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?

Despite the popularity of the neo-liberal thought since the 1980s, it has also been recognised that markets cannot fully self-regulate and require corrections, namely in the light of social justice considerations. Therefore, any market (or economic) integration project needs to incorporate as well social policy elements. Only the combination of economic and social elements within EU policies can provide for sustainable development and a social progress, both objectives of the EU (Articles 3 TEU). Limiting EU's action to economic integration and reserving social policy to Member State authorities creates what has been termed as 'constitutional asymmetry'[1], which on a long-term basis leads to inadequate policy frameworks and political programmes insufficiently strong and coherent to address existing social and economic challenges.

This point of view was recognised with the Single European Act (SEA), which came into force in 1987. The Treaty establishing the European Economic Community (TEEC) contained extremely weak labour and social law provisions. There was, in fact, a complete lack of actual competence to legislate with regard to labour standards, as Articles 117 and 118 TEEC only contained a 'political programme',[2] constituted of reference to common goals and values, and the commitment to promote collaboration between Member States. With the SEA, Articles 118a and 118b were introduced into the TEEC and the Community became for the first time competent to regulate on health and safety related matters in the field of labour, by qualified majority in the Council acting in co-operation with the Parliament. Besides this competence excluding most labour related matters (including pay, the right of association and the right to strike, as later on specified and nowadays enshrined in Article 153(5) TFEU), it was also limited by the text of the provision itself: Article 118a TEEC established that the directives produced on the basis of this new competence would 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings' (nowadays stated in Article 153(2)(b)). This ensured Member States struck the balance between economic development and workers' well-being. Moreover, only minimum standards could be set by directives produced on the basis of this competence, precluding full harmonisation in this field. Article 118a TEEC remained unchanged by the Treaty of Maastricht 1992.

Soon after the introduction of these competences in the Treaties by the SEA, the Community Charter of Fundamental Social Rights for Workers was adopted by 11 out

[1] See, for example, F. Scharpf, (2002): *The European Social Model: Coping with the Challenges of Diversity*, Max-Planck-Institut für Gesellschaftsforschung Working Paper 02/08. Köln: MPIfG.

[2] Matthias Hartwig (2008): The Elimination of Child Labour and the EU. In: Nesi, Giuseppe, Nogler, Luca and Pertile, Marco (eds.): Child Labour in a Globalized World – A Legal Analysis of ILO Action. Aldershot: Ashgate, pp. 245-262, p. 245.

of the 12 Member States at the time (the UK only adopting it when the Charter was (partly) incorporated into the Treaties by the Treaty of Amsterdam). This Charter enshrines a range of labour-related rights, namely concerning free movement, remuneration, working conditions, social protection, freedom of association, equal treatment and vulnerable groups. It was approved as a 'declaration', hence being considered as only constituting a (moral) commitment, not imposing legal obligations as such (Article 28). The Community Charter is still held as a valid and relevant instrument, namely by being mentioned in Article 151 TFEU and the Preamble to the CFR, and by the possibility of the Courts using it as an interpretative tool.

Subsequent treaties have not significantly amended the relevant provisions, so the EU competences to regulate labour matters have, except for greater emphasis on social protection and the open method of coordination (OMC), remained largely unchanged since 1997. The Treaties have, however, increasingly endowed the EU with competences in the field of justice and home affairs, as well as some limited supporting and coordinating competences in the fields of social inclusion (Articles 9 and 151-153 TFEU) and education (Articles 6, 9 and 165-166 TFEU), which has allowed the EU institutions to legislate in labour- and social-connected fields. Most significantly, it has been the European Union Courts that, on some occasions and in some periods of their history and even if not always with consensually positive results, have pushed forward a socially and human rights friendly agenda to the greatest extent of its capacities. Also, the production and later inclusion of the Charter of Fundamental Rights into the Treaties also increased the number of labour- and social-related provisions from which the EU institutions, Member States and individuals may draw to potentially enhance their positions. A substantial proportion of the EU's work on labour- and social-related matters is, therefore, nowadays carried out within the context of soft law instruments and the OMC. EU's labour and social policy may therefore be characterised as significant, albeit still considerably limited by the reduced number of competences the EU possesses in this field and the non-binding nature of many of its outcomes.

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

To the extent that EU social and employment policy may contribute to an improvement in living and working conditions, EU competence and initiatives in this field may be very significant in building a more cohesive and peaceful societal life.

Impact on the national interest

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

Many examples could be adduced in respect of the advantages that derive to the UK from EU action in social policy. We have chosen to mention Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2 December 2000, pp.16-22), generally referred to as the Framework Directive, and the positive impact and yet untapped potential that this Directive has with regard to young people.

Courts have already had the opportunity to use the Framework Directive to protect the interests of young workers, as in *Hütter* with regard to determination of pay,[3] *Kücükdeveci* with regard to calculating the notice period for dismissal,[4] and in *Hennigs and Mai* with regard to a national collective agreement providing for differences in basic pay according to age.[5] Other contexts in which the Framework Directive may be used to fight discrimination against young workers include the offer of more precarious employment arrangements (e.g. allowing more successive fixed-term contracts for younger workers than for older ones, as advocated for in the Netherlands and Spain) and lower salaries (e.g., paying younger workers a fraction of the minimum salary payable to older workers merely on grounds of age, as it occurs in Greece and the UK).[6] Domestic case law also reveals the potential to use age anti-discrimination provisions to protect young workers, as in relation to dismissal in the UK decision in *Wilkinson v Springwell Engineering Ltd*.[7]

The range of issues that have been, and can eventually be, addressed on the basis of the Framework Directive is very wide, even if restricting one's considerations to young workers, as we have done. This could not be done, or would arguably have taken much longer to do, if the EU were not active in the social and employment fields.

[3] Case C-88/08, David Hütter v Technische Universität Graz, Judgment of 18 June 2009, ECR 2009 I-05325.
[4] C-555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG, Judgment of 19 January 2010, ECR 2010, p. I-365.
[5] C 297/10 and C 298/10, Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai, Judgment of 8 September 2011, OJ 311/12, 22 October 2011.
[6] Malcolm Sargeant (2010): Young Workers and Age Discrimination. In: International Journal of Comparative Labour Law and Industrial Relations, 26, 4, pp. 467-478, at 474; Melanie Simms (2011): Helping Young Workers during the Crisis – Contributions by Social Partners and Public Authorities (EF/11/29/EN). Dublin: European Foundation for the Improvement of Living and Working Conditions, at 20-21.
[7] ET/2507420/07.

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

Conventional wisdom may tell us that several pieces of EU employment and social legislation create disadvantages to Member States, by imposing costly obligations and restricting business freedom. By analysing a particular case study, we hope to illustrate how erroneous some of that 'conventional wisdom' is.

The Young Workers Directive (Directive 94/33/EC of 22 June 1994 on the protection of young people at work, YWD) has, indeed, been one of those cases of EU law that raised considerable opposition within and by the UK at the time. The UK government successfully negotiated a four-year extension to the deadline to implement several (the most important) provisions of the YWD (Article 17(1)(b) YWD): Article 8(1)(b) in relation to working time limits for children above the age of 14 with regard to work/training schemes and light work, Article 8(2) in relation to working time limit for children between the ages of 15 and 18, and Article 9(1)(b) and (2) in relation to the prohibition of night work for children between the ages of 15 and 18. Whilst the European Parliament and the European Commission agreed on the inappropriateness of such an extension,[8] the EU Council of Ministers conceded to the UK government's concerns and agreed to such an 'additional transitional period' – generally called by the UK as a 'renewable opt-out'. 'Extension' or 'renewable opt-out', such exceptional regime was classified at the time as a unique remarkable feature.[9] The YWD Directive justified such exceptional regime in its Preamble by referring to 'particular problems' that the implementation of some provisions posed to the UK system of protection of young people (Preamble consideration No. 24). At the end of the extension period, the UK argued in favour of a renewal of the transitional period, partially by invoking the fear of shift of working children to the 'black economy'.[10] The Commission's 2000 report on the transitional report, supported by trade unions and later on by the European Parliament as well,[11] found, however, that the transitional period should not be extended and that the UK should adhere fully to the Directive,[12] something not disputed by the UK authorities.[13] The

[8] Amendment No 28 in the Commission's Re-examined proposal for a Council Directive on the protection of young people at work, COM(94) 88 final – SYN 383, Brussels, 30 March 1994.

[9] Kenner, Jeffrey (2003): EU Employment Law – From Rome to Amsterdam and Beyond. Oxford and Portland, Oregon: Hart, p. 184.

[10] Commission of the European Communities, *Report from the Commission on the Effects of the Transitional Period Granted to the United Kingdom Concerning Certain Provisions of the Council Directive 94/33/EC on the Protection of Young People at Work* (COM(2000) 457 final, 20 July 2000), point 6.6.

[11] *Resolution on the Commission report on the effects of the transitional period granted to the United Kingdom concerning certain provisions of Council Directive 94/33/EC on the protection of young people at work (COM(2000) 457 – C5-0010/2001/2002(COS))* (OJ No. C 276/36, 1 October 2001).

[12] Commission of the European Communities, *Report from the Commission on the Effects of the Transitional Period Granted to the United Kingdom Concerning Certain Provisions of the Council Directive 94/33/EC on the Protection of Young People at Work* (COM(2000) 457 final, 20 July 2000), point 10.

[13] Select Committee on European Scrutiny of the UK Parliament, 28th Report, 17 November 2000.

fear related to the shift of children to the 'black economy' have not materialised – in fact, some Member States have even reported a significant increase in the employment rate of older children (e.g., Sweden, in relation to 16-17 year-olds) and the UK has recognised that the risks it had invoked to obtain a transposal extension did not come true.[14]

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

The impact of EU social and employment policy on Member States is often exaggerated. Let us return to the example of the YWD: despite setting minimum standards with regard to work conditions and work age for young people, the YWD's impact on domestic legal frameworks or labour realities was in fact minimal.[15] Often, and as it was the case with the YWD, most Member States' legal frameworks are already mostly in line with the minimum standards imposed by directives and regulations in the fields of social and employment law, so no overhaul of the domestic legal framework is required.

Future options and challenges

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

The exchange of best practices, peer-reviews and mutual learning activities within the context of the OMC plays a very significant role in the current context of social and employment (and economic) crisis. It is very important for the UK to go on meeting with other EU Member States to discuss social and employment matters, in particular the means to raise awareness of rules (such as websites and publications), effective training packages on health and safety, and, most important, take a holistic view of the relevant issues by tackling matters from the prism of poverty, discrimination, education and welfare. Only such an approach will tackle the root causes of social and employment issues of concern. This does not, however, mean that the OMC should become an escape route from more stringent and protective (and effective) standards.

[14] European Commission (2004): Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the application of Directive 94/33/EC on the protection of young people at work, COM/2004/0105 final.

[15] Hartwig, Matthias (2008): The Elimination of Child Labour and the EU. In: Nesi, Giuseppe, Nogler, Luca and Pertile, Marco (eds.): Child Labour in a Globalized World – A Legal Analysis of ILO Action. Aldershot: Ashgate, pp. 245-262, p. 249.

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?

As the consultation paper rightly points out, there are different industrial relations 'models' throughout the EU – 'models', meaning that no such 'model' is entirely followed by any single Member State. The main models identified are:

- the Anglo-Irish, characterised by a limited role of the state, reduced body of legislation, employment contract as main pillar of work relationship, and collective agreements which are neither legally binding nor extendable to all workers and employees;
- the Roman-Germanic, characterised by the State playing a central and active role, thorough legislation on all aspects of labour, a fundamental right to collective bargaining and to join a union, collective agreements that can be extended to all workers; and,
- the Nordic Model, characterised by a limited role of the state, reduced body of legislation, collective agreements as the essential element, and high unionisation of workers.

The EU has chosen *not* to follow any of these models. Instead, it has adopted its own model – a flexible model of social dialogue, characterised by:

- few regulations, mostly directives;
- use of framework directives and directives only aiming at partial harmonisation or setting minimum standards;
- use of soft law: codes of conduct, recommendations, conclusions, communications, reports, guidelines;
- Flexibility within directives: acceptance of alternatives to directive (collective agreements) or delayed deadlines to implementation; and,
- Possibility of European collective agreements.

This model allows for cultural, social and economic differences across the EU to be accommodated, thus avoiding the imposition of any instrument or measure that may be completely harmful to or essentially contradictory with 'local' practices.

The tendency of more contemporary EU action in the areas of social and employment competence to primarily utilise soft law, as opposed to hard law, as the mechanism for achieving its goals has been well documented.[16] From this perspective, a preoccupation with principles such as subsidiarity and proportionality would likely serve very little purpose. Certainly, given that such principles have very little formal role outside the scope of the legislative process, greater adherence to them would not have significant impacts for the range of non-binding, softer initiatives in the employment and social sphere. From another perspective, there is evidence that, when hard law is the preferred mode of regulation at Union level, the

[16] E.g. Samantha Velluti (2010): New Governance and the European Employment Strategy. Abingdon: Routledge.

enhanced status granted to subsidiarity by the Treaty of Lisbon – at least so far as *pre-legislative* scrutiny by national parliaments is concerned under the "yellow card" procedure[17] – is already shaping the development of EU social policy. One such example concerns the proposal from the Commission in 2012 for a *Regulation on the exercise of the right to take collective action*.[18] This was withdrawn due to opposition expressed by a number of national parliaments, including that of the UK, under the "yellow card" warning system questioning the desirability and legitimacy of EU-level action on the specific subject-matter. Consequently, it would seem that this procedure is having a limiting effect on the exercise of Union competence in some areas of social policy.

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

The cross-border posting of workers

It is interesting to consider the issue of cross-border posting within the context of the social and employment review. The posting of workers has implications for the balance and relationship between the Single Market, on the one hand, and social and employment competence, on the other hand. Workers posted by an establishment in one Member State to an undertaking based in another, as part of a cross-border provision of services, remain connected to the employer in the state of origin.[19] Clearly, the posting of such workers is inextricably linked to the exercise of a right to provide services pursuant to Article 56 TFEU, a right very much tied to Single Market objectives. Nevertheless, the presence of such workers in a host state brings to the fore certain pertinent social and employment-related issues, such as the potential implications for national workers, national regulatory standards and national wages.

At this juncture it should be noted that the influence of EU enlargement continues to shape the context within which posting is taking place. Enlargement of the Union has brought specific concerns about posting, particularly in the old Member States, to the fore. Much of the unease surrounding the transnational provision of services in the enlarged and economically diverse EU relates to the notion of social dumping and the potential for service providers in new Member States to take advantage of cheaper compliance costs to win contracts in the old Member States. As a consequence of lower wages in new Member States, labour cost differentials continue to persist. This issue, and the related matter of how far trade unions are

[17] Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, 2010 OJ C 83/206.
[18] COM(2012) 130 final.
[19] Directive 96/71 on the posting of workers [1997] OJ L18/1 sets out the legal framework applicable to posting (although the Court of Justice has been clear to frame the exercise of these rules within the broader legal context of Article 56 TFEU, e.g. cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831). The directive specifies that there should be an employment relationship between the undertaking making the posting and the worker during the period of posting" (Article 1(3).

entitled to take action to protect national workers, has received significant attention following the CJEU's interpretation of the Posted Workers Directive in a line of cases beginning with Case C-341/05 *Laval un Partneri Ltd.*[20]

In its post-*Laval* case law, the CJEU limited the national rules that can be extended to posted workers to those laid out in accordance with the methods stipulated in the Directive and restricted the scope for host Member States to impose additional employment conditions beyond the minimum standards of the Directive (under Articles 3(1), 3(7) and 3(10) of the Directive).[21] Furthermore, it subjected trade unions' opportunities to undertake collective action to protect national workers to an application of the proportionality principle. Consequently, the CJEU's decisions have been heavily criticised by many actors in the old Member States. Trade unions have clearly been particularly critical, both at the national (especially old Member State) and European level.

Posted workers themselves are at risk of being placed in vulnerable situations and of their rights being undermined. Evidence suggests that workers from the EU8 and EU2 posted to old Member States, particularly in the construction sector, are susceptible to working long hours for the same level of wages that national workers receive for working much shorter hours. There are also frequent reports of poor living conditions right across the old Member States, including in the UK.[22] There are certainly problems with enforcement of the current rules on posting. The increased relevance of flexible subcontracting chains involving companies established in different Member States can serve to undermine the posted workers' rights and render enforcement difficult.[23]

The Commission is currently very active in this area, having commissioned a number of reports into different aspects of posting and the legal framework since 2010. The Commission seems to have dismissed the idea of wide scale reform of the law and instead in 2012 it published a proposal for a Directive on the enforcement of Directive 96/71.[24] This seeks to raise awareness of the law and implement harsher sanctions to aid its enforcement. Should this proposal enter into force, posted workers in the construction sector would have an enhanced level of protection as a result of the mechanism of joint and several liability contained therein. Nevertheless, it is as yet unclear how the resulting legislation will incorporate the joint and several liability principle. Certainly, following the meeting of the Council in December 2013, it would seem that such a principle is unlikely to be strictly mandatory.[25]

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[20] [2007] ECR I-11767.

[21] E.g. Case C-346/06 *Rüffert* [2008] ECR I-1989 and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-5271.

[22] Clark, *Regulation and Enforcement of Posted Workers Employment Rights* (May 2012) (European Commission Grant Agreement VS/2010/0630).

[23] Jorens, Peters and Houwerzijl: Study on the protection of workers' rights in subcontracting processes in the European Union (June 2012) (Project DG EMPL/B2 – VC/2011/0015).

[24] COM(2012) 131 final.

[25] Council of the European Union Press Release, 3280th Council Meeting, *Employment, Social Policy, Health and Consumer Affairs*, Brussels 9th and 10th December 2013.

The law remains unsettled and there is little consensus amongst Member States, business enterprises, trade unions and representatives of posted workers as to the most effective way to proceed. However, given that the CJEU's interpretation of the Directive seems set on the course established in *Laval,* and that the Commission is avoiding any radical overhaul of the framework, it is unlikely that far-reaching change will be brought about. Much of the emphasis in the existing literature, however, is placed on the reform of the law at EU level. Undoubtedly, this is clearly a significant factor given the cross-border nature of the provision of services. Nevertheless, it should not be overlooked that national law also has a role to play in the regulation of posting and, as such, it would be unwise to direct criticism solely at the EU for the perceived failings of the posting regulatory framework.

For example, the Posted Workers Directive only requires employers to respect those terms and conditions set out in the host state's general legislation, or contained in collective agreements which have been declared to be or are treated as universally applicable. The UK, however, is one of the Member States that does not have in place any system for declaring or treating collective agreements as universally applicable. Essentially, the structure of the UK's system of labour relations does not fall within the scope of the regulatory model envisaged by the Posted Workers Directive. The consequence of this is that foreign service providers are in no way obliged to treat posted workers in accordance with existing collective agreements; instead the UK only requires such undertakings to comply with the minimum standards laid down in national employment legislation.

A key message, then, is that whilst attention is (probably rightly) placed at EU level to deliver a 'solution' to address the 'problems' of posting, it is open to Member States such as the UK to take unilateral steps to address perceived failings within the system. For example, it is open to Member States that do not declare collective agreements as 'universal' to introduce a mechanism to do so, should they wish to align themselves more fully with the regulatory system espoused by the PWD. The introduction of a system that treated collective agreements as universally applicable would, in effect, require undertakings from outside the UK to price their tenders on the basis of the same compliance costs as any national company must do.