



Balance of competences: Social and Employment Review

TUC response

Introduction

The Trades Union Congress (TUC) has 54 affiliated trade unions, which represent nearly 6 million members working in different sectors and occupations across the UK. The TUC is an active affiliate of the European Trade Union Confederation (ETUC).

In our capacity as a national trade union centre in the UK, the TUC also acts as a national social partner for the purposes of the European Union (EU). The TUC has participated in a wide range of social dialogue processes in the EU. For example, the TUC participated in the negotiations which led to the agreement of the Part-time Workers Directive and Fixed Term Employees Directives (Citation) and to the recast of the European Works Council Directive. The TUC also recently participated in the social partner negotiations on the Working Time Directive.

The argument for social and employment competence

Question 1:

To what extent is EU action in this area necessary for the operation of the single market?

The TUC has always taken the view that a strong social dimension is critical for the effectiveness of the single market. We do not view action in the social and employment field and the single market as alternative options but rather as complementary policies.

One of the key aims of social and employment policy is the creation of a level playing field for business and the prevention of social dumping. A degree of approximation of laws in this field is necessary to allow member states access to each other's market, thereby creating a 'single' market. The social dimension also has positive effects on growth as it reduces costs of transactions and facilitates mobility. Specific measures such as the Acquired Rights Directive and the Collective Redundancies Directive, for instance, allow for restructuring to take place in a way that is more socially acceptable, that avoids disputes and that has less damaging implications for local and regional economies.

European social and employment policy has also contributed to the more effective operation of the EU labour market and the wider economy. For example, rights relating to maternity leave and equal treatment rights for part-time workers, which originated in the EU and have been extended in UK domestic law, have assisted in increasing female participation in the UK labour market. Equality legislation also plays an important role in tackling market failures, for example the exclusion of disabled workers from employment. The EU skills agenda and information and consultation rights at a national and European level help to promote high trust, high skill, high productivity workplaces.

Question 2:

To what extent are social and employment goals a desirable function of the EU in their own right?

The TUC believes that there is a clear moral and social case for the EU action in these areas, in addition to the business and economic justifications. Since the mid 1970s, action taken by the European Union has played a central role in maintaining employment, in protecting of working people from exploitation, in combating discrimination and social exclusion in and promoting high trust, high skilled workplaces.

The measures have also reduced the risk of ‘social dumping’. In the absence of existing safeguards, it is likely there would have been a ‘race to the bottom’, with countries seeking to compete on the basis of lower pay and condition and reduced employment protection. As a result, all the social and economic benefits associated with such policies would have been lost.

The TUC therefore welcomed that fact that the Treaty of the European Union (TEU), adopted in 2008 gave due recognition to the role of social and employment policy within the workings of the European Union.

Article 3(1) of the TEU made clear that the EU is a community of values and one of its core objectives is to promote the well-being of its people.

Article 3(3), which provides for the establishment of the internal market, notably does not describe it as an end in itself, but rather as a means to achieving different ends including the creation of ‘.. a social market economy, aiming at full employment and social progress...It shall combat social exclusion and discrimination, and shall promote social justice and protection...’. All of these aims, enshrined in EU primary law, would not be attainable if the EU did not exercise some competence in the social and employment field.

Question 3:

What domestic legislation would the UK need in the absence of EU legislation?

The TUC is troubled by the lack of transparency in the framing of this question. We are concerned that the government is surreptitiously seeking views on whether aspects of EU employment law should be deregulated. If so, the TUC believes that the government should be open about such proposals in order to facilitate a full and informed debate.

The current patchwork of EU social and employment legislation was introduced in response to clear and pressing social and economic needs. There is no case for diminishing this basic framework of rights.

In the absence of EU law, it would necessary for the UK to introduce legislation to ensure that UK workers experienced no loss in their equality and employment rights. This process is likely to be complex and time-consuming. For example:

- Primary legislation would be needed in place of Regulations introduced under the auspices of the European Communities Act 1972. This would take up a disproportionate amount of the Parliamentary schedule.

- UK legislation would need to be revised to ensure that it fully embodies EU employment and equality law standards derived directly from EU Treaty provisions.
- It would be necessary to consolidate the jurisprudence of the European Court into UK legislation. This could be an excessively complicated process which is likely to generate lengthy and complex legislation.

Impact on the national interest

Question 4:

What evidence is there that EU action in social policy advantages the UK?

Since the 1970s, EU social policy has played a central role in promoting employment and raising living standards and in tackling discrimination and social exclusion. These benefits have not been limited to working people. Social and employment policy also assists in creating a level playing field for businesses and in promoting high skill, high productivity workplaces which are equipped to compete in the global economy.

Promoting Equality

The EU has played an important role in combating discrimination and promoting equal treatment. While there now appears to be broad support for anti-discrimination legislation (the Equality Act 2010 received cross-party support and a recent GEO survey suggests overwhelming business support for equality law),¹ in a number of instances it was EU action that prompted its adoption and development in the UK.

EU action has directly benefitted UK women, including in the following ways:

- **The Equal Pay Act was amended in 1983 to incorporate a right to equal pay for work of equal value** after the European Commission brought a successful legal case against the UK government. The inclusion of a right to equal pay for work of equal value is essential in narrowing gender pay gaps in a labour market such as the UK's, where there are relatively high levels of occupational segregation between the sexes and 'women's work' has been historically undervalued.
- **ECJ case law has been influential in combating indirect sex discrimination in pay and other terms and conditions, the benefits of this in the UK have included:**
 - Part-timers (the majority of whom are women) have gained access to occupational pension schemes, which they were previously excluded from, with potential backdating of membership to 1976. Government estimates were that as many as 400,000 individuals had lodged or could bring a claim

¹www.gov.uk/government/uploads/system/uploads/attachment_data/file/78432/Eval_of_Equality_Act_Report1.PDF

for equal treatment as a result.² Despite the costs incurred, the UK economy and taxpayer will benefit from part-time women having access to occupational pensions as they will have greater disposable income and be less reliant upon welfare benefits in retirement.

- Stronger challenges to occupational segregation and the undervaluation of ‘women’s work’ as result of the Enderby case, which also held that separate collective bargaining arrangements were not sufficient to justify pay disparities between jobs predominantly done by women and jobs predominantly done by men. This led directly to extensive negotiations in the public sector, in particular, the efforts to adopt ‘single status’ pay systems in local government and the ‘Agenda for Change’ harmonised pay structure in the NHS. Again, hundreds of thousands of women have benefited as a result.

The UK already had sex and race discrimination legislation when it joined the EU and it introduced disability discrimination legislation prior to the EU taking action. However, EU action in this area still led to improvements in UK law, for example:

- **The introduction of provisions on the burden of proof** in discrimination cases created greater clarity for all parties in determining when discrimination had occurred.
- **Definitions of indirect discrimination were improved** so that women and black and ethnic minority workers who were put at a disadvantage by a common practice of their employer could challenge their treatment. Previously they could only challenge situations where the employer had adopted a formal condition or requirement which had a disparate impact so this closed a loophole in the law.
- **Protection for transsexual people from discrimination** resulted from a ruling of the ECJ (P v S and Cornwall County Council) that held that less favourable treatment of someone because they were intending to, were undergoing or had undergone gender reassignment was discrimination on the grounds of sex. This reinforced the political impetus for further improvements in rights for the UK trans community (which some estimate could be around 6,000)³ in the Equality Act 2010.

EU action resulted in the UK adopting anti-discrimination legislation and undertaking initiatives to ensure equal treatment on grounds of sexual orientation, religion or belief and age. The Regulatory Impact Assessments of the employment equality regulations covering these three grounds provided estimates of the number of individuals who would benefit from not suffering discrimination or harassment at work. They also assumed considerable economic benefits would be derived from increased economic activity and income for many of these individuals. In the run up to and since the adoption of age discrimination legislation, the UK has seen significant increases in employment rates among the over-60s.

² www.scottishlife.co.uk/scotlife/web/site/Adviser/TechnicalCentralArea/Presimplification/OccupationalArea/Part-TimeWorkers-EqualTreatmentPage.asp

³ www.gires.org.uk/assets/Medpro-Assets/GenderVarianceUK-report.pdf

As well as benefiting particular individuals, EU action to combat discrimination and promote equal treatment has brought wider advantages to the UK:

- Increased economic activity within the UK and across the EU as a result of reducing barriers to labour market participation, better utilisation of talent and skills and further economic gains from a more equitable distribution of resources if it is assumed that there is diminishing marginal returns to income (i.e. more consumption from redistribution).
- EU-wide provisions prevent some countries undercutting UK businesses by exploiting the weaker labour market position of more vulnerable groups. The right to equal pay between men and women appeared in the founding treaty because of concerns that businesses in member states where such legislation did not exist could gain advantage at the expense of more progressive countries by underpaying women.
- Helping to address the demographic challenge of ageing societies. In particular, age equality initiatives are likely to lead to extended working lives and reconciliation of work-life measures encourage higher labour market participation among women throughout their life course.
- The UK derives social benefits from having EU-wide action on equality as it knows that its citizens, whatever their gender, race, disability, sexual orientation or age should experience the same respect for their rights and be given the same opportunities to participate wherever they live, work or travel within the EU. The UK also benefits from having greater social stability across the EU. The adoption of Article 19 (ex. Article 13) which was the basis for action on race, disability, age, sexual orientation and religion or belief resulted from concerns over the rise of far right extremism and violence in some member states.
- The UK has exceeded EU minimums with the adoption of the single Equality Act 2010 and it could play an influential role in the EU on these issues.

Worker Protection

EU action has also significantly raised the level of worker protection in the UK, leading to important protections for workers affected by business restructuring, safeguards against excessive working hours and equal treatment rights for atypical workers. Some EU initiatives aimed at enabling working parents and carers reconcile work with their caring responsibilities have benefited individuals in the UK and now attract cross-party support.

Working time rights

The Working Time Directive has led to significant benefits for working people in the UK. For example:

- The introduction of 48 hour average limit on weekly working time has been associated with one million fewer UK employees working excessive hours, which constitutes a fall of 25 per cent.
- The accompany introduction of the right to paid annual leave led to six million workers receiving an increase in their holiday entitlements, including 2 million who previously had no leave entitlements at all. This increase in paid leave entitlements particularly benefited women working on a part time basis.

The UK government has repeatedly indicated a desire to reform EU working time rules, which could lead to a loss of these benefits.

Improved protection when pregnant or on maternity leave

Although maternity leave entitlements in the UK have been above the EU minimum of 14 weeks for some years, EU action in this area has still brought benefits, for example:

- ECJ case law made clear that treating a woman unfavourably because she was pregnant or seeking to take or on maternity leave was discrimination and it was not necessary for a woman to identify a male comparator in similar circumstances in order to prove sex discrimination.
- The Pregnant Workers Directive introduced specific health and safety protections for pregnant workers, those who have recently given birth or who are breastfeeding.

EU action on the reconciliation of work and family life has brought benefits to working parents and carers in the UK. The latest BIS Work-Life Balance Survey found that:

- Almost a fifth of employees (19%) had made use of the right to time off to deal with domestic emergencies in the previous year, rising to nearly a quarter of parents (23%) and 29% of those with caring responsibilities.
- 11% of parents with children under 6 had taken some unpaid parental leave (derived from the EU Parental Leave Directive) in the previous 12 months. This leave was relied on more by lone parents (20%), the majority of whom are women, who face great difficulties in accessing and staying in employment because of problems balancing work with their caring responsibilities. No doubt the uptake of parental leave will be greater following the coalition government's extension of the upper age limit to 18 in the UK from 2015. This extension also shows support across the political parties for the right to parental leave and recognition of the benefits it can bring the UK economy and society.

Atypical worker rights

During the 1990s and 2000s the EU adopted a triumvirate of equal treatment directives for atypical workers which were designed to facilitate the use of more diverse employment relationships whilst at the same time providing safeguards for those employed in more precarious forms of employment. Two of these measures, the Part Time and the Fixed Term Workers Directives, were the subject of successful social partner negotiations, reflecting the mutual recognition amongst employers and trade unions that atypical workers are more vulnerable to mistreatment and need to be insulated from the effects of competition. The Temporary Agency Worker Directive was finally adopted in 2008, following a social partner agreement reached between the CBI and TUC.

These equal treatment rights have created significant benefits for UK workers:

- **Part-time Worker Regulations** – it was estimated that the transposition of the directive on equal treatment for part-time workers (around three quarters of whom are women in the UK) could benefit around 400,000 employees in terms

of improving their pay and benefits.⁴

- **The Fixed Term Employee Regulations** have led to a significant improvement in pay and conditions and access to occupational pensions for many temporary staff in the UK, particularly in the education sector. Temporary staff also have increased job security, with improved access to permanent employment and rules preventing employers from requiring staff to waive their unfair dismissal rights.⁵
- **The Agency Worker Regulations** - Many agency workers have received increased pay and improved holiday entitlements. However problems with the implementation of the so-called 'Swedish derogation' in the UK means that a significant proportion of agency workers continue to face pay discrimination, with some agency workers being paid up to £135 a week less than directly employed staff doing the exact same job.⁶
- Agency workers employed in the public sector also benefitted from the decision of the ECJ in the *Alonby* case which provided agency workers with the rights to equal access to statutory occupational pension schemes.

Contrary to many employers' predictions, there is no evidence that equal treatment rights for atypical workers has resulted in a loss of employment or reduced workforce flexibility. TUC research suggests that in the aftermath of the 2008/09 recession the UK has experienced higher levels of under-employment, mostly in the form of involuntary part time work and a growth in temporary, insecure employment.⁷ As a result there is increasing concern that the UK labour market is moving towards more low paid, less secure and more exploitative forms of employment, at a time when job opportunities are scarce and many households are struggling with an unprecedented fall in living standards.

Protections for staff affected by restructuring

The **Acquired Rights Directive** and the **Collective Redundancies Directive** both originated as internal market measures, in the recognition that these measures benefit employers, employees and the wider economy by ensuring that restructuring takes place in way that is more socially acceptable, avoids disputes and leads to less damaging effects on local and regional economies.

The Commission recently carried out an evaluation of these Directives and the **Information and Consultation Directive** as part of the wider 'fitness check'

⁴ <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/employment/balancing-work-family-responsible/part-time/ria/page19200.html>

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⁶ <http://www.tuc.org.uk/workplace-issues/employment-rights/proposed-changes-law/basic-rights-work/tuc-lodges-complaint>

⁷ TUC analysis of official statistics in August 2013 suggested that half of employment growth since the recession has been in temporary job, many of which have been involuntary. <http://www.tuc.org.uk/economic-issues/labour-market/labour-market-and-economic-reports/involuntary-temporary-jobs-driving>

exercise. Throughout the process employers and trade unions agreed that the Directives continued to be fit for purpose and should be retained. The Commission review report, published in July 2013 also found that the Directives were generally relevant, effective, coherent and mutually reinforcing and that the benefits outweighed any costs.

In the UK, meaningful **consultation on collective redundancies** has also achieved genuine benefits for employees, employers and the wider economy:

- During the 2008/09 recession many private sector employers worked with unions to find ways of avoiding mass redundancies and retaining skilled staff.⁸ Findings from the 2011 WERS Survey reveal that in 40 per cent of workplaces that engaged in consultation on redundancies, manager's original proposals were altered as a result of consultation, and in 18 per cent of workplaces multiple changes were made to manager's proposals. In 22 per cent of workplaces the numbers of redundancies were reduced; in 14 per cent of workplaces strategies for redeployment were identified or changed; redundancy payments were increased in 10 per cent and additional assistance for individuals facing redundancy was introduced in 19 per cent of workplace.
- The findings from the TUC survey in 2012 revealed⁹ that **between a third and almost a half of workplaces** appear to have consultation periods which exceed the statutory minimum, which suggests that many employers recognise the benefits associated with consultation
- Meaningful consultation assists in maintaining morale amongst 'surviving staff' and supporting good employment relations. CIPD¹⁰ research suggests that employees believe that frequent and honest communications (53%), more meaningful consultation (35%) and giving employees greater voice in the workplace (30%) can help to maintain trust with the remaining workforce.

The TUPE Regulations 2006 benefit both employers and staff affected by outsourcing and business transfers. For example:

- TUPE Regulations protect the incomes and working conditions of outsourced staff. According to a BIS Impact Assessment, amendments introduced to the TUPE Regulations to ensure that protections apply to all service provision changes have improved pay and conditions for service sector workers of between £10.8 million and £24.1 million per year. These benefits assist in supporting demand in the economy and in reducing in-work poverty and reliance on benefits by low paid service sector workers.
- TUPE protections assist in ameliorating the detrimental effects of outsourcing on affected staff, including the erosion of pay and conditions and related growth in in-work poverty, the impact on health and well-being and the

⁸ <http://www.acas.org.uk/CHttpHandler.ashx?id=2694&p=0>

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<http://www.tuc.org.uk/sites/default/files/tucfiles/callforevidencecollectiveredundancyconsultation.pdf>

¹⁰ <http://www.cipd.co.uk/pressoffice/articles/GDPworkaudit250110.htm>

damaging impact on staff morale.¹¹

- The TUPE Regulations prove beneficial for employers by reducing transaction costs and creating a level playing field for contractors bidding for service contracts. Tendering decisions are based on commercial merit rather than competition based on reduced pay and conditions.
- There is no evidence that the TUPE Regulations have constrained growth or employment levels. According to Oxford Economics, the UK outsourced sector has a turnover in the region of £199 billion, which is equivalent to approximately 7.5 per cent of total economy wide output. The sector directly supports around 3.3 million jobs, equivalent to 10 per cent of the UK workforce.¹²

Health and safety at work

According to Open Europe, an independent think-tank based in London and Brussels, 41 of the 65 new health and safety regulations introduced between 1997 and 2009 originated in the EU. Separately it has been noted that approximately half of all new regulations that impact upon businesses in the UK originate from the EU, and seven of the ten most important regulations originate from the EU.

According to the Lofstedt report, the increasing influence of the EU in health and safety regulation has provided a number of benefits to the UK. The more prescriptive nature of much of EU legislation may have helped small businesses who often welcome greater certainty over what they are required to do. Where EU Directives have been implemented, it has provided an opportunity to consolidate a number of previous sets of regulations. Furthermore, the Directives provide a level playing field across Europe, which can help competitiveness, particularly as UK health and safety law was already well established.

Evidence to the Lofstedt committee from employers identified a number of regulations introduced as a result of EU Directives as particularly helpful. The report mentions the evaluation of the Provision and Use of Work Equipment Regulations, originally introduced as part of the six-pack of regulations. It suggests that it led to improved working practices without causing significant financial concerns. The evidence suggests another of the six-pack, the Manual Handling Operations Regulations, was also generally well received by duty holders, with a case study of one organisation reporting a six per cent reduction in sickness absence and 50 per cent fall in lost time due to accidents directly as a result of measures introduced to comply with the law.

Employment promotion and social protection

¹¹ Thomas Kieselbach et al, (2009) *Health in restructuring: Innovation Approaches and Policy Recommendations*. Project supported by DG Employment, Social Affairs and Equal Opportunities, European Commission. University of Bremen.

¹² *UK Outsourcing across the private and public sectors: An updated national, regional and constituency picture*. Report prepared by Oxford Economics for the Business Services Association, November 2012.

The European social model is in accordance with much modern thinking on the sources of economic success. The OECD now argues that well-designed benefits can keep unemployed people in touch with the labour market and reduce unemployment¹³, whilst “overly-strict eligibility conditions and rigorous gate-keeping can also have negative consequences for the effectiveness of employment-oriented policies.”¹⁴

Social protection establishes a floor to consumer spending, thus helping to maintain demand during recessions. Furthermore, social protection reduces inequality, and this is also recognised as a positive economic factor. As Christine Lagarde has remarked:¹⁵

“Now all of us—including the IMF—have a better understanding that a more equal distribution of income allows for more economic stability, more sustained economic growth, and healthier societies with stronger bonds of cohesion and trust. The research reaffirms this finding.”

These principles have pointed to an important role for the EU in preventing “social dumping”. Without rules to prevent this, countries might engage in competitive lowering of standards of employment protection and social security. Eventually, every country would have fallen as far as possible, none would have the advantage they had sought but social and employment protection would be threadbare everywhere and the social *and* economic advantages they bring would have been lost.

It is at least arguable that a continuing problem for the EU has been that the Treaty basis for this duty has been too weak.¹⁶ The problem is not that the EU is over-mighty in matters relating to social security, but that measures such as the Open Method of Co-ordination and Recommendations on minimum standards are inadequate to this task.

Despite this weakness, European legislation has had a positive impact. The 1992 Recommendation on common criteria concerning sufficient resources and social assistance in social protection systems (92/441/EEC) has helped concentrate attention in Member States in the Mediterranean and Eastern Europe on the need for means-tested minimum income schemes, alongside contributory social security. It also led directly to the creation of Portugal’s Social Insertion Income scheme and a similar scheme in Italy (since replaced).

The EU rules on the co-ordination of social security schemes for migrant workers (regulations 883/2004 and 987/2009) have been a concrete benefit for UK workers. The trade union concern is clear: workers should not pay taxes and

¹³ <http://www.oecd.org/els/emp/36889821.pdf>

¹⁴ <http://www.oecd-ilibrary.org/error/authentication;jsessionid=550guaril9dwe.x-oecd-live-02>

¹⁵ <http://www.imf.org/external/np/speeches/2013/012313.htm>

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<http://www.europarl.europa.eu/document/activities/cont/201106/20110620ATT21867/20110620ATT21867EN.pdf>

contributions, only to find that they are not entitled to the benefits they have paid for. We are also concerned that workers should only pay one set of taxes and contributions in respect of a given piece of work. Similarly, the government will want to make sure that people are not entitled to two countries' benefits for one piece of work or alternatively avoid paying any taxes and contributions. That is why the UK had bi-lateral social security agreements with the EEC before joining and would need similar rules were it to leave.

Agreed rules are vital if British workers are to be able to work in other countries and workers from other countries are to be treated fairly when they work here. The TUC strongly supports the EU's rules, though we think they need to be modernised. In particular, migrant workers employed under atypical "flexible" contracts frequently find that they are not protected by a framework that was designed before the Treaty of Rome.

One problem is the impossibility of aggregating periods because insurance periods accrued in one member state have no equivalent in another; this is especially a problem where someone is on the border between salaried work and self-employment. We also have concerns about the position of workers who are classified as self-employed in the UK but are paid a salary when they work in another EU member state who may find themselves liable for two sets of Contributions. A growing problem is the result of a trend across Europe to create unemployment benefits for "special cases" that do not require contributions. These benefits have different rules in different countries, cannot be combined with contributory benefits and often have residence rules that make it difficult for migrant workers to qualify for them, even though they are engaged in the sort of atypical work policy makers had in mind when these benefits were created.

The advantages of the EU's role in social and employment legislation can be seen in the social dialogue negotiations undertaken by European employers' organisations and the European TUC. We have produced, for instance, a framework agreement on Inclusive Labour Markets and a "Framework of actions on youth employment". There are dozens of agreed actions relating to learning, transitions, employment and entrepreneurship.

Wholehearted engagement with European policy could deliver even more for the UK. It is very sad that the UK is the only EU member state that has said it will not implement the Youth Guarantee¹⁷. This provides a good example of why a policy competence that is limited to writing Recommendations is insufficient and ineffective. Unlike most of the richer Member States, the UK is also not adding national funding to the European Youth Initiative.

Question 5:

What evidence is there that EU action in social policy disadvantages the UK?

There is no evidence that EU action in social policy has disadvantaged the UK.

¹⁷ http://europa.eu/rapid/press-release_MEMO-13-984_en.htm

For many decades, proponents of deregulation have argued that the adoption of levels of EU social policy will cost jobs and damage labour market performance. In recent years these views have become increasingly discredited with analysis undertaken by the OECD and academic commentators concluding that there is no negative correlation between levels of employment protection legislation and labour market performance.¹⁸

The arguments promulgated by the proponents of deregulation also do not bear scrutiny when assessed against the performance of the UK labour market. Between 1997 and 2005, the UK implemented a number of EU employment rights. These included working time rules, equal treatment rights for atypical workers, parental leave rights and information and consultation measures. The UK government simultaneously introduced new domestic regulations including the national minimum wage and enhanced maternity rights. At the time advocates of deregulation predicated that increased rights would lead to substantial job losses. In practice the UK experienced falling unemployment, job creation and the longest period of growth witnessed in decades. This growth was only brought to an end by the financial crisis and the biggest downturn in the world economy since the 1920s. None of these developments were caused by excessive regulation, but rather by the lack of effective regulation, especially in financial services.

Some commentators have subsequently sought to argue that weaker employment protection was responsible for the UK's relatively good employment performance during the 2008/09 recession.¹⁹ However comparative academic studies suggest that there is no link between the flexibility of a country's labour market and job losses in this recession.²⁰

In practice, countries such as the USA which have very flexible labour markets experienced significant hikes in unemployment following the economic crisis. In contrast, Germany, with its higher level of employment regulation, has experienced falling unemployment and rising employment levels.

Whilst the success of the German economy in responding to the recession is in part due to its industrial strategy and strong export record, there is also evidence that employment levels have been maintained as a result of the state-funded short-term working scheme. The system of collective bargaining and co-determination has also enabled the German labour market to remain flexible and responsive to changing market conditions.²¹ The German experience clearly suggests that

¹⁸ See Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* for a detailed review of recent research.

¹⁹ For a review of these arguments see Lansley S, Reed H (2010) 'Red Tape delusion: Why deregulation won't solve the jobs crisis' London: TUC

²⁰ Amna Silim (2013) 'Job Creation: Lessons from Abroad' London: TUC; Gregg P and Wadsworth J (2011) 'Workless Households' in Gregg P and Wadsworth J (Ed.) *The Labour Market in Winter: The state of working Britain* Oxford: OUP

²¹ Amna Silim (2013) *ibid*

additional social policy initiatives in the UK and across Europe are likely to yield significant economic benefits.

Question 6:

Are there any other impacts of EU action in social policy that should be noted?

There is clear evidence that EU action on social policy has benefited working people, has created a level playing field for employers and contributed to the development of high trust, high skill workplaces.

An effective 'European Social Model' is also essential for securing public support for the European project. As the Commission regularly acknowledges the 'European Social Model' plays a vital role in connecting the EU to its citizens.²²

However in recent years there has been a major loss of confidence in the ability of the European Union to deliver an effective European social model. The growing scepticism is based on three main developments. Firstly, the EU social policy agenda has effectively become frozen as a result of the paucity of proposals emerging from the Commission and the confluence of right of centre governments which has successfully blocked or delayed policy initiatives.

Secondly, decisions of the European Court of Justice (ECJ)²³ have limited the discretion of member states to determine the appropriate level of social policy within their borders. More recently and perhaps more significantly the wave of austerity measures adopted in the aftermath of the economic crisis now threatens to engulf the EU social model. Since 2008/09, working people across the EU have experienced a sustained attack on pay and conditions through the dismantling of collective bargaining arrangements and the weakening of employment protections. These policies have led to an unprecedented decline in living standards and in escalating inequality and in-work poverty across the EU. Cuts in public spending and the ensuing loss of public sector jobs has led to rising levels of unemployment in many EU countries.

These developments have in turn fuelled the rapid resurgence in Euroscepticism across Europe. The TUC believes that the strengthening of EU social policy is essential if public confidence in the European project is to be restored and maintained.

Question 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?

²² Catherine Barnard (2012) 'Social Policy in the dock' in *Single Market, Equal Rights? UK Perspectives on EU Employment Social Law* Edited by Adam Hug and Owen Tudor. The Foreign Policy Centre February 2012.

²³ Notably the decisions in the Viking, Laval, Ruffert and Luxembourg cases

As outlined in the response to question 5 above, there is no evidence that EU action in the field of social policy has had negative implications for the UK.

In spite of having implemented the various EU employment and equality measures, the UK still remains one of the most lightly regulated labour markets in the industrialised world. OECD research reveals that among the world's 36 most prosperous countries, only workers in the USA and Canada have weaker employment protection than UK employees.²⁴ The World Economic Forum's latest Global Competitiveness report ranked the UK 5th out of 144 countries for 'labor market efficiency' (based on a survey of business executives).²⁵

As highlighted in the response to question 4 there is also evidence that different social policy initiatives contribute significant economic gains. For example, recently published BIS research on the business case for equality and diversity and the Regulatory Impact Assessments for EU-derived equality regulations and the Equality Act 2010 show the kind of economic gains that can be expected from action to combat discrimination, promote equality and better manage diversity.

It is very difficult to estimate the impact of EU action separately from any domestic legislation that would be needed in its place.

If, in the absence of EU action, the UK abandoned the framework of equality, employment and health and safety legislation, this would mean the UK would become a more unequal society, with lower economic activity, employment rates and incomes for certain groups falling and potentially lower growth. There would also be greater costs in terms of poorer relations between groups and more social conflict, increased child poverty if parents and carers struggled to manage work and care, and difficulties meeting the demands of an ageing population.

If the UK were to maintain the framework of rights that currently exists and EU action in this area were to stop, then its businesses could be undercut by those that do not abide by such standards and it would suffer disadvantage from the EU as a whole experiencing lower employment rates, greater socio-economic inequality, increased costs of an ageing society, etc.

If both the UK and the EU were to abandon the current framework of rights, it is likely there would have been a 'race to the bottom', with countries seeking to compete on the basis of lower pay and condition and reduced employment protection. As a result, all the social and economic benefits associated with such policies would be lost.

Future options and challenges

Question 8:

How might the UK benefit from the EU taking more action in social policy?

²⁴ OECD Employment Data.

²⁵ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf

The TUC believes that the UK would benefit significantly from additional EU action in social policy. For example:

- The revised Pregnant Workers Directive – this would bring benefits in the form of improved female participation and fewer women working beneath their previous skill and qualification level after having children. In the UK, increases in paid maternity leave led to an increase in the proportion of women returning to the same employment after childbirth²⁶ and employers that provide occupational pay above the low statutory flat-rate for maternity leave report very high return rates.
- To further improve female participation in the labour market, measures should be adopted at EU level to encourage fathers to play more of a role in their children's upbringing, including an entitlement to paternity leave immediately after the birth and paid parental leave.
- The draft framework directive covering non-discrimination on the grounds of disability, religion or belief, age and sexual orientation in the provision of goods and services should be adopted. The UK would benefit from its citizens being able to move throughout the EU knowing that they had the same protection from discrimination as they do at home.
- The EU legal framework for equal pay could be improved to encourage more transparency and proactive steps by employers to eradicate discrimination in their pay systems, especially to ensure equal pay for work of equal value.
- The TUC does not agree that the proposed consolidation of the three national level information and consultation directives is necessary or appropriate. However should these Directives become the subject of a recast or revision, the TUC believes that a stronger framework of information and consultation rights should be adopted at a national and EU level, incorporating tougher sanctions for employers.
- Worker participation – A European framework for worker participation rights should be considered. Currently there is much disparity between national legislation on board level representation and the TUC supports mandatory representation of workers on company boards in the UK. Such European framework would provide for minimum rules thereby levelling the playing field and reducing the scope for companies to opt to register in countries with lower levels of protection.
- A revised Data Protection Regulation should be adopted which includes increased safeguards for the processing of sensitive personal data relating to trade union membership and activities. This would help to protect UK workers from victimisation for being a union member or participating in union activities. It would also prohibit the blacklisting of trade union activists in the

²⁶ A BIS evaluation report of the Work and Families Act 2006 which looked at the impact of extending paid maternity leave in the UK found that: *“Returning to the same employer after maternity leave helps to guard against women returning to a job with lower pay, skill level or responsibility.... The 2007 DWP survey found a dramatic decline in the proportion of mothers who changed employer upon returning to work after childbirth – down from 41 per cent in 2002 to 14 per cent by 2007.”*

UK construction sector and beyond.

- The current proposals for a Posted Workers Enforcement Directive should be strengthened to ensure that Member States are able to decide the level of control measures which should be adopted and to include joint and several liability provisions. These measures will help to provide a level playing field for employers and protect the rights of posted workers.
- There is also a case for wider reform of the Posted Workers Directive restoring the ability of national governments to introduce legislation and trade unions to negotiate effective protections for posted workers. These measures would prevent employers from using posted workers to undercut UK industry standards and pay and conditions. It would also prevent future disputes, similar to that experienced at the East Lindsey oil refinery in 2009.

Question 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?

The TUC believes it is essential that the EU maintains a core framework of employment and equality rights and health and safety standards.

The current patchwork of EU social and employment legislation was introduced in response to clear and pressing social and economic needs. There is no case for diminishing the existing framework of rights. Rather there is a case for extending it.

Nevertheless, the TUC also believes that Member States should have the right to determine the level of social and employment standards which apply within their countries, in excess of the minimum EU standards.

To this end, there is an urgent need for the EU to take action to address the problems created by the ECJ judgements in the *Viking*, *Laval*, *Rüffert* and *Luxembourg* cases. These judgements restrict the ability of Member States to determine the level of employment rights and social protections for migrant workers, in particular posted workers. As a result governments are unable to regulate labour markets so as to prevent unfair competition between domestic and foreign traders. The constraints on governments and trade unions have had a detrimental impact on industrial relations; can lead to xenophobia; generate pressure for protectionist policies and undermine confidence in the EU.

The TUC believes that:

- A social progress clause should be adopted in the EU Treaties confirming that economic freedoms and competition rules do not take precedence over fundamental social rights, including the right to bargain collectively and the right to strike. Where economic freedoms and fundamental rights conflict the clause should make clear that fundamental social rights take precedence.
- EU law should also make clear that economic freedoms cannot be interpreted in a way which permits companies to circumvent or undercut national labour laws or collectively agreed terms and conditions, thereby creating unfair competition.

Question 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?

The TUC would advocate a wider as well as deeper use of social dialogue mechanisms as foreseen in Title X of TFEU (in particular articles 153-155), for instance by entrusting social partners with the implementation of EU measures – as is often done in Scandinavia. Greater use of social partnership arrangements would ensure sufficient flexibility as well as proximity to the labour market’s needs in a way that statutes often lack.

Similarly, a greater use of social partners agreements at EU level to regulate specific aspects (as it has been the case with forms of atypical work or parental leave) or greater consultation of social partners in the legislative process would allow for the concerns of the two sides of industry to be taken into account at an early stage and would prevent the sort of reactions to a Commission’s proposal that were seen at the time of the Services directive, which in France contributed to the rejection of the constitutional treaty in the referendum.

The TUC would take issue at the way social partners agreements are described in paragraph 28 of the consultation paper. It is important to recall that the Treaty that gives the social partners the power to negotiate agreements (article 155). Member States do not have the right to amend the text concluded by the social partners. The TUC would not support any changes to these arrangements. However, it would however be beneficial for the social partners to be provided with legal assistance throughout the negotiations to ensure that the texts produced stand up to legal scrutiny.

The TUC expresses grave concern at the way recent social partners agreements in the field of health and safety for hairdressers have been ridiculed in the British media and the challenge mounted by certain governments. The TUC believes that the Commission’s failure to propose a directive transposing the agreement constitutes a serious and despicable precedent which undermines the European social dialogue.

The Lisbon Treaty has already increased the role of national partners in monitoring and intervening in the EU legislative process. The TUC does not believe that vaguely formulated proposals about ‘red cards’ would add anything to existing powers. Indeed national parliaments have already exercised these new powers by rejecting the Monti II proposal on the right to strike and the freedom to provide services. It appears therefore that the existing systems are already effective.

Question 11:

How else could the UK implement its current obligations in this area?

The UK is disadvantaged as compared with many other European countries when it comes to the application of EU employment standards.

Many member states use national or sectoral collective bargaining arrangements to implement EU legislation. This ensures that EU standards are implemented in a manner which reflects the operational needs of different sectors. In contrast in the UK EU legislation is largely implemented through prescriptive legislation. This ‘one size must fits all’ approach means that UK legislation tends to be over-complicated and creates unnecessary rigidities. It can also lead to anomalies in different sectors.

Question 12:

What future challenge/opportunities might the UK face in this area and what impact might these have on the national interest?

The current debate on migration has exposed the risks associated with greater internal market integration without the corresponding integration of labour markets.

The trade union movement supports an internal market in which the social and economic dimensions go hand in hand, and can only support the completion of the internal market if effective social protection and safeguards for public services are guaranteed. In our view, support for the internal market and the EU among citizens and working people will only be maintained if the social dimension is strengthened and extended, a view which is not unique to the TUC but increasingly being recognised by the European Commission as well as other actors. With the resurgence of populist and xenophobic parties, the idea of EU (and with it the single market that the UK covets so much) will be increasingly under threat. Only greater action in the field of social and employment policy and economic growth will heed those threats.