Chapter 6

Social and employment law

The summary

- Some legislation on social and employment matters is needed. However, over-burdensome regulation in this field reduces wealth and job creation without delivering proportionate benefits. Further measures to boost growth and jobs in the UK are needed fast, which means stripping away unnecessary regulation.

- It is estimated that if the burden of EU social and employment legislation was halved, it could deliver a £4.3 billion direct boost to the UK's GDP, as well as 60,000 new jobs.

- Based on Government figures, around two-thirds of the cost of this category of EU legislation comes from two Directives: the Working Time Directive and the Temporary Agency Workers Directive.

- Although the UK appears to have included some 'gold-plating' of the Working Time Directive, the great majority of the regulatory burden of this measure derives from the Directive itself.

- The picture regarding gold-plating of the Temporary Agency Workers Directive is not as clear. The UK's implementation of the Directive, which includes a 12 week qualifying period before agency workers get the same treatment as employees in certain employment conditions, is linked to an agreement brokered between designated 'social partners', the Confederation of British Industry and the Trades Union Congress. Consequently, the Government may be 'forced' to include additional requirements by the TUC.

The options for change

- To boost the British economy and jobs market, there should be a significant reduction in the constraints imposed by the Working Time Directive and the Temporary Agency Workers Directive.

➔ The UK could remove as much gold-plating as possible.

➔ The UK could deregulate through the EU, by bolstering its efforts at influencing the EU legislative process. History suggests this would be very difficult.

Alternatively, the UK could take back control of its social and employment law. There are two ways the UK could do this as a member of the EU:

➔ a) Obtain a new EU treaty provision creating a 'triple lock' arrangement.

The first 'lock' would be for the UK to opt out completely from the 'Social Policy' section of the EU treaties – the principal part of the treaties used to produce social and employment legislation.

The second lock would give the UK the ability to opt out of any EU legislative proposal it believed would impact intolerably on its social and employment law.

The third lock would allow the UK to determine that a piece of EU law unacceptably affected social and employment policy or law in the UK; and, in making this determination, the UK would be entitled to disapply the relevant law from itself.

This would be a radical change to the EU treaties, and would need to be agreed by all EU Member States. However, the UK has some negotiating leverage. For instance, Germany would still like to incorporate into the EU treaties the 2012 agreement on fiscal integration between various EU countries, something that would require UK approval.

➔ b) Unilaterally disapply EU social and employment law in the UK, through an Act of Parliament.

This would be a clear breach of the UK's EU treaty obligations in international law. Under general international law, the other Member States might be able to suspend obligations they owe to the UK internationally, including but not limited to EU treaty obligations.

In short, this unilateral action would not provide a sustainable long-term solution. It could, though, create the conditions to force a meaningful negotiation if other Member States had previously refused to take the UK seriously.

The introduction

Few question the need for some legislation on social and employment matters. However, over-burdensome regulation in this field reduces wealth and job creation without delivering proportionate benefits. Concerns about regulation choking growth and employment opportunities are especially great at present given the condition of the British economy. Further measures to boost growth and jobs are needed fast, including stripping away unnecessary regulation.

The EU is often criticised for imposing burdensome social and employment legislation on the UK. In a November 2011 report, think-tank Open Europe estimates that if the burden of this type of EU legislation was halved, it could deliver a £4.3 billion direct boost to the UK's GDP, as well as 60,000 new jobs.[160]

The EU treaties have a dedicated section on 'Social Policy', covering social and employment matters. Under this section of the treaties, proposals for EU legislation are usually made by the European Commission. They must then be agreed under the so-called 'co-decision procedure' by both a 'qualified majority' of EU Member States in the Council of the EU and by the European Parliament.[161]

Figures provided by Open Europe, based on impact assessments produced by the UK Government, show that out of the annual cost arising from EU social and employment laws implemented since 1998, around two-thirds of the cost comes from the Working Time Directive and the Temporary Agency Workers Directive.

The detail

The Working Time Directive

The Working Time Directive (WTD)[162], adopted by the EU in its current form in November 2003, regulates various aspects of working time. Best known is its default limit of a 48 hour working week, with a right for Member States to allow individual workers to opt out of this limit. The Directive also allows Member States to lay down provisions so that weekly working time is averaged over a certain period, for the purposes of determining whether the 48 hour limit has been adhered to.[163]

However, the Directive contains much more than the 48 hour working week. Other provisions include:

- Workers are entitled to minimum daily rest of 11 consecutive hours in every 24 hour period in which they work.

[160] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, November 2011, p.12 and p.25.
[161] : The only variation is where the 'social partners' at EU level – certain representative bodies of employers and workers – reach an agreement on a social policy matter falling within the EU's powers, and request that the EU give it the force of legislation. In this case, the Commission will propose an EU law implementing the agreement. For these legislative proposals, the European Parliament's agreement is not required.
[162] : Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time.
[163] : The Directive sets an upper limit on that period, which varies according to different scenarios. The typical upper limit on the period over which weekly working time can be averaged is 4 months.

- Workers are entitled, as a rule, to minimum weekly rest of 24 uninterrupted hours per each seven-day period, on top of the minimum 11 hours daily rest period. However, if "objective, technical or work organisation conditions so justify", the weekly rest period of 24 hours can include rest taken as part of the daily rest entitlement.

- Every worker has the right to paid annual leave of four weeks. The Directive explicitly prohibits this minimum period of paid annual leave being replaced by a payment in lieu.

- There are restrictions on the daily working time of 'night workers'. Individual workers *cannot* opt out of these restrictions.[164]

The WTD also contains exceptions to the general rules it sets down. These include the following:

- The Directive does not apply to certain public service activities, such as specific activities of the armed forces or the police.[165]

- Member States are allowed to disapply/modify the entitlements to, or requirements regarding, daily and weekly rest periods, the weekly working hours limit and the limitations on night workers' working hours where a job does not have predetermined working hours, or where workers can determine their hours themselves (e.g. managing executives who have "autonomous decision-taking powers" over their working time).

- The entitlements to, or requirements regarding, daily and weekly rest periods, the limitations on night workers' working hours and the maximum period over which weekly working time can be averaged can be disapplied or modified by "collective agreements or agreements concluded between the two sides of industry at the appropriate collective level". However, this is only "on condition that equivalent compensating rest periods" are granted to the workers concerned, in all but exceptional cases. Moreover, there is still an upper cap of 12 months on the period over which weekly working time can be averaged.

- The entitlements to, or requirements regarding, daily and weekly rest periods, the limitation on night workers' working hours and the maximum period over which weekly working time can be averaged can be disapplied or modified by Member State legislation, in certain cases. These include: security and surveillance activities "requiring permanent presence in order to protect property and persons"; activities "involving the need for continuity of service or production", including services related to the care provided by hospitals; and "where there is a foreseeable surge of activity", such as in agriculture or tourism. However, these changes are only allowed "provided that the workers concerned are afforded equivalent periods of compensatory rest", or, in exceptional cases, other "appropriate protection". Furthermore, these changes cannot extend the period over which weekly working time is averaged to more than six months.

---

[164] : The term 'night worker' in the Directive covers: a worker who normally works at least three hours of his/her daily working time during 'night time'; and a worker who is "likely" to work a certain proportion of his/her annual working time during night time, with this proportion defined either by national legislation or "collective agreements or agreements concluded between the two sides of industry". The Directive says that the period deemed to be 'night time' is specified by national law, but must be, at a minimum, a period of seven hours that covers the hours between midnight and 5am.

[165] : According to the European Commission, the EU's Court of Justice has held that this exemption must be limited to exceptional situations, such as natural or technological disasters, attacks or serious accidents, and that the "normal" activities of workers in the armed forces, police and emergency services are covered by the WTD. See European Commission, *Report on the implementation by Member States of Directive 2003/88/EC ('The Working Time Directive')*, December 2010, p.6.

- Member State legislation, or collective agreements or agreements between the two sides of industry, can extend the period over which the weekly working time of trainee doctors (sometimes referred to as junior doctors) is averaged to six months, rather than the four months generally stipulated in the Directive.

- Special rules apply to certain sectors, such as some mobile transport workers, offshore workers and workers on sea fishing vessels. In some cases, the working time of these people is covered by other EU legislation.

UK implementation – the regulatory burden and gold-plating

The Working Time Directive is implemented in Great Britain by the Working Time Regulations 1998, as amended many times by subsequent Regulations, including the Working Time (Amendment) Regulations 2003. There are also Northern Ireland-specific implementing Regulations.

The UK Government's own impact assessments show that the Working Time Regulations 1998, as amended by the Working Time (Amendment) Regulations 2003, have created an annual cost in Britain of £2.6 billion, in 2002 prices.[166]

This makes the Working Time Regulations the single most expensive piece of EU-driven regulation in the UK.[167]

According to the Government's impact assessment, by far the largest component of this cost derives from the entitlements to daily and weekly rest periods. This is responsible for around two-thirds of the total cost of the Regulations.[168]

Comparing the Directive and British implementing Regulations, it appears the great bulk of the British regulatory burden comes from the Directive – it is *not* gold-plating in the UK legislation. Having said that, below are some areas that appear to be, or might be, gold-plating:

- The Directive's definition of 'working time' is "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

  The British Regulations include time receiving "relevant training" within the definition of working time. "Relevant training" is defined as: "work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training— (a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and (b) which is provided on a course run by that institution or person [emphasis added]". The main aim of this, apparently, was to

[166] : Department for Trade and Industry, 'Horizontal Amending Directive on the Working Time Regulations (2000/34/EC)', July 2003, in Department for Trade and Industry, *2003 Compendium of Regulatory Impact Assessments*, April 2004, p.136.
[167] : Open Europe, *Top 100 costliest EU regulations*, December 2009. It should be noted that the Working Time Regulations, as well as implementing the Working Time Directive, also implement certain provisions of Directive 94/33/EC on the protection of young people at work. However, the UK Government impact assessment for the 1998 Regulations said that the implementation of this other Directive "makes little difference to the overall figures" given here for these Regulations.
[168] : The second most costly element of the Regulations is the entitlement to paid annual leave, accounting for a little over 20% of the total cost. The third most expensive aspect of the Regulations is the daily limit on night workers' working hours, which generates about 8.5% of the legislation's total cost. The limit on weekly working time only accounts for just over 2% of the overall cost – due to individuals being able to opt out of the limit, and the impact assessment's finding that the great majority of workers would not prefer to work fewer hours if it meant less pay. See Department for Trade and Industry, *op. cit.*, p.149.

include the time spent by non-employed trainees (such as those on Government training schemes) while at training. This would seem to be additional to the Directive's requirements.

- The Directive allows Member States to define a period over which the average daily working hours of night workers are calculated, following "consultation of the two sides of industry". The Directive does not set any clear limit on this period.

  The British Regulations set down an averaging period of 17 weeks for this purpose. It might be that the UK could set down a significantly longer period, increasing flexibility, after consultation of employers and employees.

- The British Regulations require employers to keep records for 2 years showing that they are complying with the obligations in relation to their employees regarding the weekly working time limit, the daily working time limit for night workers and the Directive's requirements for health assessments for night workers. Such record-keeping is not clearly stipulated in the Directive.

- The Directive provides workers with an entitlement to paid annual leave of 4 weeks. The British Regulations state that this leave can only be taken in the leave year in which it arises. However, the Directive does not contain any clear provision to this effect. If this is not a requirement of EU law, British legislation could, for instance, provide that the leave may be rolled over into the subsequent year where both employer and employee agreed. The aim would be to discourage employees from simply taking leave because they would otherwise lose it, where the employer could afford to be flexible in carrying the leave over.

- The Directive allows collective agreements, or agreements between the two sides of industry concluded "at the appropriate collective level", to exclude or modify the entitlements to daily and weekly rest periods and the limits on daily working time of night workers and on the length of the period for averaging weekly working time.

  The Directive also says that Member States can lay down rules on the extension of the provisions of such agreements to other workers "in accordance with national legislation". It is not clear what requirements, if any, there are under the Directive regarding such a process. British legislation could provide for these agreed reductions in the requirements under the Directive to be transferred expeditiously to other sections of the national workforce. The British Regulations are currently silent about this.

- As the European Commission has itself said, the Directive does not clearly state how its limits on working time apply when a worker works under more than one employment relationship.

  Implementation of the Directive in this respect varies considerably across EU Member States. According to a 2010 Commission report, 14 Member States, including the UK, apply the Directive 'per worker' ie. all working time performed by a worker under different contracts is taken together when applying the Directive's rules. 11 Member States, on the other hand, apply the Directive 'per contract', so that the limits on working time apply separately to the work performed under each contract held by a worker.[169]

  The Commission has long stated that it believes the Directive should, as far as possible, be applied per worker.[170] However, at present EU law is not clear on this point.

---

[169] : European Commission, *Report on the implementation by Member States of Directive 2003/88/EC ('The Working Time Directive')*, December 2010, p.7

[170] : *Ibid*

Naturally, applying the Directive's working time limits per contract could make them much less restrictive in practice.

However, such an approach may not provide a sustainable solution to the burden created by the Directive. For one, the European Commission could take the UK to the EU's Court of Justice (ECJ) for what it believed to be incorrect implementation of the WTD. Perhaps more importantly, a legal challenge might also be brought in a British court by a worker who claimed that their rights under the Directive were not being recognised. The matter could then be referred to the ECJ for a definitive ruling. If called on to judge whether the Directive should be applied 'per worker' or 'per contract', it seems quite likely that the ECJ would decide in favour of the former, given it has emphasised in past judgements that the Directive's purpose is to protect workers through restrictions on working time.

The Working Time Directive and the NHS

It has been widely reported that the Working Time Directive is causing serious problems for the National Health Service, and the training and deployment of junior doctors in particular.

The individual opt out from the 48 hour working week applies to trainee doctors, like anyone else. However, hospitals do not find it practicable to organise doctors' rotas so as to accommodate individual preferences on the working week (those using the opt out, for instance, can subsequently change their mind). Doctors' working times have therefore become much more complicated, with some doctors using additional hours to fill gaps in rotas based on the 48 hour weekly limit. Furthermore, the bill for locum doctors to cover rota gaps is soaring.[171]

There has actually been a domestic drive to cut trainee doctors' working hours since December 1990, when agreement was reached in principle between the Government and doctors to implement a 72 hour working week for trainees (though it is not clear how much of that 72 hours was intended to be active working time and how much on-call time). From December 2000, this objective became much more binding under the so-called 'New Deal' arrangements in England. Weekly working hours for trainee doctors were to be limited to 56 for active work, and 72 including on-call time, or NHS trusts would be in breach of contract. A new NHS doctors' pay system was brought in to accompany these changes.

While this clearly put added strain on the NHS, there seems to be debate about how damaging the New Deal arrangements have been. The House of Lords EU Select Committee heard in 2004 that the vast majority of NHS organisations had by then adapted to the New Deal weekly working time.[172] The Royal College of Physicians, on the other hand, still believes that the New Deal has created problems.[173] It has been said that the New Deal makes it much more expensive to employ trainee doctors working more than 48 hours a week, after they have opted out of the WTD's weekly hours limit.[174]

Irrespective of the New Deal, the ECJ has set down two judgements interpreting the Working Time Directive that have caused huge problems for the NHS, on top of the Directive's 48 hour weekly working time limit. The first of these was the ruling in *Simap*[175] in 2000, which was confirmed and exacerbated by the ruling in *Jaeger*[176] in 2003.

---

[171] : With thanks to Charlotte Leslie MP for some of this information; also derived in part from a briefing note by the Royal College of Surgeons of England.
[172] : House of Lords European Union Committee, *The Working Time Directive: A Response to the European Commission's Review*, 9th report of Session 2003-04, para 3.7
[173] : Royal College of Physicians, *Parliamentary briefing: Medical workforce: New Deal and European Working Time Directive*, July 2011
[174] : Andrew F Goddard, 'Progress on the European Working Time Directive (EWTD) and New Deal negotiations', *Clinical Medicine*, Vol 11, No 5, 2011, p.420
[175] : *Simap v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, Case C-303/98
[176] : *Landeshauptstadt Kiel v Norbert Jaeger*, Case C-151/02

Among other things, the ECJ in *Jaeger* held that a hospital doctor's on-call time, where he or she is required to be in the hospital, must be counted as working time, even if he or she is resting.

Jaeger also said that where the daily rest period of 11 consecutive hours is overridden in whole or part by a doctor performing such on-call time, so as to provide a continuity of service, the 'compensatory rest' required by the Directive must be provided *immediately* after the relevant period of 'work', not at a later point. This would apply to any period of work that interrupted the daily rest period, not just resident on-call duty.

The classification of residential on-call time as working time, combined with the Directive's restrictions on working time, has forced the NHS to move away from its residential on-call system in part, in favour of a system of shifts for doctors that involve doctors 'clocking on' and 'clocking off'.

This has restricted the doctors available at any one time in hospitals, including in particular specialties, disrupted the continuity of patient care, and led to complaints that junior doctors are not able to access adequate training. Some junior doctors have also said that the more irregular shifts resulting from the WTD have actually caused a deterioration of their work-life balance.

The ECJ's ruling in *Jaeger* regarding the timing of compensatory rest has also greatly compounded the situation. In oral evidence to the House of Lords EU Select Committee in 2004, the then Health Minister John Hutton said: "To require compensatory rest to be taken immediately would potentially have a massively destructive effect across the NHS and might mean that doctors could not work the following shift or rota that they were required to do and that would have knock-on consequences right across the hospital. At the end of the day, the only people who would be negatively affected would be the patients and that is a ridiculous result."[177]

It is also possible that the principles regarding on-call time at the place of work, and the timing of compensatory rest, laid down by the ECJ in *Jaeger* may be applied more widely than the NHS by EU law.

It has been mooted that the UK might be able to implement the WTD in certain ways, which would remedy or mitigate the problems it has caused the NHS, particularly trainee doctors.[178]

Apparently, for instance, the Republic of Ireland exempts training from the definition of 'work', so that trainee doctors fall outside the scope of the Directive's requirements. However, this is unlikely to be compatible with EU law given the Directive is explicitly written to apply to trainee doctors, and that the ECJ has taken an expansive approach to the concept of work.

On another tack, the Netherlands has apparently classified trainee doctors as 'autonomous workers', meaning most of the Directive's provisions can be disapplied in relation to them. It might be argued that the working time of trainee doctors is not 'predetermined', due to the unpredictable nature of hospital care, causing them to fall within this exemption in the Directive. However, this would probably require a departure from the domestic 'New Deal' arrangements, which do appear to predetermine trainee doctors' working time, and it still sits uneasily with the Directive's specific provisions on the (much more limited) exemptions that can be applied to trainee doctors.

---

[177] : House of Lords European Union Committee, *The Working Time Directive: A Response to the European Commission's Review*, 9th report of Session 2003-04, Volume II, answer to Q259

[178] : Charlotte Leslie MP, article in *The Times*, 20 January 2012

The case study – the Working Time Directive and junior doctors

The following description of the problems encountered by a trainee doctor under the Working Time Directive was provided for this chapter by a hospital doctor who was in foundation training between 2009 and 2011:

"When I was on my surgical placement as part of my training, we were told by the hospital to take a mandatory 'zero hours' day off every week, as we were working 8am – 6pm on the other weekdays, as well as some longer on-call days and on-call weekends at times. The purpose was to keep our average working week within the 48 hour limit.

"We rotated who took the day off among our team, but this meant that on any particular day only one or two doctors would know the patients who had been admitted the day before. However, those particular doctors might not be there the next day, so would have to hand over patient information to a colleague. Unsurprisingly, much information was 'lost in translation'. Trainee doctors would also not know which registrar, or even consultant, to expect on any particular day, due to the irregular working patterns of these people also caused by the limits on working time.

"Furthermore, patients no longer knew who would see them on the ward round. The effect was poor patient experience, as patients were unable to build a rapport with individual doctors. People would be very frustrated that the doctors seeing them did not know what the same medical team had planned/achieved the day before!

"There is also much less time for on-the-job training for junior doctors. This was compounded by the fact that we often had to cover for other trainees who were rostered off due to the Working Time Directive, missing our regular teaching sessions. Lack of training time has made it difficult for us to establish rapport with our seniors, and gain adequate support in terms of mentorship and career advice. In fact, trainee doctors no longer feel that we 'belong' to a team, given the new shift patterns have broken up teams of trainee doctors and their seniors. Morale is certainly lower and junior doctor sickness rates much higher. This is a negative spiral – more doctors off means that when you do turn up, your working day is more hectic and stressful, and you are much more likely to fall ill and take time off yourself.

"Diary carding exercises (whereby doctors record the actual hours they work) have shown almost universally high rates of non-compliance with the Working Time Directive. During my general medicine attachment in training, I ended up working 1½ - 2 extra hours (unpaid) per day and was consistently non-compliant with the Directive. Doctors that do opt out of the 48 hour limit on the working week are sometimes not sure whether they will be remunerated appropriately for their time."

Furthermore, a recent report by the West Somerset Coroner Michael Rose indicated that he felt that hospitals were evidently "running into problems" with the Working Time Directive, and that it may have been a factor in the deaths of patients.[179]

[179] : See recent press reports at:
http://www.telegraph.co.uk/health/healthnews/7995374/Coroner-criticises-EU-working-time-directive-after-hearing-of-doctor-shortage.html
http://www.telegraph.co.uk/health/healthnews/9076736/Family-devastated-after-healthy-daughter-dies-following-routine-operation.html

The Temporary Agency Workers Directive

In November 2008, the EU adopted the Temporary Agency Workers Directive (TAWD).[180]

Principally, this Directive requires certain working conditions of agency workers to be the same as if they were recruited directly to the same job by the organisation at which they are working. Agency workers are not recruited directly by the place they work, but are provided for a fee by an agency, and their employment relationship is with that agency. As a general rule, the Directive requires that this equal treatment be given to agency workers from when they start their work at the organisation in question.

The working conditions concerned are those laid down by any "binding general provisions" in force in the organisation dealing with pay, the duration of working time, overtime, breaks, rest periods, night work and holidays. Agency workers must also receive the same treatment under rules in force in the organisation regarding maternity, protection of children and young people and anti-discrimination.

However, in Member States in which there is no established system for extending particular collective agreements throughout the economy, the Member State can lay down arrangements diverging from the equal treatment described above, "on the basis of" an agreement between the national "social partners", and provided that "an adequate level of protection is provided for temporary agency workers".

In May 2008, in the final stages of negotiations on the TAWD at EU level, the UK Government facilitated an agreement between the Confederation of British Industry (CBI) and the Trades Union Congress (TUC) on implementation of the Directive. The Government referred to these organisations as the UK's national social partners.

The main point of substance of this agreement was that agency workers' entitlement to equal treatment would begin "after 12 weeks in a given job", rather than immediately.

The TAWD is implemented in Great Britain by the Agency Workers Regulations 2010, made by the then Labour Government in January 2010. These Regulations entered force on 1 October 2011. Separate Regulations exist for Northern Ireland, where, according to the Government impact assessment that accompanied the Agency Workers Regulations, only around 1% of the UK's agency workers are located.[181]

The Agency Workers Regulations implement the TAWD's principle of equal treatment for agency workers, though this principle only applies once an agency worker has completed 12 continuous calendar weeks in the same role, at the same organisation.[182]

The Government impact assessment on the Agency Workers Regulations estimated that, with this arrangement, around 40% of all agency workers (about 520,000) would be covered by the principle of equal treatment.[183] It estimated that this would cost private sector employers up to £1.46 billion a year (in 2009 prices).[184]

---

[180] : Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work

[181] : Department for Business, Innovation and Skills, *Impact assessment: European Parliament and Council Directive on working conditions for temporary agency workers*, January 2010, p.3

[182] : A worker can, however, take a break for six weeks and return to the same role, and that will not be counted as breaking the 'continuous' period of work. Other special provisions apply to calculating the period worked.

[183] : Department for Business, Innovation and Skills, *Impact assessment: European Parliament and Council Directive on working conditions for temporary agency workers*, p.9

[184] : *Ibid*, *passim.* The estimated cost to public sector employers was slightly outweighed by the benefits enjoyed by the Treasury through increased tax revenues and National Insurance contributions.

The impact assessment also said that around 65,000 agency workers could have their roles curtailed to prevent them satisfying the 12 week qualifying period for equal treatment, and incurring extra cost for the organisation at which they were working.[185]

In 2011, law firm Allen and Overy conducted a survey of 200 medium-sized and large UK organisations regarding the Agency Workers Regulations. A third of respondents said they would consider terminating agency workers' roles before they had satisfied the 12 week qualifying period, as a way of preventing the increased costs of equal treatment.[186]

Has the UK gold-plated the Directive?

The scope for the UK to lessen the burden of the Directive is, in theory, quite wide, but this is dependent in large part on agreement from the TUC, given it is apparently taken as the UK's national 'social partner' representing workers.

As it turned out, the one main divergence from the Directive's principle of equal treatment that the 2008 TUC/CBI 'national social partner' agreement allowed was that the equal treatment principle would not apply until 12 weeks had been completed in a given job.

Taking this into account, the following still appear to be examples of where the Agency Workers Regulations create additional requirements over and above the TAWD:

- The Directive allows Member States to exempt agency workers from the principle of equal treatment "as regards pay", where those workers have a permanent contract of employment with their agency and continue to be paid between assignments ie. when they are not actually in work. The Directive does not specify the rate of pay these agency workers must receive between assignments.

  The Agency Workers Regulations allow the principle of equal treatment in pay to be disapplied in relation to agency workers who are paid at least a certain rate between assignments, that rate being 50% of the highest level of basic pay they received during the last 12 weeks of their last assignment. If this would be lower than the National Minimum Wage, that rate of pay applies instead.

  It may be necessary to require minimum pay between assignments to prevent abuse of this exemption by employers. However, 50% of highest previous basic pay seems unnecessarily high as a minimum rate.

- A major issue during implementation of the Directive was the definition of "pay". Regarding what types of pay do agency workers have to be treated equally with employees?

  The Directive does not set down a definition of pay; this is left to national law.[187] The Agency Workers Regulations' definition of pay goes beyond, for instance, basic salary, including payments such as shift allowances and some bonuses. When it consulted on how to implement the Directive, the previous Government heard from employers that pay should be defined as basic wage only, so as to enable a simple system that was easy to

[185] : Department for Business, Innovation and Skills, *Impact assessment: European Parliament and Council Directive on working conditions for temporary agency workers*, p.9
[186] : Allen and Overy, *Changes to Temporary Workers: An employers' guide*, September 2011, p.22
[187] : The Agency Workers Regulations define pay as "any sums payable...in connection with the worker's employment", but excluding certain kinds of payments. Among the excluded payments are occupational sick pay and pensions, payment regarding maternity or paternity leave, redundancy pay, rewards from financial participation schemes such as share ownership schemes, and bonuses "not directly attributable to the amount or quality of work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service".

administer, and prevent problems in distinguishing bonuses directly related to individual performance from bonuses that were not.[188] There was also concern that including agency workers in performance-related payments would require the hiring organisation to appraise agency workers' performance in a way more like treatment of employees.[189] The previous Government, however, believed that its approach of including other types of pay on top of basic salary was right "in terms of policy".[190]

- As noted above, the Directive's principle of equal treatment requires that certain conditions laid down by "binding general provisions" in force in the organisation be the same for an agency worker as those that would apply if the worker had been recruited directly to do the same job.

  The Agency Workers Regulations, on the other hand, say that, where the principle of equal treatment applies, an agency worker is entitled to the same conditions on these matters as are "ordinarily included" in the contracts of the relevant organisation's employees, and which would have applied to the agency worker if he or she had been recruited without the use of an agency.

  In answer to a formal written question tabled by Ashley Fox MEP[191], the European Commission (which proposed the TAWD and polices Member State implementation of the Directive) said the following on this issue on 26 January 2012: "The concept of 'basic working and employment conditions' as defined in Article 3(1)(f) of the Directive refers to all binding general provisions, notably legislation, regulations, administrative provisions and collective agreements, in force in the user undertaking. It therefore in principle does not cover practices which are not considered as having a general and binding character, such as individually negotiated wages. It is for the transposing [national] legislation to further define national criteria allowing for the application of the principle of equal treatment in situations where such practices prevail."[192]

  However, the Government's guidance on the Agency Workers Regulations, published in May 2011, makes clear that, under the Regulations, the principle of equal treatment extends to worker conditions that have been set through custom or practice rather than binding company policies or pay scales.[193]

  The Association of Recruitment Consultancies, working with the Institute of Directors, estimated in 2009 that only about 10% of agency workers in the private sector were covered by a binding pay scale or collective agreement, which usually only exist in the largest businesses.[194] It would seem that on a strict reading of the Directive, other agency workers in the private sector would not be affected by the principle of equal treatment, at least as regards pay.

---

[188] : Department for Business, Innovation and Skills, *Implementation of the Agency Workers Directive: Consultation on draft regulations*, October 2009, paras 4.16 and 4.17.
[189] : Department for Business, Innovation and Skills, *Implementation of the Agency Workers Directive: Response to consultation on draft regulations*, January 2010, para 4.14.
[190] : *Ibid*, para 4.17.
[191] : Mr Fox is a Conservative MEP representing South West England and Gibraltar.
[192] : http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-011778+0+DOC+XML+V0//EN&language=EN .
[193] : Department for Business, Innovation and Skills, *Agency Workers Regulations: Guidance*, May 2011, pp.27-28.
[194] : http://www.arc-org.net/news/09-07-30/Government_massively_gold-plating_Agency_Workers_Directive_says_ARC_and_the_IoD.aspx . The ARC estimated that 30% of agency workers worked in the public sector, where binding pay scales are common.

The Coalition Government – specifically, the Department for Business, Innovation and Skills – undertook a review of the Agency Workers Regulations in 2010 to see if they could be revised to impose less of a burden on employers.

In a written ministerial statement to Parliament, the minister directly responsible for this review, Edward Davey MP, identified the definition of pay as one matter that had been raised, but went on to say:

"...the Government's ability to make changes...is constrained by the fact that the regulations are based to a significant degree on the agreement brokered by the previous Administration between the CBI and TUC. Due to this unique legal situation, any amendments proposed to the regulations touching upon the subject matter of the CBI and TUC agreement, which did not have the agreement of those parties, would face the risk of being set aside in the courts in the event of a legal challenge.

"Were that to happen, the effect could be to call into question the very foundation for the fundamentals of the implementing legislation, crucially including the 12-week qualifying period itself.

"The Secretary of State [for Business, Innovation and Skills] and I have therefore discussed this matter on a number of occasions with both the CBI and the TUC, seeking agreement on changes that we consider would have improved the implementation regime, to the potential benefit of both employers and agency workers. Unfortunately it has not been possible to find a way forward that would be acceptable to both parties.

"This outcome is clearly disappointing. However, the Government have taken the view that the absolute priority must be not to take any steps that could put at risk the 12-week qualifying period, which significantly mitigates the burdens the legislation will place on employers. The Government will not therefore be proceeding with any amendment of the regulations themselves."[195]

It appeared, in particular, that the TUC was resistant to changes lightening the regulatory burden.

However, under the Directive, the definition of pay by Member State law seems distinct from any national social partner agreement qualifying the principle of equal treatment. Furthermore, the 2008 TUC/CBI agreement does not set out a comprehensive definition of pay.

Similarly, the exemption the Directive allows from the principle of equal treatment in pay, when it comes to agency workers who are paid between assignments, is not dependent on a national social partner agreement.

In addition, the definition of the working conditions subject to the principle of equal treatment as those laid down in "binding general provisions" is set down in the Directive itself – it does not require, and is not subject to, a national social partner agreement.

Nevertheless, the Coalition Government was clearly concerned that changes to UK implementation in these areas could jeopardise the 2008 national social partner deal.

It may be that, although the Government was legally entitled to alter these aspects of implementation without revising the social partner agreement, the TUC threatened to pull out of that agreement if such changes were made. This would raise the prospect of the principle of equal treatment applying from day one of an agency worker's assignment, which is the default position under the Directive.

[195] : HC Deb 19 October 2010, cc49WS-50WS.

Whether the TUC could nullify the social partner agreement in this way is not clear. The agreement contains no expiry date or termination clause.

In sum, according to the Government, the TAWD gives the TUC great leverage to insist on particular implementation of agency worker rules that are more burdensome for employers, through the TUC's ability to require the application of the Directive's default rule that equal treatment of agency workers applies from day one of their assignment.

The case study – The impact of the Temporary Agency Workers Directive on job opportunities

The following account of the impact of the TAWD and Agency Workers Regulations was provided for this chapter by someone who works for a temporary work agency. It provides an insight into the serious problems this legislation is causing in the UK:

"In these extremely difficult economic circumstances this legislation has placed even greater pressures on businesses in one of the most unfortunate areas, i.e. employment. At the moment these regulations are actually *preventing* people from working. I speak from the viewpoint of an employment agency, but of course these regulations have an impact on every business that employs people on a temporary basis through an agency.

"I work in the logistics sector, predominantly with drivers. We have some companies who will now only accept PAYE drivers, and some companies who will only accept drivers working through a limited company. It's become a minefield. Those companies who will accept PAYE drivers insist that the agency puts them on PBA (pay between assignments) contracts, which of course makes the industry very nervous. Some only want limited company drivers as the regulations (so far) don't apply to them – or do they? The guidelines are ambiguous – a great help!

"In many cases drivers who are employed on a PAYE basis are actually being stopped from working after their 11th week as this is the point at which the regulations kick in. I have known this to happen within our company at the request of our client, and also have had drivers call me as they have lost their long-term job for this very reason, following the regulations' entry into force last October.

"Another example is that of an admin assistant working for a client, who had no clear comparator employee within the business she was working for. We did not know if she would take us to court; we believed she was paid fairly for her role, and as far as we were aware she was happy with her wages and was not a litigious person. However, we didn't know this for sure, and we couldn't afford to be wrong. The client ended her contract in the 12th week. This lady is now unemployed – because of the Agency Workers Directive."

Other EU social and employment laws

There are a wide range of other EU social and employment laws, covering areas such as health and safety, employment conditions and industrial relations. Open Europe's November 2011 report contained a list of 89 such laws in its Annex II.[196]

After conducting a wide-ranging study of UK Government impact assessments produced since 1998, Open Europe did not find any evidence of regular, significant gold-plating of EU legislation by the UK Government.[197]

[196] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?,* p.27 et seq.
[197] : Open Europe, *Still out of control? Measuring eleven years of EU regulation*, March 2010, pp.19-20.

As can be seen above, at least in relation to the Working Time Directive, gold-plating does happen; another example of it is the UK's extension of certain EU health and safety Directives to the self-employed.[198] However, gold-plating does not appear to be anything like the main driver of the regulatory burden, which comes from the relevant EU laws themselves.

Examples of these EU laws include the health and safety Directives on control of noise and vibration at work[199]. These Directives require all organisations within their scope to update risk assessments "on a regular basis".

Furthermore, the Directive on control of noise at work replaced a previous Directive on the same subject, lowering the noise thresholds at which employers must undertake certain actions, such as noise reduction programmes, at significant cost.

The options for change – in an ideal world

The Working Time Directive

The Government's impact assessments on the Working Time Regulations 1998, and amending Regulations in 2003, said that the benefits of this legislation were:

- promotion of individuals' choice over whether they work more than 48 hours a week;
- enabling a better balance between work and outside life, which should boost participation in the workforce;
- improving worker health and safety, leading to less call on health services and better work performance, including fewer accidents;
- improving workforce commitment and morale that should result in higher productivity;
- ending poor working conditions that amount to exploitation in some situations.

However, the impact assessments left these benefits largely unquantified. The 2003 assessment admitted that there was "uncertainty" over "the degree of causal relationships that exist between the regulations" and most of the benefits cited.[200]

The British economy clearly needs a major boost. Combined with the huge cost of those provisions and the clear problems some of them have caused, this strongly suggests that the requirements of the Working Time Directive should be pared back, while retaining some regulation of working time as a 'safety net' for workers. Moreover, some provisions of the Directive seem to interfere unnecessarily with the freedom of individual workers to agree matters with their employer.

For instance, there could be a statutory entitlement to a minimum 11 hour daily rest period in usual circumstances, five days out of every seven worked. A minimum 9 hour daily rest period could exist on the other two days. The additional statutory weekly rest period could become an entitlement to a minimum of 24 hours uninterrupted rest every two weeks.

The same sort of situations as in the existing WTD could be exceptions to these requirements, though compensatory rest could be granted within 72 hours or, if that was not possible due to operational need, within a reasonable period (instead of a requirement for such rest to be provided immediately, as under the ECJ's case law).

---

[198] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?,* p.12.
[199] : Directive 2002/44/EC (control of vibration) and Directive 2003/10/EC (control of noise).
[200] : Department for Trade and Industry, *op. cit.*, p.135.

An individual's right (which they could exercise or not) to a maximum working week of 48 hours could be retained in general, though with weekly working time automatically averaged over a year, and periods of on-call time not actually spent working not counting as working time. Certain sectors might be exempted from the 48 hour limit, such as trainee doctors; the right to a 56 hour working week might instead apply to them, if the 'New Deal' arrangements were retained. Night workers could be given the right to opt out of the limitations on their daily working hours.

Workers and employers could also be given the freedom, by mutual agreement, to replace at least some of the four weeks of paid annual leave with an allowance.[201]

The Temporary Agency Workers Directive

When considering the need for this state intervention, the Government impact assessment on the Agency Workers Regulations said that "agency workers can work for the same hirer for lengthy periods and be well integrated into the hirer's business but may not receive the same basic working and employment conditions, such as pay and holidays, as the permanent employees who they are working alongside".[202] The previous Government's fundamental justification for the legislation was "fairness for workers".[203]

However, agency workers do not benefit from regulation that raises their cost to employers to the extent that they are not offered work at all or their work assignments are cut short. The TAWD and Agency Workers Regulations clearly make agency workers more expensive and also create a great deal more administrative compliance work for businesses and public services.

Furthermore, these costs come at a time when the British economy can least afford them, and when work opportunities need to be boosted as much as possible. Agency work often provides a route into work for the young, so any measures that limit agency working should be resisted when youth unemployment is such a major issue.

There might, as identified by the previous Government's impact assessment, be a case for requiring equal treatment of agency workers in basic working conditions, when those workers have been working successfully in an organisation for a long period of time. However, three months does not seem a common sense definition of a lengthy period for these purposes.

Instead, a statutory requirement for equal treatment might kick in after an agency worker had been working in the same role at the same organisation for two years.

Of course, all agency workers have the statutory protections afforded to every worker in basic conditions such as working time and paid leave.

Other EU social and employment laws

Naturally, the UK will want some regulation in matters like health and safety. However, the EU's regulation in this area can impose unnecessary or disproportionate costs and obstacles.

For instance, in relation to the control of noise and vibration at work, organisations found to be low risk on their first risk assessment could be exempt from carrying out further assessments,

[201] : Though when it comes to statutory entitlement to paid annual leave, a purely domestic requirement for an additional 1.6 weeks a year was introduced by the previous Labour Government.
[202] : Department for Business, Innovation and Skills, *Impact assessment: European Parliament and Council Directive on working conditions for temporary agency workers*, p.1.
[203] : *Ibid.*

unless and until they underwent a significant, relevant change.[204] This would be a more proportionate rule than the requirement of the current Directives on this subject for all risk assessments to be updated regularly.

In another case, it has been queried whether the lower noise thresholds in the replacement Directive on control of noise at work, at which employers have to take certain actions, are necessary to provide adequate protection for workers.[205] Unnecessary burdens on employers, at a time when more jobs are needed, should of course be removed. Regulation of this area could be modified so that the obligation on employers to undertake noise reduction programmes did not kick in until the noise threshold that applied previously for this purpose was reached.

The options for change – what can the UK do?

The colour-coding used below for possible UK action follows the categorisation for all the Fresh Start Project's Green Paper chapters. Green are those measures that can be achieved domestically or within the current EU legal framework; Amber are those measures that require negotiated EU treaty change; Red are those steps that the UK could take unilaterally that would involve breaking its treaty obligations. Please see the Introductory Chapter to the Green Paper.

Try to achieve deregulation through the EU

Firstly, any UK gold-plating of EU social and employment laws could be ended, something the UK could achieve through domestic action.[206]

The UK could also mount a determined effort to persuade other Member States and the EU institutions to repeal undesirable EU regulation.

The EU would retain the ability to pass new social and employment laws binding the UK, most of which the UK could not veto. To try and block new burdensome laws, the UK could push to build stronger alliances with any like-minded Member States often opposed to EU intervention in this policy area.

However, it is highly unlikely that the UK would be able to achieve the kind of deregulation of working time and agency work described above, through the EU legislative process.

In 2004, the European Commission proposed a revision of the Working Time Directive, aimed partly at ameliorating the impact of the *Simap* and *Jaeger* judgements of the ECJ. However, after years of negotiations, the attempt at amendment finally collapsed in 2009. The European Parliament, whose agreement was required, had insisted that the changes include removing the opt-out from the 48 hour limit on the working week. It had also insisted on retaining the ECJ's definition of all on-call time at the place of work as working time.

In 2010, the Commission initiated a fresh attempt at revising the WTD, though it did not propose any reduction in the requirements regarding daily and weekly rest periods, night workers' working hours or the core provisions on paid annual leave. The EU-level social partners representing workers have insisted that the opt-out from the 48 hour cap on the

[204] : As suggested by Open Europe in *Repatriating EU social policy: The best choice for jobs and growth?*, p.12.
[205] : Submission by the British Beer and Pub Association to the Government's Löfstedt Review of health and safety.
[206] : Of course, when it comes to the TAWD, it may not be possible to get the TUC's agreement to remove certain gold-plating.

working week be abolished, and that the ECJ's definition of much of on-call time as working time be retained.

Indeed, it seems very unlikely that a qualified majority could be found in the Council in favour of the sort of WTD reforms described above. Many of the Member States who currently allow their workers to opt out of the 48 hour weekly limit do so largely because of the ECJ's judgements counting much on-call time as work. If the EU manages to solve this particular problem, the UK could again become quite isolated in its use of the opt out, and see renewed attempts by other Member States to remove this flexibility in the WTD.

Under the Temporary Agency Workers Directive, the European Commission must review the TAWD's application by December 2013, with a view to proposing amendments if necessary. However, in the unlikely scenario that the Commission proposed a major reduction in the TAWD's burden of the kind described above, the chances seem remote that the Council and the European Parliament would agree to this. The UK was in a minority of Member States that opposed the original proposal for the Directive on the grounds that it was too burdensome.[207]

The prospect for reducing the burdens of, for instance, EU health and safety legislation is not as clear. However, it does not seem likely that the Commission or the European Parliament would be prepared to reverse core requirements of these laws, such as those in the replacement Directive on control of noise at work.

The Commission has spoken about reducing the regulatory burden on small and medium-sized enterprises (SMEs) in particular, and especially so-called "microenterprises" (defined as enterprises with fewer than 10 employees and an annual turnover of less than €2 million). According to the Commission, in the EU SMEs provide two-thirds of private sector jobs and generate more than half of all the economic value added created by business. 90% of SMEs are microenterprises.[208]

In a November 2011 document, the Commission tentatively mooted changes to around a dozen EU laws, to lighten the regulatory burden on SMEs/microenterprises.[209] Some of these were pieces of health and safety legislation, though none, certainly at this stage, dealt with terms and conditions of employment.

Ultimately, any serious attempt at EU deregulation would run against political considerations, not least in the European Parliament. For instance, the UK's Federation of Small Businesses, in conjunction with the European Small Business Alliance, lobbied intensively in 2011 for MEPs to sign up to a declaration that called for a reduction in the administrative burdens imposed by EU law (administrative burdens are focused on requirements such as form-filling, reporting and record keeping). Less than 30% of MEPs agreed to sign, however.

While there may be things the UK could do, under the current EU treaty arrangements, further to mitigate EU interference in British social and employment law, overall the scales seem to be tilted against this country, certainly when it comes to labour law. The centre of

[207] : A key UK problem here is that agency workers are much more important to the British labour market than they are to the labour market of virtually all other EU countries. In 2009, agency workers made up around 3.6% of the UK workforce, compared to a European average of 1.5%. See International Confederation of Private Employment Agencies, *The agency work industry around the world*, 2011 edition, pp.23-24.

[208] : http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm.

[209] : European Commission, *Minimising regulatory burden for SMEs: Adapting EU regulation to the needs of micro-enterprises*, November 2011, p.12 et seq.

gravity in the EU in this policy field is towards the Continental labour market model, which entails heavy regulation and a corporatist approach.[210]

However, the approach of deregulation by EU consent has the benefit of not requiring EU treaty change, or other major revision of the UK-EU relationship, with the diplomatic and legal issues that would throw up.

Seek EU treaty change to repatriate social and employment policy to the UK

To achieve the kind of deregulation described above, the UK would have to take back control of its social and employment law.

As a member of the EU, this means changing the EU treaties, which currently provide the basis for EU legislation in this area that binds the UK. A further consideration is that, other than the dedicated section on 'Social Policy', other parts of the EU treaties have also been used to pass laws that impact on British social and employment policy. For instance, the UK's Transfer of Undertakings (Protection of Employment) Regulations ('TUPE'), which set out employee rights in the event of a business takeover or outsourcing, implement an EU Directive[211] adopted using the EU's treaty powers over the single market.

The impact of this is that there is no one 'ring-fenced' part of the EU treaties that the UK could seek to opt out of to return social and employment policy fully to British control. While an opt-out solely from the Social Policy section (which included an opt-out from existing EU laws based on that part of the treaties) would enable a great deal of deregulation for the time being, it is highly likely that the EU would make increased use of other parts of the treaties that continued to apply to the UK to pass social and employment legislation, which would still bind this country.[212]

In their November 2011 report, Open Europe suggested an EU treaty change involving a 'double lock' for the UK in the area of social and employment law.[213]

The first lock would be a complete UK opt-out from the Social Policy section of the EU treaties, including an opt-out from all EU laws that have been adopted using those treaty articles. The second lock would be a right for the UK to insist that any other proposed EU law be referred to the EU's European Council, for decision by unanimity among Member States, if the UK believed it affected British social and employment policy or law in a way that was unacceptable. Once referred, the UK could insist on changes or block the proposal completely.

As Open Europe point out, this would still leave the problem of rulings by the ECJ that reinterpreted EU laws after their adoption, in a way that impacted on British social and employment policy. It would also not prevent the ECJ reinterpreting provisions of the EU

[210] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, p.13.
[211] : Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
[212] : It should also be noted that the EU treaties contain further sections on economic and employment policy. These enable the EU to adopt policy "guidelines" in these areas, and Member States' conformity with those guidelines is monitored. The guidelines themselves, though, are not legally binding. On the other hand, there are EU treaty provisions that could be interpreted as requiring Member States to give at least some effect to the EU guidelines, or otherwise run their national policies in this area in accordance with EU objectives. The final word on the meaning of these EU treaty provisions, under the terms of the EU treaties, rests with the ECJ.
[213] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, pp.21-22.

treaties themselves so that they had new and intrusive effects in the UK. Furthermore, it would not stop one Government (or Parliament) from agreeing to EU legislation with a major effect on British social and employment law, which subsequent Governments and Parliaments would be stuck with.

This particular 'double lock' may also have the drawback in the eyes of other Member States of interfering with the EU legislative process as it applies to all EU members (by allowing the UK to hold up a proposal for everyone). To avoid this, the UK might instead be allowed to opt itself out of an EU legislative proposal it believed would impact intolerably on its social and employment law.

To be completely watertight legally in terms of repatriating this policy area, the 'double lock' could be built on so as to include an EU treaty provision allowing the UK to determine that an EU treaty provision, piece of EU legislation or decision of an EU institution, or an aspect thereof, perhaps within a certain time period of a new ECJ decision or a new Parliament[214], unacceptably affected social and employment policy or law in the UK; and, in making such a determination, the UK would be entitled to disapply the relevant provision, legislation or decision (or part thereof) from itself.

The new treaty provision would need explicitly to prohibit the ECJ from reviewing the legality of UK opt out decisions, including by reference to 'general principles' of EU law. If this is not done, there is a risk the ECJ could overturn UK exemptions by reference to 'higher' principles of EU law.

This sort of treaty provision would be unprecedented in the EU, and very radical.

Any amendments to the text of the EU treaties require the agreement of all EU Member States (first from their governments, and then through national ratification).

A simple opt-out from the Social Policy section of the EU treaties would be seen as a very big request by the other Member States, let alone the 'triple lock' suggested above.

One complaint other Member States would be likely to raise is that this new arrangement would allow the UK to take part in the EU single market on the basis of 'unfair competition'. In other words, the UK would be allowed the same automatic access to EU markets without having to apply the minimum EU requirements in labour conditions, which is likely to give UK traders a competitive edge.

Firstly, it seems a little naive to think that there is currently a 'level playing field' in minimum working conditions, such as in health and safety, given some EU countries having a patchy record of actually implementing EU laws, in contrast to the UK's usually diligent implementation.

Secondly, the UK is not going to regress to some Dickensian state when it comes to working conditions and labour law. The aim is to cut unnecessary and counter-productive costs, not to turn people into serfs or run serious risks with health and safety. The British people would not stand for this, and with social and employment law under their control via the UK's democratic process, they would be able to prevent it happening.

Thirdly, there are very many factors that determine the costs of a country's industries, such as availability of raw materials, geographical positioning, accumulated capital, taxation and availability of skills. The EU cannot 'harmonise' all of these, and nor would it be desirable for

[214] : The new treaty provision could also identify pre-existing aspects of EU law, not based on the Social Policy section of the treaties, that the UK wants to opt out of.

it to try. Free trade is not about homogenisation but about enabling competition to increase overall welfare.

Indeed, the Deputy Prime Minister, when he was a Member of the European Parliament, said the following: "The claim from advocates of a 'social Europe' that detailed social legislation is required at European level, to offset the effects of the single market, rests on a flawed assertion. This is that the best level for the implementation of social protection is the level at which economic deregulation unfolds...In reality, of course, social protection can be most effectively administered at lower levels, irrespective of the level at which economic deregulation operates."[215]

He went on to say that the necessary EU reforms could include, "...a treaty declaration stating that certain policy areas—notably health, education, culture, tourism, employment and social policy—are the exclusive province of national authorities. In these areas, any action at European level should be confined to 'soft' instruments such as exchange of best practice, bench-marking and peer review. Such action need not even take place within the EU institutions but could be the subject of issue-specific intergovernmental arrangements. Naturally, this would require the highly-controversial deletion of the existing treaty references to these policy areas. But it is difficult to see how we can achieve greater clarity without the political will to take certain policy competences off-limits altogether."[216]

It is clear that Germany in particular still wishes to incorporate into the EU treaties the 2012 agreement on fiscal integration (the so-called 'fiscal compact'), something that would require UK approval. In other words, the UK does have negotiating leverage, and could seek to use this to defend and uphold its national interest.

An important question is whether the repatriation of social and employment policy should be a priority when using this leverage, or whether changes in the UK-EU relationship in other areas, such as financial services or immigration, should be a greater focus.

Take unilateral action to prompt a negotiation

It is possible that, through EU procedures, the UK would not be able to get the other Member States to agree to a satisfactory change to the EU treaties, which would give the UK control over its social and employment policy once more.

In this scenario, the UK could revert to the option described above of trying to achieve deregulation through the EU legislative process. If it was not prepared to do this, the UK might instead take unilateral legal action. As described in Open Europe's November 2011 report[217], it is open to Parliament, in the UK's legal order, to disapply EU social and employment law. This would, however, be a clear breach of the UK's EU treaty obligations in international law. While, ultimately, the EU cannot enforce its treaties against the UK, under general international law the other Member States might be able to suspend obligations they owe to the UK internationally, including but not limited to EU treaty obligations.

In short, such unilateral action would not provide a sustainable long-term solution. It could, though, create the conditions to force a meaningful negotiation if other Member States had previously refused to take the UK seriously. The suitability of this approach is likely to depend on the UK's priorities and its bottom line regarding its future relationship with the EU.

[215] : Nick Clegg, *Doing less to do more: a new focus for the EU*, September 2000, p.21.
[216] : *Ibid*, pp.36-37.
[217] : Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?,* p.23.