist in national law) on the undertaking using the temporary/fixed term worker for that workers health and safety.

75. **Directive 92/85/EEC (Pregnant Workers)** imposed an absolute prohibition requiring pregnant workers to undertake underground mining work and work activities where there is a risk to health and safety from exposure to certain high risk chemical, physical and biological agents. The Directive also requires employers to take measures to avoid risks to health and safety from exposure of pregnant or breastfeeding women to a wider range of dangerous chemical, biological and

physical agents (including ionising radiation, carcinogens and carbon monoxide) and from working practices like lifting heavy weights. Additionally, Article 11 requires states to provide maternity pay that is no less than sick pay, or an adequate maternity allowance, "in accordance with national legislation and/or national practice".

76. **Directive 94/33/EC (Young People)** prohibits the employment of under-18 year olds in particularly hazardous roles, such as those dealing with radiation and carcinogenic chemicals. The Directive also placed a general obligation on employers to take into account the particular vulnerabilities of young people given their lack of experience and maturity when assessing risks and adopting measures to protect their safety.

Sector-specific Directives

77. **Directive 92/57/EEC (Temporary or Mobile Construction Sites)** places responsibilities upon clients or project supervisors to ensure that health and safety considerations are considered in both the preparations of the work and throughout its completion. The Directive applies to any construction site at which building work or civil engineering works are carried out (excluding drilling and extraction in the extraction industries). The Directive seeks to ensure there is a clear chain of responsibility established with regards to maintaining high standards of health and safety on construction sites. To achieve this, where several firms are present, the client or project supervisor is required to nominate one or more co-ordinators who are to ensure that all employers are operating within the health and safety guidelines cohesively. This nomination does not reduce the ultimate responsibility of the clients, projects supervisors or employers but does have the effect reducing risk through collaboration to reach a coordinated health and safety plan for each site.

78. **Directive 92/91/EEC (Mineral-extracting through Drilling)** aims to improve the safety and health protection of workers in the mineral-extracting though drilling sector. This includes all industries which extract minerals though boreholes (including those offshore), prospecting with a view to extraction and preparation of these minerals for sale (not including the processing of extracted materials). The Directive requires employers to take appropriate measures and precautions to avoid, detect and combat fire and the occurrence of explosive or health endangering atmospheres and contains specific requirements about providing appropriate means of escape and rescue and warning and communication systems for use in emergencies. Employers must also comply with a number of more general requirements including those relating to clear safety instructions to workers, provision of first-aid facilities, the performance of safety drills, appropriate supervision and ensuring that work carrying significant risk is done by competent staff.

79. **Directive 92/104/EEC (Surface and Underground Mineral-extracting Industries)** applies more generally to the types of mineral extraction not covered by Directive 92/91/EEC above; it protects workers in surface and underground mineral-extracting industries excluding drilling – i.e. mines and quarries. This Directive also requires employers to take appropriate measures and precautions to avoid, detect

and combat fire and the occurrence of explosive or health endangering atmospheres and contains specific requirements about providing appropriate means of escape and rescue and warning and communication systems for use in emergencies. Employers must also comply with a number of more general requirements similar to those under Directive 92/91/EEC above.

80. **Directive 2010/32/EU (The Prevention of Sharp Injuries in Hospital and Healthcare Sector)** (made pursuant to a social partners' agreement under Article 155 TFEU) gives effect to a Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM (European Hospital and Healthcare Employers' Association) and ESPU (European Public Services Union). The Directive applies to all workers in the hospital and healthcare sector and is designed to cover all situations where there is injuries from medical sharps and related risks from exposure to blood or other potentially infectious material. Employers must assess risks of injury and infection and as far as possible eliminate these risks by measures such as training, implementing safe procedures for sharps disposal, eliminating unnecessary use of sharps and banning the practice of 'recapping'. Workers should be offered free vaccinations where effective vaccines exist for diseases they are likely to be exposed to and, if a sharps injury occurs, workers should be provided with post-exposure prophylaxis, necessary medical tests and health surveillance where this is medically indicated.

Box 3: - 'Reasonably practicable'

The regulations implementing EU Directives in the field of health and safety often use the "reasonably practicable" qualification when implementing duties. In such cases, employers are only required to comply with obligations (for instance, to make workplaces safe) "so far as is reasonably practicable". This is the same qualification frequently included in domestic health and safety law to avoid strict liability where the duty holder has done all that is reasonable to prevent a breach.

This approach by the UK was challenged by the Commission in *European Commission v United Kingdom* C-127/05 [2007] ECR I-4619 as potentially incompatible with Article 5 of the Framework directive. However the ECJ found in the UK's favour and considered that the framework directive did not require the establishment of a form of no-fault liability and the UK was therefore able to continue using the "reasonably practicable" qualification.

Social Protection and Equal Treatment

81. Articles 153 and 156 TFEU confer competence on the EU as regards social security and social protection of workers, the modernisation of social protection systems and the combating of social exclusion. This goes beyond the power conferred in Article 48 TFEU, which is limited to making provision for social security in order to facilitate the free movement of workers. Where there is a power to adopt binding measures, this is an area of shared competence. Where, however, there are powers for the Union to coordinate policy only this is a supporting competence.

82. Article 153 gives the Council the power to adopt directives (setting out minimum requirements) in relation to social security and social protection of workers.[120] However, as regards the modernisation of social security systems and combating social exclusion, the power is limited to adopting measures to encourage cooperation between the Member States Moreover, the action that can be taken is circumscribed by Article 153(4) TFEU, which underlines that any provisions adopted shall not affect the right of Member State to define the fundamental principles of their social security systems, nor significantly affect the financial equilibrium thereof, nor prevent any Member State from maintaining or introducing more stringent protective measures.

83. The provisions in Article 153 and 156 TFEU, concerning taking measures to encourage cooperation between Member States, are complemented by Articles 5 and 160 TFEU. Article 5 TFEU sets a framework, which permits the EU to take initiatives to coordinate Member States' social policies. Article 160 TFEU, is the legal basis for the Social Protection Committee, provides one of the tools by which Member State social policy can be coordinated.

Equal Treatment

84. Domestic discrimination law relating to race and sex discrimination has existed in some cases from the 1960s and 1970s (therefore largely pre-dating relevant EU law) although EU law has had an impact and relevant provisions of domestic legislation have been removed or amended to reflect relevant decisions of the CJEU or to implement European Directives. The Equality Act 2010 ("the 2010 Act") is now the main piece of domestic implementing equality legislation which applies to England, Wales and, save for some minor exceptions, Scotland. There are some limited provisions which also apply to Northern Ireland. The 2010 Act consolidated a number of equality Acts (such as the Race Relations Act 1976 and the Sex Discrimination Act 1975) and regulations (such as the Employment Equality (Age Regulations) 2006) and harmonised domestic equality law. It prohibits discrimination, harassment and related conduct in relation to certain protected characteristics.

85. A number of the common provisions of the EU Treaties contain references to the objective of combating discrimination and eliminating inequality within the EU. Article 2 TEU refers to the values on which the Union is founded, which are common to a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Article 3 TEU provides that the Union shall combat social exclusion and discrimination and shall promote, among other things, equality between women and men. Article 8 TFEU provides that "in all its activities, the Union shall aim to eliminate inequalities and to promote equality between men and women." Article 10 goes on to provide that in defining and implementing its policies, the Union "shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

120 The power to adopt Directives in Article 153 TFEU has in fact so far not been used in relation to social security and social protection.

86. Article 6(1) TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union.[121] The Charter contains a chapter on equality.

87. Article 6(3) TEU confirms that fundamental rights as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States shall constitute general principles of law. These general principles of law include the principle of equality which applies whenever Member States are implementing Union law. A number of cases have addressed the general principle of non-discrimination on grounds of age. In *Mangold v Helm*[122] the CJEU held that there was a general principle of primary Community law prohibiting discrimination on grounds of age which existed independently of the Directive 2000/78/EC (the Discrimination Framework Directive) in prohibiting age discrimination in employment and vocational training. In *Kucukdeveci,*[123] the CJEU held that "the principle of non-discrimination on grounds of age is a general principle of European Union law". The Court also significantly held that in cases between private parties the national court must if need be disapply any provision of national law contrary to that principle.

Major pieces of EU legislation

88. All of the equal treatment Directives adopted under either Article 19 TFEU or Article 157(3) TFEU or their predecessors have a number of common elements, including the fact that they are all minimum standards Directives which allow Member States to introduce or maintain more favourable provisions for the protection of equal treatment. Another common feature relates to the enforcement of obligations under the Directives and require Member States to ensure that all victims of discrimination are provided with a judicial and/or administrative remedy and that any sanctions are effective, proportionate and dissuasive. Although it is primarily for Member States to provide for remedies and procedural matters, such as time-limits and compensation, such provision must comply with the principles of effectiveness and equivalence, as laid down in a substantial body of ECJ case law[124]. The principle of effectiveness requires that the procedure in respect of cases concerning EU law is not such as to make it in practice impossible or excessively difficult to obtain redress and the principle of equivalence requires that rules applicable to such cases apply without distinction to similar actions alleging infringement of national law. Finally, all of the Directives contain a provision on the burden of proof.

Social Protection

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121 14 December 2007 (2007/C 303/01), Title III. .

122 Case C-144/04.

123 Case C-555/07.

124 See, for example, Marshall (No.2) Case C-271/91 in relation to the incompatibility with the Equal Treatment Directive of an upper limit on the compensation payable for a breach of the principle of equal treatment and Levez Case C-326/96 in relation to time limits on arrears of damages in the context of equal pay.

89. **Directive 79/7 (sex discrimination and social security)** prohibits sex discrimination in statutory social security schemes for workers and former workers. The Directive does not apply to occupational social security schemes. The Directive covers sickness, invalidity, old age, industrial injuries, and unemployment benefits. It does *not* apply to family or survivor benefits. There are derogations from the general principle of equal treatment that permits unequal state pension ages and inequalities in conditions of entitlement to other benefits where – in the words of the CJEU – they are "necessarily and objectively connected" to state pension age.[125]

Equal Treatment

90. **Directive 2000/43/EC (the Race Directive) on equal treatment between persons irrespective of racial or ethnic origin** requires Member States to prohibit direct and indirect discrimination, harassment and victimisation on the grounds of racial and ethnic origin (but not nationality or colour) in relation to employment and occupation, social protection and social advantages, health, education and access to and the supply of goods and services. It includes derogations permitting differential treatment, including treatment based on a genuine and determining occupational requirement and in relation to the adoption of positive measures to compensate for disadvantage and ensure full equality in practice. The Directive also requires Member States to establish an equality body responsible for promoting equal treatment. In the case of *Firma Feryn*[126], the ECJ confirmed that the prohibition on discrimination in the Directive extends to potential applicants who have been deterred from applying for a post.

91. **Directive 2000/78/EC (the Discrimination Framework Directive)** establishes a general framework for equal treatment in employment and occupation. It prohibits direct and indirect discrimination, harassment and victimisation in relation to employment, self-employment and occupation on the grounds of disability, age, religion or belief and sexual orientation. The Directive requires the provision of reasonable accommodation for disabled persons and includes: derogation to the age and disability prohibition in relation to service in the Armed Forces; an exception for direct discrimination based on age where this is objectively justified by a legitimate aim; and an exception in relation to positive action measures. Moreover, it does not preclude national measures which are necessary in a democratic society for the protection of public security, public order, health and the rights and freedoms of others. In *Coleman*127, the ECJ held that the prohibition of direct discrimination on grounds of disability in the Directive extended to the less favourable treatment of a person associated with a disabled person, in that case, an employee caring for her disabled child. As far as the scope of "employment, self-employment and occupation" is concerned, the Supreme Court in *X v CAB* held that it did not extend to cover a volunteer at a Citizen's Advice Bureau.

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125 The CJEU held that the derogation could be relied on in Case C–9/91 EOC [1992] ECR I–3297 (contribution periods), Case C–92/94 Graham [1995] ECR I–2521 (IB) and Case C–196/98 Hepple [2000] ECR I–3701 (non-contributory industrial injuries benefits). But not in Case C–328/91 Thomas [1993] ECR I–1247 (SDA and ICA) or Case C–382/98 Taylor [1999] ECR I–8955 (winter fuel payments), because there was no necessary link between entitlement to the benefit and state pension age.

126 Case C-54/07.

127 Case C-303/06.

92. **Directive 2004/113 (the Gender Directive)** prohibits direct and indirect discrimination, harassment, sexual harassment and victimisation on grounds of sex, including pregnancy and maternity, in relation to access to and the supply of goods and services. The directive does not apply to "the area of private and family life", to the content of media and advertising and to education. The directive permits the provision of goods and services exclusively or primarily to members of one sex if justified as a proportionate means of achieving a legitimate aim and permits the adoption of positive action measures to prevent or compensate for disadvantages linked to sex. There is a derogation in respect of insurance services that permits proportionate differences in an individual's premiums and benefits where sex is a determining factor in the assessment of risk. The scope of this derogation was the subject of a reference to the CJEU in the case of *Test-Achats*[128], in which the Court found that that derogation, which was not time-limited, was incompatible with the purpose of the Directive and with Articles 21 and 23 of the Charter of Fundamental Rights, and it was declared invalid with effect from 21 December 2012.

93. **Directive 2006/54/EC (the Recast Directive)** consolidates a number of earlier Directives relating to equal treatment on grounds of sex, including the Equal Treatment Directive and the Equal Pay Directive.[129] It prohibits direct and indirect discrimination, harassment, sexual harassment and victimisation in relation to employment and occupation; ensures that the principle of equal pay is applied; and provides for equal treatment in relation to occupation social security schemes. The Equal Treatment Directive[130] was subject to a substantial body of ECJ case law, some of which was codified in the Recast Directive.[131] The prohibition in the Equal Treatment Directive was also held by the Court to include less favourable treatment based on gender reassignment[132].

94. **Directive 2010/41 (the Self-Employed Persons Directive)** provides for equal treatment between men and women engaged in an activity in a self-employed capacity.[133] It applies to the self-employed and their spouses[134] who are not employees or partners, but who participate in the same activities.

Proposed EU legislation

95. In 2008, the Commission proposed new legislation using the Article 19(1) legal base aiming to impose minimum standards of protection against discrimination for the prohibited grounds of age, disability, sexual orientation and religion and belief. The proposal broadly aims to ensure that discrimination on those grounds have the

128 Case C-236/09.

129 The Equal Treatment Directive (76/207, as amended by Directive 2002/73), the Equal Pay Directive (75/117), the Occupational Pensions Directive (86/378) and the Burden of Proof Directive (98/52).

130 Directive 76/207.

131 For example, the reference to discrimination on grounds of sex in the Equal Treatment Directive was held by the ECJ to include discrimination based on pregnancy and maternity: Dekker Case C-177/88.

132 P and S v Cornwall County Council Case C-13/94.

133 See also its predecessor Directive 86/613/EEC.

134 Including life partners recognised by domestic law.

same or similar levels of protection as provided for race under the Race Directive and seeks to prohibit discrimination in social protection, social security and healthcare, social advantages, education and access to and the supply of goods and other services which are provided to the public including housing. The proposed directive is intended to be without prejudice to national laws on marital or family status including reproductive rights, the secular nature of the state and its institutions, education or the status and activities of churches and other organisations based on religion or belief. The proposal has been before the Council for more than five years with no agreement as it has been difficult to secure the unanimous consent of all Member States.

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