

The 'European Social Model' and the UK: From Europeanization to Anglicization

Since the early 1970s, there have been attempts – largely under the banner of a so-called European Social Model (ESM) – to introduce a social dimension to European Union (EU) integration. Over time, and despite frequent UK opposition, these attempts have resulted in the creation of a patchwork of European labour laws. However, this has not altered the status quo which prioritizes economic over social integration. This article analyses the way in which the ESM has attempted to 'europeanize' national labour law systems between 1973 and 2016, with due regard to the UK. The article concludes that it is difficult to speak of a clearly defined ESM which develops a social dimension to European integration that has had a significant positive influence on the UK. This became evident in the run-up to and outcome of the 'Brexit' referendum when rhetoric on the EU's contribution to workers' rights in the UK appeared insufficient to encourage a majority to support 'Remain'.

Word count:

Introduction

Labour law was excluded from the 1957 founding Treaty of the European Economic Community (EEC):

So long as we confine our attention to international differences in the general level of costs per unit of labour time, we do not consider it necessary or practicable that special measures to 'harmonise' social policies or social conditions should precede or accompany measures to promote greater freedom of international trade.¹

Social policy was to remain within the regulatory domain of the nation state; an approach which prevails at the European level. The priority of European integration has always economic rather than social integration. Article 3 EEC

¹ These comments were made by the Ohlin Report, drafted by a group of experts of the International Labour Organization led by Bertil Ohlin in 1956. Together with the Spaak Report it provided the basis for the Treaty of Rome on the common market in 1957 and the creation of the European Economic Community in 1958. ILO, *Social Aspects of European Collaboration (Ohlin Report)* (ILO Studies and Reports, Geneva: 1956), pp. 40-41.

enabled the EEC to abolish obstacles to the free movement of persons and to establish a Social Fund. Although Title III covered Social Policy, with the exception of Article 119 EEC (the equal pay clause), its provisions gave the EEC an insecure legal base on which to develop a coherent social policy. Social policy measures could be enacted under the general provision Article 100 EEC on the basis of a unanimous vote in the Council of Ministers but only if they furthered the economic aims of the Treaty. In addition, article 235 EEC could be used, but again this was subject to a unanimous vote and in furtherance of the Treaty's objectives.

A step-change (see below) in the EEC's abstentionist approach to social policy occurred in the early 1970s and coincided with the UK's accession. Subsequent attempts made to introduce a comprehensive policy – largely under the banner of a so-called European Social Model (ESM) – have required either unanimous or majority (under article 118A EEC) approval by the member-states and have, therefore, been dependent on the effective accommodation of member-states' political interests within the legislative processes set out in the Treaty.² As a result, the ESM is patchy in its coverage of rights. In its White Paper on Social Policy, the Commission described the values underpinning the ESM as including 'democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity.'³ The model is based on the conviction that economic progress and social progress are inseparable. The Nice European Council meeting in December 2000 described the ESM as: free movement of workers, gender equality at work, health and safety of workers, regulation of working and employment conditions, and, more recently, the fight against all forms of discrimination.⁴ As this list excludes a number of important areas of social policy associated with national social models, it is impossible to define a universal Europe-wide social model. Even where European standards exist, these are often implemented to varying degrees and in different ways in the member-states.

² U. Weinstock, 'Europäische Sozialunion – historische Erfahrungen und Perspektiven', in W. Däubler (ed.), *Sozialstaat EG? Die andere Dimension des Binnenmarktes* (Bertelsmann Stiftung, Gütersloh: 1989).

³ European Commission, *European Social Policy - A Way Forward for the Union. A White Paper. Part A*. COM (94) 333 final, 27 July 1994, para 3.

⁴ *Ibid.*, para 12.

Thus, the ESM is a broad label encompassing a narrow definition of employment law and broader issues of social policy.⁵ Maria Jepsen and Amparo Serrano Pascual regard it as 'a political project of highly normative ambiguity'⁶ which is a 'key factor in legitimising European institutions.'⁷ The ESM cannot be compared with national social models that regulate a vast array of social matters. Instead, the ESM should be conceived of as a tool which enables the EU to create minimum standards in those areas that fall within its competence. Hence, it is possible to recognize the ESM as a regulatory framework which can complement rather than replace national structures and institutions. As Giddens points out, the ESM is 'a mix of values, achievements and hopes which differ in their form and in the extent of their development in the individual Member States.'⁸ It seeks to act as a counterweight to the economic side of European integration. However, it is marked by a 'constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality.'⁹ For those critical of the ESM, it legitimizes a neoliberal (European) integration process which demands far-reaching restrictions and reforms of national welfare states under the pretence of modernisation.¹⁰

The UK, for much of its membership of the EEC/EC/EU,¹¹ has often acted as a brake on further integration in the social and political sphere, particularly during the 1980s and 1990s when the development of the ESM reached its peak

⁵ See W. Streeck, 'From Market-Making to State Building? Reflection on the Political Economy of European Social Policy' in S. Leibfried and P. Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Brookings Institute, Washington, D.C.: 1995).

⁶ A. Serrano Pascual and M. Jepsen (eds) *Unwrapping the European social model*. (Policy Press, Bristol: 2006), p. 19.

⁷ *Ibid*, p. 25.

⁸ A. Giddens, *Die Zukunft des europäischen Sozialmodells* (Friedrich-Ebert-Stiftung Politikanalyse, Bonn: 2006), p. 1.

⁹ F. W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, 40:4 (2002) pp. 645–70, p. 645.

¹⁰ C. Hermann and I. Hofbauer, 'The European Social Model: Between Competitive Modernisation and Neoliberal Resistance', *Capital and Class*, 93 (2007) pp. 125-39.

¹¹ The European Economic Community (EEC) was created by the Treaty of Rome in 1957 which came into force in 1958. The Maastricht Treaty (signed in 1992; entry into force in 1993) renamed the EEC as the European Community (EC). The EC became the first pillar of the newly-created European Union (EU). The second pillar dealt with Common Foreign and Security Policy. The third pillar dealt with Justice and Home Affairs. This pillar structure was preserved until the entry into force of the Lisbon Treaty (2009) which renamed the EC Treaty as the Treaty on the Functioning of the European Union (TFEU). See E. Jones, A. Menon and S. Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press: 2012).

in legislative terms. This has led it to be labelled the 'awkward partner'.¹² The reasons for this vary. Economists have focused on the UK's common law tradition as correlating with a specific approach to social policy.¹³ The political science literature accepts that significant obstacles at the European level have hindered the development of the ESM. There is however little agreement on the content and scope of these obstacles. Political economists have used the 'varieties of capitalism' literature to distinguish between the UK as a 'liberal market economy' and European countries as 'coordinated market economies'.¹⁴ Thus at European level not only are different types of welfare state in competition but also different types of capitalism and different types of industrial relations.¹⁵ For most of the twentieth century, national labour law systems were not affected by the European integration process which focussed mainly on product market integration.¹⁶ During the first decade of the 21st century, the UK has been at the centre of a coalition of countries that have pushed for the EU to take the same 'market-making' approach to social policy development and have promoted the modernisation of European economies along the lines of the Anglo-Saxon model.¹⁷ As a result, the Commission and the Court of Justice of the EU (CJEU) have increasingly pushed for convergence of national economies along the Anglo-Saxon model.¹⁸ This has affected the place given to social rights in the EU's legal order (second to economic rights and market freedoms) and has brought national labour law systems within the regulatory sphere of the EU institutions despite their formal exclusion from the treaties. Other obstacles to

¹² S. George, *An Awkward Partner: Britain in the European Community*, (3rd ed.; Oxford University Press: 1998).

¹³ R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Economic Consequences of Legal Origins', *Journal of Economic Literature* 46:2 (2008), pp. 285-332.

¹⁴ P.A. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism' in P.A. Hall and D. Soskice (eds) *Varieties of Capitalism*, (Oxford University Press: 2001).

¹⁵ B. Ebbinghaus, 'Does a European Social Model Exist and Can It Survive?' in G. Huemer, M. Mesch and F. Traxler (eds), *The Role of Employer Associations and Labour Unions in the EMU* (Ashgate, Aldershot: 1999).

¹⁶ M. Höpner and A. Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', *West European Politics*, 33:2 (2010), pp. 344-68.

¹⁷ The other countries are Ireland, the Netherlands, and the Scandinavian countries. See Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *JCMS* and S. Leibfried, 'Social Policy: Left to the Judges and Markets?', in H. Wallace, W. Wallace, and M. A. Pollack (eds) *Policy-making in the European Union*, (5th ed.; Oxford University Press: 2005).

¹⁸ Höpner and Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', *West European Politics*.

the development of the ESM include: the decision-making process at EU level¹⁹, the predominance of (national) identity politics and the corresponding absence of a European identity²⁰, the non-participatory nature of EU decision-making²¹, and the dominance of capital over labour within the European project.²²

This article acknowledges that a variety of different political, cultural, economic and structural factors explain the development hitherto of the ESM but also introduces a legal perspective. In particular, the ESM has developed as a result of the EU's limited legislative competence and innovative ways of using that competence in the face of individual (particularly UK) member-state ability to block legislative developments. Against this background, the article uses a socio-legal understanding of the 'europeanization' literature to explore the ways in which there have been attempts under the ESM to europeanize systems of national labour law, and the actors involved in that process. In the legal literature, the discourse on europeanization has distinguished between measures adopted at an EU level which aim at harmonization or co-ordination through 'hard' or 'soft' law mechanisms.²³ The rationale and legal basis for pursuing europeanization – whether through (minimum) harmonization or co-ordination – in the sphere of social policy/labour law has varied over time²⁴ but overall it has served to legitimize the establishment of an internal market.

A focus on europeanization in terms of co-ordination or harmonization illuminates the aims embedded in particular measures and policies. However, it explains little about the processes and actors that influence these measures.

¹⁹ S. Leibfried and P. Pierson, 'Semisovereign Welfare States: Social Policy in a Multitiered Europe', in Leibfried and Pierson, *European Social Policy* and F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press: 1999).

²⁰ M. Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press: 2005) and W. Streeck, 'International Competition, Supra-national Integration, National Solidarity: the Emerging Constitution of "Social Europe"', in M. Kohli and M. Novak (eds) *Will Europe Work? Integration, Employment and the Social Order* (Routledge: 2001).

²¹ A. Warleigh, *Democracy in the European Union: Theory, Practice and Reform* (Sage: 2003).

²² G. Carchedi, *For Another Europe: a Class Analysis of European Economic Integration* (Verso: 2001).

²³ See further S. Weatherill 'The Constitutional Context of (Ever-Wider) Policy-Making' in Jones, Menon and Weatherill, *The Oxford Handbook*, p. 573 and P. Syrpis, 'Should the EU be attempting to harmonise national systems of labour law?' in M. Andenas and C. Baasch Andersen (eds), *Theory and Practice of Harmonization* (Edward Elgar, Cheltenham: 2012).

²⁴ C. Barnard and S. Deakin, 'Social Policy and Labour Market Regulation' in Jones, Menon and Weatherill, *The Oxford Handbook*, p. 546 onwards.

One of the earliest conceptualizations of the term 'europeanization' was given by Ladrech who considered it as 'an incremental process of re-orienting the direction and shape of politics so that EC political and economic dynamics become part of the organizational logic of national politics and policy making.'²⁵ Others have developed Ladrech's definition, widening it to recognize that European political and economic dynamics can be integrated into a member-state's organizational structure through either a 'top-down' or a 'bottom-up' approach.²⁶ This focuses attention on the role of discrete actors at different times. Although europeanization as harmonization was driven principally by the European Commission, domestic developments, particularly in the UK, influenced the development of the ESM from 1979 until 1997. This led to the increasing involvement of non-governmental actors in the europeanization process. Since 1997, there has been a closer alignment between UK and EU social-policy preferences.

This article examines the different stages of development of the ESM from 1973 (entry of the UK into the EEC) until the launch of the European Pillar of Social Rights in 2016, the distinctive legal strategies adopted at different times, and the relationship between the ESM and the UK. It argues that it is difficult to speak of a clearly defined ESM which has developed a social dimension to European integration, and which has had a significant influence on the UK. Overall, the ESM is subordinate to economic freedoms contained in the Treaty despite attempts particularly in the 1990s to establish it as a model in its own right. This became evident in the run-up to and outcome of the 'Brexit' referendum when rhetoric on the EU's contribution to workers' rights in the UK was insufficient to win a majority to vote for 'Remain'. The article concludes with a coda on Brexit which questions whether attempts to europeanize the British system of labour law were a success as measured against its aims and discusses the likely impact of Brexit on UK employment law.

1973 – 1979: The first Social Action Programme

²⁵ R. Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' (1994) 32 (1) *Journal of Common Market Studies* 32:1 (1994) pp. 69-88, p. 69.

²⁶ See U. Sedelmeier, 'Europeanization' in Jones, Menon and Weatherill, *The Oxford Handbook*.

The change in the EEC's abstentionist approach to social policy can be traced to the Declaration of Heads of State or Government after the Paris Summit of October 1972 which proclaimed the attachment of 'as much importance to vigorous action in the social field as to the achievement of economic union.'²⁷

The reasons for the shift in policy are unclear. Politicians such as the German Chancellor, Willy Brandt, were keen to develop a 'social' side to the economic policy of the EEC. In addition, economic and fiscal crises, unemployment, persistent imbalances between member-states, and the political upheavals of the 1960s, particularly in France and Germany, appear to have been factors.²⁸ As Shanks argued: '[t]he Community has to be seen to be more than a device to enable capitalists to exploit the common market; otherwise it might not be possible to persuade the peoples of the Community to accept the disciplines of the market.'²⁹ The emphasis on putting a 'human face' on the EEC's agenda was important given the UK public's ambivalence and the Labour Party's opposition to the country joining the EEC.³⁰ It is therefore likely that the EEC's first enlargement to include Ireland, Denmark and the UK, with its diverse set of social systems, prompted the new focus on social aspects of economic integration.³¹

The result was the adoption of an ambitious Social Action Programme³² which proposed more than thirty legal and policy measures over 3-4 years with the aim of promoting full and better employment; the improvement of living and working conditions; and increased involvement of management and labour in the economic and social decisions of the Community and of workers in the life of undertakings. The legal basis was Articles 100 and/or Article 235 EEC, both of which required unanimous approval in the Council of Ministers. The adoption of

²⁷ *Statement from the Paris Summit*, Bulletin of the European Communities. October 1972, No 10, pp. 14-26.

²⁸ See J. Lodge, 'Towards a Human Union: EEC Social Policy and European Integration' *British Journal of International Studies* 4:2 (1978), pp. 107-134; and, M. Shanks, *European Social Policy Today and tomorrow* (Pergamon Press, Oxford: 1977).

²⁹ M. Shanks, 'The Social Policy of the European Communities' *Common Market Law Review* 14:4 (1977) pp. 375-383, p. 377.

³⁰ For an overview of the period prior to the UK joining the EEC see H. Young, *This Blessed Plot: Britain and Europe From Churchill to Blair* (Macmillan, Basingstoke: 1999).

³¹ A. L. Sandler, 'Players and Process: The Evolution of Employment Law in the EEC' *Comparative Labor Law Journal* 7 (1986), pp. 1-31, pp. 3-4.

³² Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12.2.1974, pp. 1-4.

the measures was therefore vulnerable to member-state political preferences.³³ Lack of political will among the member-states and the need for unanimity meant that the Social Action Programme and its ambitious aims failed largely to materialize. Only three specific legislative measures were adopted on the basis of article 100 EEC: Directive 75/129/EEC on Collective Redundancies, Directive 77/187/EEC protecting the Acquired Rights of workers on the transfer of an undertaking, and Directive 80/987/EEC protecting workers in an insolvency situation. An Action Programme was also adopted in the area of health and safety at work which paved the way for developments in subsequent decades.³⁴

The Court of Justice of the EU (CJEU)³⁵ emerged as an actor in the europeanization of labour law, whether through decisions handed down in infringement proceedings brought by the European Commission or through the preliminary rulings procedure.³⁶ This was particularly evident in the equality sphere where the interplay between the CJEU and British courts drove forward EU equality law in the sphere of indirect discrimination, positive discrimination, and maternity during the 1970s, 1980s and 1990s.³⁷ As the UK had a more developed antidiscrimination law prior to and after accession than other member-states, this led to numerous preliminary references from British courts which gave the CJEU an opportunity to define key concepts in equal pay and equal treatment law.³⁸ Thus, British courts had been faced with questions over equal pay in the 1970s³⁹ and the decision by the Employment Appeals Tribunal to refer a question to the CJEU in *Jenkins v Kingsgate*⁴⁰ resulted in the articulation of the concept of indirect discrimination in relation to the equal pay provision contained in the EEC Treaty. At the same time, the CJEU's case law in

³³ See Scharpf, 'The ESM: Coping with the Challenges of Diversity'.

³⁴ OJ C 165/78.

³⁵ The Court of Justice of the European Union was known as the European Court of Justice before the entry into force of the Lisbon Treaty in 2009.

³⁶ The reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union. This procedure enables national courts to question the Court of Justice on the interpretation or validity of European law. It is contained in article 267 TFEU.

³⁷ C. Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in S. Sciarra, *Labour Law and the Courts: National Judges and the European Court of Justice* (Hart, Oxford: 2001).

³⁸ See J.C. Suk, 'Equality after Brexit: Evaluating British Contributions to EU Antidiscrimination Law' (2017) 40(5) *Fordham International Law Journal* 40:5 (2017), pp.1535-52.

³⁹ See Lord Lester of Herne Hill (Anthony Lester), 'Making Discrimination Law Effective: Old Barriers and New Frontiers' *International Journal of Discrimination and the Law* 2:3 (1997), pp. 167-81.

⁴⁰ Case 96/20, [1981] ECR 911.

the equality sphere had a profound impact on British equality law. For example, the decision in Case 43/75 *Defrenne v Sabena (No. 2)*⁴¹ applied the principle of direct effect to the equal pay provision in Article 119 EEC which resulted in the adoption of the Equal Pay Directive 75/117/EEC and Directive 76/207/EEC on equal treatment.⁴² Although there is evidence that the Labour government in the 1970s was eager to pre-empt EEC decisions by introducing its own laws on employment protection and equal pay,⁴³ the Equal Pay Act 1970 had to be amended following infringement proceedings brought by the European Commission before the CJEU to include the possibility of claims based on equal value.⁴⁴

1979 – 1992: From Stasis to Social Dialogue

A fundamental change in approach to social integration occurred at an EU and UK level after the election of Margaret Thatcher's Conservative government in 1979, although other member-states also pursued 'orthodox and conservative attitudes towards social policy law in the 1980s.'⁴⁵ While the Commission continued to put forward proposals for regulatory legislation to protect part-time work, temporary work, and enable flexible retirement, these failed to secure the necessary consent in the Council where the United Kingdom was willing to block harmonizing social-policy measures.

Bercusson identifies two alternative strategies which sought to maintain and continue Community social policy and labour law at a time of British resistance.⁴⁶ First, EU institutions turned to 'soft law'⁴⁷ initiatives to encourage

⁴¹ [1976] ECR 455.

⁴² An overview of the three *Defrenne* cases and their effect on the UK can be found in R. Nielsen and E.M. Szyszczak, *The Social Dimension of the European Union* (Handelshøjskolens Forlag, Copenhagen: 1991), chapter 3.

⁴³ J. Bridgford and J. Stirling, 'Britain in a social Europe: industrial relations and 1992' *Industrial Relations Journal* 22:4 (1991), pp. 263-72.

⁴⁴ C. Kilpatrick, 'Effective Utilisation of Equality Rights' in F. Gardiner (ed), *Sex Equality Policy in Western Europe* (Routledge: 1997).

⁴⁵ Nielsen and Szyszczak, *The Social Dimension of the European Union*, 1991, p. 30.

⁴⁶ See Bercusson, *European Labour Law*, 1995, chapter 5.

⁴⁷ Instruments of 'soft law', in theory, have no legal effect and should not therefore be called 'law'. However, despite their putatively non-binding character, many of these instruments – recommendations, opinions, Commission communications – have indirect legal effects by setting benchmarks or policy preferences.

the restructuring of Community labour markets and used indirect financial instruments, under the umbrella of the European Social Fund, to promote social policy initiatives and to promote labour law objectives. Second, Jacques Delors, President of the EC Commission⁴⁸, sought to link social policy law to the objectives of realizing an internal market by 1992; an initiative driven by the British (Conservative) government.⁴⁹ This changed the rationale for European social policy initiatives from humanization of the market to the prevention of 'social dumping', seen as an obstacle to the functioning of the market.⁵⁰ The introduction by the Single European Act in 1986 of Article 118A EEC which permitted member-states to adopt harmonizing measures in the area of health and safety by relying on qualified majority voting fundamentally altered the dynamics in the adoption of social policy measures under the ESM and prevented a complete stasis in this area as a result of British opposition. Against the backdrop of a second Action Programme on health and safety that had been adopted in 1984,⁵¹ article 118A EEC provided the basis for a number of general and specific Directives aimed at protecting health and safety at work which included, but also went beyond, the traditional scope of health and safety law.

The implications for UK labour law on health and safety cannot be overstated. Writing in 1993, John Hendy and Michael Ford described the health and safety directives as having 'changed the face of British health and safety law' to the effect that they 'set the agenda for developments in health and safety law and standards.'⁵² The adoption of the Working Time Directive 93/104/EC on the basis of Article 118A EEC is a case in point.⁵³ Having been adopted to prevent not only accidents and disease at work but also to protect broader 'human' aspects of work that included physical, psychological and social considerations, the Directive was unsuccessfully challenged by the UK government in Case C-84/94 *UK v Council* on the basis that working time related to 'working conditions' (which required unanimity voting) rather than health and

⁴⁸ He served as the President of the European Commission from 1985 – 1995.

⁴⁹ See Young, *This Blessed Plot*, 1999, chapter 9 from p. 328 onwards.

⁵⁰ Bulletin of the E.C. 1986, p. 12.

⁵¹ OJ C 67/84.

⁵² J. Hendy and M. Ford, *Redgrave Fife and Machin's Health and Safety*, (2nd edn; Butterworths:1993), pp.v and lxi.

⁵³ B. Fitzpatrick, 'Straining the Definition of Health and Safety?' *Industrial Law Journal* 26 (1997), pp. 115-135.

safety. Implementation of the Directive in the UK has been far from smooth⁵⁴, illustrating the tensions between national and European level approaches to social policy which have been a feature of the UK's membership of the EU.

Although the British government overall claims a good record of compliance with EU social policy measures, it has often adopted a policy of 'minimum compliance' where it disagreed with a directive or used European standards lower than the UK equivalent as a reason for deregulation. This was common practice under Conservative governments 1979-1997.⁵⁵ In addition to infringement proceedings brought by the European Commission, individuals and groups challenged UK policy with regard to EU law before British courts, including invoking the preliminary rulings procedure to the CJEU contained in article 267 Treaty on the Functioning of the European Union (TFEU) in order to compensate for British government resistance to social rights adopted at EU level.

Delors initiated another shift away from supra-national harmonization of social policy (evidenced in the first Social Action Programme) towards the development of a dialogue between the social partners and the Commission. This was not new but plans for the formal involvement of the social partners in the legislative process marked a departure from a 'top-down' approach to europeanization to a more complex process of law-making. Plans for a European social dialogue emerged at the *Val Duchesse* talks between 1985 and 1987, were institutionalized in Article 118B EEC by the Single European Act, and eventually led to the adoption of the Community Charter of Fundamental Social Rights of Workers, and the Protocol and Agreement on Social Policy of the Treaty on European Union agreed at Maastricht in December 1991. The former, adopted by the member-states on 9 December 1989⁵⁶ provided for a body of minimum social provisions that were to act as the social dimension to accompany the

⁵⁴ For the working time directive and its implementation in the UK, see R. Hyman, 'Britain and the European Social Model: Capitalism Against Capitalism?' *IES Working Paper: WP19*, November 2008.

⁵⁵ This can be seen in relation to the implementation of health and safety standards in the 1980s. See M. Beck and C. Woolfson, 'The Regulation of Health and Safety in Britain: From Old Labour to New Labour' *Industrial Relations Journal* 31:1 (2000), pp. 35-50.

⁵⁶ The content of the Social Charter shifted during its adoption partly in response to Member-state (including the UK) concerns and its final text has been described as 'indicative of the limited commitment of the Member-states to the full implementation of social rights post-1992.' Nielsen and Szyszczak, *The Social Dimension of the European Union*, p. 34.

creation of the Single European Market. The UK dissented on grounds of principle: the Charter was considered threatening to British visions of a 'free market' and symbolic of outdated ideas rooted in 'Marxism and class struggle'.⁵⁷ Thus, it could not be integrated into the Treaty of Rome. The Charter's principles were incorporated in the Commission's 1989 Social Action Programme⁵⁸ which proposed the adoption of a large number of directives in the social field, some of which could be adopted by qualified majority voting and therefore applicable to the UK despite its opposition to the Charter.

The Maastricht Protocol and Agreement implemented Delors's view that the social dialogue was the principal mechanism for the future regulation of labour law and social policy at EU level: most of its substance was the result of negotiations between the social partners.⁵⁹ Again as a result of British opposition, the Agreement could not be inserted into the Maastricht Treaty but was given legal effect among the eleven member-states that agreed to it. It significantly expanded the legal competences of the EC in the field of social policy to allow the Council to adopt, by qualified majority voting, directives in five fields: health and safety, working conditions, the information and consultation of workers, equality between men and women, and the integration of persons excluded from the labour market.⁶⁰ Unanimity was required for the Council to legislate in the sphere of social security and social protection of workers, employment termination, limited collective representation (subject to exclusions in the field of pay, the right of association and the right to strike), conditions of employment for third-country nationals, and the Social Fund.⁶¹ In addition, the Agreement changed the role of the Commission with regard to the social dialogue: henceforth, the Commission was to consult the social partners before taking action in the social policy field and to involve the partners in the content of the proposal. It also allowed for the social partners to negotiate a proposal which, if agreement were to be reached, would be implemented either in accordance with the procedures and practices specific to management and

⁵⁷ H. Ramsay, 'The Community, the Multinational, its Workers and their Charter: A Modern Tale of Industrial Democracy?' *Work, Employment and Society* 5:4 (1991), pp. 541-66, p. 558.

⁵⁸ COM (89) 568 final.

⁵⁹ For a detailed account of the negotiations see J.E. Dolvik, *Redrawing Boundaries of Solidarity? ETUC, Social Dialogue and the Europeanisation of Trade Unions in the 1990s*, ARENA Report No 5/97, Fafo Report No. 238, Oslo, December 1997, chapter 8.

⁶⁰ Now contained in article 151 TFEU.

⁶¹ *Ibid.*

labour and the member-states or by a Council decision on a proposal from the Commission.⁶²

The 1980s then were characterized by a number of tensions in the UK-EU relationship which revolved around differing understandings of the purpose of the EC.⁶³ For Delors, the EC's aim was not to maximize competitiveness or profits as goals in their own right, but to raise living and working-life standards. For the UK, the EC was to become a driving force of the 'free' market which would, in turn, ensure the highest levels of prosperity and employment; workers' rights in this context were to ensure the free flow of the commodity of labour to maximize the impact of the open market. Collective rights were an obstacle to that aim.

Against this background, the period 1979-1997 offers a clear example of the UK's (negative) influence on the development of European social policy and provides examples where attempts at europeanization led to a lowering of labour standards in the UK. Yet it also illustrates the extent to which the UK's blocking veto resulted in creative approaches to europeanization in order to circumvent British opposition. Even though Delors' *Espace Sociale Européenne* was never completed, with the benefit of hindsight, the mid-1980s onwards can be viewed as the starting point of an unprecedented period of legislative activity which aimed to develop an aspirational ESM that has come to define labour lawyers' views on the minimum content, form and shape of 'social Europe'. The Delors Presidency is the only period where the ESM was given the same status as economic integration.

In the UK, the steps towards the development of an ESM initially had limited legal effects – mainly in the field of equal opportunities and health and safety law – but consequences for the debate on public policy as well as the attitudes of the labour movement towards UK membership of the EEC/EC.

The Trades Union Congress (TUC) originally adopted a pragmatic approach to the UK's proposed entry into the EEC. It neither supported nor opposed entry *per se* but was concerned with the terms and conditions of accession.⁶⁴ Following the publication of the Conservative government's

⁶² See now article 155 TFEU.

⁶³ See further Ramsay, 'The Community, the Multinational, its Workers and their Charter: A Modern Tale of Industrial Democracy?', pp. 558-9.

⁶⁴ P. Teague and J. Grahl, *Industrial Relations and European Integration* (Lawrence and Wishart: 1992), pp. 191-2.

negotiated terms for entry, the TUC opposed membership of the EEC and urged a 'No' vote in the 1975 British referendum. However, after the decision in favour of the UK remaining in the EEC, the general secretary of the TUC announced an end to its boycott of EEC institutions and from 1976 TUC leaders participated in EEC advisory bodies, and played a constructive role within the European Trades Union Congress (ETUC). During the early 1980s, the TUC went through a phase of disillusionment with the EEC which again led to its Congress calling for the UK's withdrawal from membership in 1981.⁶⁵ However, this phase came to an end from the mid-1980s onwards, when the TUC adopted a policy of 'realism'.⁶⁶ As Paul Teague and John Grahl point out, 'becoming pro-European came to be an aspect of the modernising process for the British TUC.'⁶⁷ Jacques Delors' speech at the ETUC conference in Stockholm in May 1988, where he promised the introduction of a 'social dimension' to the single market, was significant and led to his invitation to address the TUC Congress later that year where he reiterated the same message which secured trade-union support for closer European integration.⁶⁸ As Richard Hyman explains, 'the 'social dimension' of the EU became far preferable to the market liberalism of the Thatcher government.'⁶⁹ Similar developments also took place in the Labour Party which appeared to 'endorse the Social Charter as part of its march to European style social democracy.'⁷⁰ In line with its positive position on the EEC, the TUC supported the Maastricht Treaty and the adoption of the Social Policy Agreement, and the UK's participation in Economic and Monetary Union.⁷¹ Although the Social Policy Agreement did not initially apply to the UK, this gave the TUC a major campaigning focus over the next eight years, until the New Labour government came to office in 1997.

⁶⁵ Resolution of 1981 Congress.

⁶⁶ Teague and Grahl, *Industrial Relations and European Integration*, pp. 191–2.

⁶⁷ *Ibid.*, p. 208.

⁶⁸ <http://www.historyandpolicy.org/trade-union-forum/meeting/how-the-tuc-learned-to-love-the-european-union-and-how-the-affair-turned-ou>.

⁶⁹ R. Hyman, 'Trade Unions and "Europe": Are the Members out of Step?' *LEQS Paper* No 14/2009 (London: LSE, November 2009), 26. See also B. Rosamond, 'National Labour Organizations and European Integration: British Trade Unions and "1992"' *Political Studies* 41:3 (1993), pp. 420–34.

⁷⁰ See Fundamental Policy Review, *Social Justice and Economic Efficiency* and Policy Review Report *Meet the Challenge, Make the Change*; which were adopted at the (respectively) 1988 and 1989 Annual Conferences.

⁷¹ Hyman, 'Trade Unions and "Europe"', p. 26.

1993 – 2009: The changing nature of europeanization or the beginning and end of European labour law

Based on the legislative developments initiated by Delors in the 1980s, the Maastricht Treaty 1992 marked the turn to an active europeanization of social policy by the European Commission. This saw the involvement of the social partners to put 'the flesh onto the rather insubstantial bones of the citizenship provisions introduced by Maastricht',⁷² while also broadening the legislative process to address concerns as to democratic legitimacy. Academic commentaries were optimistic about the future development of labour law at EU level and considered the introduction of the social dialogue as laying the constitutional foundation for a collective labour law of the EU.⁷³ Directive 96/34/EC on Parental Leave was the first measure to be negotiated by the social partners through the social dialogue.⁷⁴ This was followed by agreements on part-time work and fixed-term work which sought to grant rights to workers while achieving a minimum level of harmonization.⁷⁵ Where the social partners could not agree on a proposal, as in the case of the European Works Council Directive (partly because of opposition by the Confederation of British Industry within the Union of Industrial and Employers' Confederations of Europe, now known as BUSINESSEUROPE), this was adopted using the normal legislative procedure.⁷⁶

The move away from 'top-down' europeanization was not however without its problems, as illustrated by the *UEAPME* case⁷⁷ where the body representing small and medium-sized undertakings (UEAPME – the European Association of Craft, Small and Medium-Sized Enterprises) challenged the democratic legitimacy of the social dialogue. In rejecting UEAPME's challenge, the Court of First Instance recognized the role of the social dialogue and the contribution it made to enhancing the legitimacy of the EU by providing an alternative type of representative democracy. Although the case resulted in the Council and

⁷² Barnard and Deakin, 'Social Policy and Labour Market Regulation' in Jones, Menon and Weatherill, *The Oxford Handbook*, p. 547.

⁷³ See Bercusson, *European Labour Law*, part IX.

⁷⁴ OJ L 68, 18.3.2010, pp. 13–20

⁷⁵ Directive 97/81/EC OJ L 14, 20.1.1998, pp. 9–14 and Directive 99/70/EC OJ L 175, 10.7.1999, pp. 43–8.

⁷⁶ Directive 94/45/EC OJ L 254, 30.9.1994, pp. 64–72.

⁷⁷ Case T-135/96 [1998] ECR II-02335.

Commission scrutinizing the representativity of the social partners more closely,⁷⁸ the nature of the social dialogue did not change. The case continues to raise fundamental questions about the nature of EU-level collective bargaining and its legitimacy⁷⁹ in europeanizing national labour law systems especially in light of the limited consultation that appears to occur between the social partners at EU level and their national affiliates.⁸⁰

Elected in the UK in May 1997, the Labour government of Tony Blair resulted in an immediate change in the British approach towards the EU. Despite some misgivings, the government signed the Social Chapter, and the Agreement on Social Policy was incorporated into the Amsterdam Treaty, adopted in 1997: the legislation adopted under the Social Chapter during the UK's opt-out (e.g. the European Works Council Directive) was thereby extended to the UK.⁸¹ A number of provisions were inserted under a new Title on Employment which aimed at the co-ordination – rather than harmonization – of employment policy across the member-states and which formed the basis of the European Employment Strategy (EES) launched at Luxembourg in November 1997. Labour market reforms and policy convergence to achieve full employment were to be achieved at national level through legislation and political choices, with the EU adopting a co-ordinating role. As Bercusson pointed out, the influence of Sweden and Finland which acceded to the EU in 1995 is obvious: the aim of the European Employment Strategy was to allow member-states to preserve national labour market policies and powerful trade-union movements.⁸² Thus, the resort to soft law through the European Employment Strategy could be considered 'as a means of finding a middle ground between legal and political interventions, [which is] particularly important whilst member-states continue to

⁷⁸ See the Social Partners' Study of 1993, Doc No V/6141/93/E. The main findings of the study can be found in COM(93) 600, Annex 3.

⁷⁹ B. Bercusson, 'Democratic Legitimacy and European Labour Law' *Industrial Law Journal* 28:2 (1999), pp. 153-70.

⁸⁰ R. Hyman, 'Trade Unions and the Politics of the European Social Model' *Economic and Industrial Democracy* 26:1 (2005), pp. 9-40.

⁸¹ There were question marks during the period of the opt-out over how social policy adopted during that period may or may not apply to the UK. For a discussion see B. Towers, 'Two speed ahead: social Europe and the UK after Maastricht' *Industrial Relations Journal* 23:2 (1992), pp. 83-9.

⁸² B. Bercusson, *European Labour Law*, (2nd edn; Cambridge University Press: 2009), p. 169.

be so reluctant to sanction further inroads into their sovereignty.⁸³ However, once accompanied by the launch of the Lisbon Strategy in 2000 – to turn the EU into ‘the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’⁸⁴ by 2010 – developed in part by the Spanish and British governments with a view to encouraging market deregulation and labour market flexibility,⁸⁵ the EES became a tool to stimulate ‘productivity through the creation of a favourable business environment, shorn of much red tape, and improving the quality of the workforce.’⁸⁶

Accompanying the shift away from harmonizing labour laws, the Amsterdam Treaty gave additional impetus to the EU’s equality agenda – the ‘mainstay of EU social policy’⁸⁷ – through the introduction of article 13EC (now article 19TFEU). This resulted in the (unanimous) adoption of the equal treatment Directive 2000/43 on race and ethnic origin and the Framework Directive 2000/78; both now implemented in the UK by the Equality Act 2010. While the launch of the Lisbon Strategy is often considered as the beginning of the end of the development of European labour *law*, equality law has continuously expanded its scope beyond the workplace and the CJEU has played a key role in strengthening the protection against discrimination by removing the upper limit for compensation for discrimination⁸⁸, broadening the scope of sex discrimination to include transgender people⁸⁹ and, introducing discrimination by association into UK law⁹⁰. EU equality law has also impacted on the provision of goods and services, housing, education and associated areas of social

⁸³ D. Ashiagbor, ‘Soft Harmonization: The “Open Method of Coordination” in the European Employment Strategy’ *European Public Law* 10:2 (2004), pp. 305-32, p. 313.

⁸⁴ European Council, *Presidency Conclusions – Lisbon European Council* Brussels: European Council, 2000.

⁸⁵ See A.M. Sbragia, ‘Shaping a Polity in an Economic and Monetary Union: The EU in Comparative Perspective’ in A. Martin and G. Ross (eds), *Euros and Europeans: Monetary Integration and the European Model of Society* (Cambridge University Press: 2004), pp. 66-8.

⁸⁶ C. Barnard, ‘EU “Social” Policy: From Employment Law to Labour Market Reform’ in P. Craig and G. de Búrca, *Evolution of EU Law* (Oxford University Press: 2011), p. 657.

⁸⁷ Barnard and Deakin, ‘Social Policy and Labour Market Regulation’ in Jones, Menon and Weatherill, *The Oxford Handbook*, p. 544.

⁸⁸ C-152/84 *Marshall v Southampton and South West Hampshire AHA* [1986] ECR 723.

⁸⁹ C-13/94 *P v. S and Cornwall County Council* [1996] ICR 795.

⁹⁰ C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

protection.⁹¹ In parallel, the UK's approach to equality law impacted on the extent to which EU law (as interpreted by the CJEU) permits positive action and the way in which maternity protections are framed.⁹² In relation to the former, the restrictive British approach to positive action has been adopted by the CJEU.⁹³

The main policy instrument to give effect to the European Employment Strategy, introduced as part of the Lisbon Strategy, was the Open Method of Co-ordination (OMC) – an inter-governmental process – described as a 'means of spreading best practice and achieving greater convergence towards the main EU goals.'⁹⁴ Its characteristics are flexibility, adaptability and pervasiveness.⁹⁵ Giubboni argues that 'in embracing open co-ordination the Union represents, more than ever before, a "polycentric legal system" in which europeanization (of the employment policies and labour law of the member-states) respects 'national peculiarities'.⁹⁶ In this the OMC is a normative tool which can be used to enshrine a series of common values within the national policies of member-states so that the goals are identical with methods adapted to suit domestic frameworks.

Opponents of the OMC challenge its effectiveness and argue that it only 'impacts on domestic policy-making, when the European objectives coincide with the national policy objectives.'⁹⁷ This may be the case in areas where it is difficult to achieve the required majorities to pass legislation on the basis of either qualified majority voting or unanimity in the Council of Ministers. Streeck

⁹¹ For the implementation of equality legislation in the UK see R. Hyman, 'Britain and the European Social Model' *IES Working Paper*.

⁹² For overview see Suk, 'Equality after Brexit' *Fordham International Law Journal*.

⁹³ The CJEU has only permitted positive action where safeguards were in place to avoid automatic preferential treatment. See Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3069; Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6383; Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5562; and, Case C-158/97 *Badeck and Others* [2000] ECR I-1902.

⁹⁴ COM (2002) 629.

⁹⁵ M.-J. Rodrigues and M. Telo (eds), *Vers une société européenne de la connaissance : La stratégie de Lisbonne 2000-2010* (Éditions de l'Université de Bruxelles, Bruxelles: 2004).

⁹⁶ S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press: 2009), p. 247 citing S. Sciarra, 'Global or Re-Nationalised? Past and Future of European Labour Law' in F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart, Oxford: 2000), p. 288.

⁹⁷ C. De la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' *European Law Journal* 8:1 (2002), pp. 38-58, p. 50.

argued that a shift from hard to soft law in social policy (which he describes as 'neo-voluntarism') could lead to 'a type of social policy that tries to do with a minimum of compulsory modification of both market outcomes and national policy choices, presenting itself as an alternative to hard regulation as well as to no regulation at all.'⁹⁸ Although the Lisbon Strategy and the OMC can be criticized for a lack of effective time constraints on implementation or enforcement mechanisms to ensure compliance, a general consensus emerged that the Lisbon Strategy 'enlarged the EU employment and social agenda on matters of national priority'⁹⁹ even if there is limited evidence of its impact on the europeanization process.

The introduction of the Charter of Fundamental Rights by the Treaty of Nice in 2000 – albeit as a non-legally binding document due to British resistance to its incorporation into the Treaty – contributed to this consensus. On the one hand, the introduction of the Charter functioned 'as a limit to the exercise of the powers of the EU institutions and the Member-states acting as decentralized European administration'.¹⁰⁰ On the other, the placement of the full range of rights within a single document signified a process of deconstruction of the traditional hierarchy of rights within EU law which had prioritized economic over social rights; a hierarchy which had tempered the EU's social ambitions since the 1970s. As Wedderburn had recognized, writing in 1995: 'Although some lip service has been paid to the "equal" place of the "social dimension" with economic ambitions, it is impossible to recognise this in the real world of the Community.'¹⁰¹ The Charter could have signified a sea change in this regard. Placing the OMC against this backdrop of fundamental rights protection suggested 'possibilities for stimulating governmental actors to reflect upon and to develop the protection of fundamental rights in policy-making while also holding states to account for their performance through systematic and periodic

⁹⁸ Streeck, 'From Market-Making to State-Building?' in Leibfried and Pierson, *European Social Policy Between Fragmentation and Integration*, p. 424.

⁹⁹ J. Goetschy, 'The Lisbon Strategy and Social Europe: two closely linked destinies', in M.J. Rodrigues (ed), *Europe, Globalization and the Lisbon Agenda* (Edward Elgar, Cheltenham: 2009), p. 222.

¹⁰⁰ O. de Schutter, 'The Implementation of Fundamental Rights Through the Open Method of Co-ordination' in O. de Schutter and S. Deakin, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, Brussels: 2005).

¹⁰¹ Lord Wedderburn, *Labour Law and Freedom* (Lawrence & Wishart: 1995), p. 387.

analysis and review.¹⁰² The viability of using the OMC to stem the rights agenda has however been questioned. As Armstrong points out, the 'OMC, while it may provide EU institutions with information, is not primarily intended as a tool to stimulate those institutions to act: rather it is intended to promote policy reflection by the member-states.¹⁰³ The Lisbon Strategy marked therefore a permanent shift in approach to europeanization by the Commission in the social-policy sphere: there is no longer a desire to adopt harmonizing legislation or legislation which aims at creating social/industrial citizenship. Instead, social policies are to provide a market-making/market-correcting function by co-ordinating national social policies.¹⁰⁴

If EEC social policy had a positive influence on UK labour law during the 1970s, and the opposition of the British government forced a creative approach to EC social policy during the 1980s and 1990s, then the post-1997 period is characterized by a more symbiotic relationship. Apart from the Labour government's acceptance of the social chapter,¹⁰⁵ its enthusiasm for harmonizing legislation in the social-policy sphere was limited. Indeed, the government emphasized that social legislation should not compromise competitiveness and labour flexibility, and it used its first period of presidency of the EU in 1998 to put forward a post-deregulation agenda at European level which was to influence the EU institutions' approach to social policy into the twenty-first century.¹⁰⁶ Overall, the increased focus on soft policy instruments at EU level was more in line with the traditional British preference for less intrusive or intergovernmental methods of EU governance¹⁰⁷, as well as mirroring the government's approach to

¹⁰² K.A. Armstrong, 'The Open Method of Co-ordination and Fundamental Rights: A Critical Appraisal', Draft Paper for Discussion at the 'Fundamental Rights and Reflexive Governance' Seminar: Columbia Law School, New York, 4th November 2005, p. 2.

¹⁰³ *Ibid.*, p. 4.

¹⁰⁴ See further Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform' in Craig and de Búrca, *Evolution of EU Law*.

¹⁰⁵ For an overview of the Labour Party's shift in approach to the EU since the 1980s see R. Holden, *The Making of New Labour's European Policy* (Palgrave, Basingstoke: 2002); also P. Daniels, 'From hostility to "constructive engagement": the Europeanisation of the Labour party' *West European Politics* 21:1 (1998), pp. 72-96.

¹⁰⁶ See D. Henderson, 'The UK Presidency: An Insider's View' *Journal of Common Market Studies* 36:4 (1998), pp. 563-72 and Höpner, M. and Schäfer, A. (2010) 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', *West European Politics* 33(2): 344-68.

¹⁰⁷ S. Bulmer, 'New Labour and the European Union 1997-2007' Working Paper FG 1, 2008/ 05, March 2008, SWP Berlin.

domestic policy-making.¹⁰⁸ Indeed, the UK's flexible labour market became a model for other member-states to follow.¹⁰⁹ As a result, there were limited 'hard' legal initiatives from the early 2000s onwards, with the Blair government actively seeking to counteract harmonizing legislative proposals that increased workers' rights.¹¹⁰ Much legislation implemented in the UK during this period was characterized either by minimalism or 'over-regulation' where complex procedures reduced the impact and accessibility of rights.¹¹¹ As part of the UK's second presidency of the EU in 2005,¹¹² the government focused inter alia on securing economic and social reform particularly in relation to the adoption of the Services Directive 2006/123/EC and further watering down the protections of the Working Time Directive.

During this period there also was a marked shift in the CJEU's approach which, to this point had developed European labour law and its importance vis-à-vis the common market. In the employment sphere, the CJEU's case law can be contrasted with the approach of UK courts which have tended to give a narrow interpretation of employment rights.¹¹³ As a result, British trade unions, traditionally wary of judicial interference in labour law, increasingly came to view strategic preliminary references to the Court of Justice as a potentially constructive way of leveraging change at national level.¹¹⁴

This was to change after the CJEU's decisions in *Viking* and *Laval*, both handed down within a week of each other in December 2007.¹¹⁵ The judgments,

¹⁰⁸ See P. Smith, 'New Labour and the Commonsense of Neoliberalism: trade Unionism, Collective Bargaining, and Workers' Rights' *Industrial Relations Journal* 40:4 (2009), pp. 337-55.

¹⁰⁹ See COM(2006) 708, p. 12.

¹¹⁰ An example can be found in the Agency Workers' Directive. See further N. Countouris and R. Holton, 'The Temporary Agency Work Directive: Another Broken Promise?' *Industrial Law Journal* 38:3 (2009), pp. 329-38.

¹¹¹ See Smith, 'New Labour and the commonsense of neoliberalism' *Industrial Relations Journal*, p. 343.

¹¹² See FCO, *Prospects for the EU in 2005. The UK Presidency of the European Union* (The Stationery Office: 2004), pp. 2-5. For an analysis of the presidency, see R. Whitman, 'The UK Presidency: In the Hot Seat' *Journal of Common Market Studies* 44: annual review (2006), pp. 57-62.

¹¹³ See M. Ford, 'The Impact of Brexit on UK Labour Law' *International Journal of Comparative Labour Law and Industrial Relations* 32:4 (2016), pp. 473-95.

¹¹⁴ See A.C.L. Davies, "Judicial Self-Restraint in Labour Law," *Industrial Law Journal* 38:3 (2009), pp. 278-305, p. 287.

¹¹⁵ Case C-438/05, *Viking* ECR [2007] I-10779; Case C-341/05, *Laval* [2007] ECR I-11767. The cases have been discussed at length elsewhere and there is a vast amount of literature on the judgments. See the website of the European Trade Union Institute (<http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The->

considered to be among the most high-profile judicial decisions in EU law during the last decade, have created a difficult interface between EU free-movement law and national labour regulation. Both cases arose in the specific context of increased free movement after the 2004 enlargement which had enhanced the disparity in labour standards across the EU at a time when EU commitment to the harmonization of national labour laws and the development of any notion of industrial/social citizenship was in decline. In addition, the europeanization of social policy through the OMC stalled as a result of the diversity of national labour law systems and differing preferences among 'old' and 'new' member-states. Unlike the first round of enlargements in 1973, the 2004 enlargement – unprecedented in terms of its size, historical significance, and political and economic consequences, incorporating former states of the Warsaw Bloc¹¹⁶ – did not precipitate any initiatives to further develop the ESM. As Scharpf predicted, the Eastern enlargement increased heterogeneity, thereby making it harder to agree on the scope and content of the ESM.¹¹⁷ What became clear post-enlargement was that confusion over the purpose and content of the ESM and its sub-ordination to economic freedoms in the EU's legal order rendered it inadequate to provide a countervailing force for workers at the national level against pressures arising at an EU level (such as an increase in the free movement of workers and enterprises).

Much of the language used in the judgments is familiar but the Court frequently relied on its internal market case law rather than case law in the social policy sphere.¹¹⁸ Both judgments set limits to the type of collective action available to trade unions. By requiring trade unions to justify the proportionality of collective action if it is to be lawful in cases where it restricts the free movement of services or the freedom of establishment, the Court introduced a judicial dimension to labour relations. By choosing to balance the right to strike with the economic freedoms at issue and thereby creating a conflict of norms, the Court is, in effect, revealing its expectation that national courts should be

[interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements](#)).

¹¹⁶ F. Schimmelfennig and U. Sedelmeier, 'The Politics of EU Enlargement: Theoretical and Comparative Perspectives', in F. Schimmelfennig and U. Sedelmeier (eds) *The Politics of European Union Enlargement: Theoretical Approaches* (Routledge, Oxon: 2005).

¹¹⁷ Scharpf, *Governing in Europe*, 1999.

¹¹⁸ See A. Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' *Human Rights Law Review* 8:4 (2008), pp. 714-29.

willing to get involved in the autonomous bargaining structures of collective relations and brings collective labour law within the regulatory sphere of the EU institutions despite its explicit exclusion from the Treaty. The introduction of the concept of 'proportionality' in balancing the opposing rights in both cases is a difficult concept to reconcile with the process of collective relations.¹¹⁹ Although the concept may be sufficiently broad and flexible to satisfy both employers and trade unions in some situations, it also leaves a lot of room for interpretation by national courts and influence by national political sentiments. This may potentially create wide disparities in the protection of collective action across the member-states. As a result, the cases question the fundamental nature of the right to industrial action enjoyed by trade unions within the EU legal order. The CJEU's willingness to adjudicate on the right to strike marked a departure from earlier case law which had exempted national labour laws from the free movement of goods.¹²⁰ The judgments in *Viking* and *Laval* thus stand out for the CJEU's willingness to prioritise EU economic integration over the preservation of national autonomy in the social sphere. The cases also re-established the traditional hierarchy that subordinates the EU's social dimension to economic concerns but a time when many had expected the Court to follow a different approach. For critics, the cases confirmed the suspicion that the EU, in the context of the Lisbon Strategy and despite the adoption of the Charter of Fundamental Rights, was not interested in protecting the 'social Europe' espoused by Delors.¹²¹

The *Viking* case, which was raised in the English courts, was eventually settled out of court.¹²² Nonetheless, the CJEU's judgments have had three effects on British industrial relations: 'the "chilling effect" which inhibits industrial action, the "ripple effect" which undermines collective bargaining, and the

¹¹⁹ See also N. Hös, 'The principle of proportionality in *Viking* and *Laval*: An Appropriate Standard of Judicial Review?' (2010) 1 *European Labour Law Journal* 236.

¹²⁰ See Case C-265/95 *Commission v France* [1997] I-6961 and Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8, Article 2.

¹²¹ See H.-W. Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the ESM in Anti-Discrimination and Consumer Law' in U. Neergaard, R. Nielsen and L. Rosebery (eds), *The Role of Courts in Developing a ESM: Developing Theoretical and Methodological Perspectives* (Djøf Forlag, Copenhagen: 2010).

¹²² M. Murphy 'Finnish shipping group settles case over cheap labour', *Financial Times*, 4 March 2008.

“disruptive effect” on UK industrial relations.¹²³ The ‘disruptive effect’ has had the most visible impact. It centres around debates on the provision of ‘British Jobs for British Workers’ which were sparked by the Lindsey oil refinery dispute in 2009.¹²⁴ The unions, despite not supporting the action as to do so would have left them open to claims for damages, benefited from the anti-European sentiments generated by the dispute, winning wide political and public support. They negotiated a deal between the owner of the refinery and the workers which contained pledges to employ a certain number of British workers on the site. The high level of public support during the dispute reflected wider concerns and resentment about the impact of European integration and the ambiguous nature of the ESM which resurfaced in the run-up to the Brexit referendum. These concerns also reflected fluctuating British trade-union attitudes to the EU. A switch to the left in the leadership of Unite, one of the largest TUC-affiliates, coupled with a pragmatic TUC general secretary, Brendan Barber, who had succeeded the pro-European John Monks in 2003, resulted in a more critical position on EU matters.¹²⁵ Thus, the TUC rejected the proposal for a European Constitution in 2005 on the grounds that it entrenched economic liberalization and it voted in favour of a referendum on the Lisbon Treaty in 2007 as a protest against the UK’s opt-out from the Charter of Fundamental Rights.¹²⁶

2009 – 2016: From soft law to Social Pillar – all change or more of the same?

The CJEU’s decisions in *Viking* and *Laval* led to increased calls for the adoption of a Social Progress Protocol¹²⁷ to be attached to the EU treaties. The proposed Protocol clarified the relationship between fundamental rights and economic freedoms. In cases where these conflict, fundamental social rights are to take

¹²³ L. Hayes, T. Novitz and H. Reed, ‘Applying the Laval quartet in a UK context: chilling, ripple and disruptive effects on industrial relations’, in A. Bückler and W. Warneck (eds), *Reconciling Fundamental Social Right and Economic Freedoms after Viking, Laval and Rüffert* (Nomos, Baden Baden: 2011).

¹²⁴ See ACAS, *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute*, 16 February 2009
<http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0>.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ The idea of a Social Progress Protocol is not new. For an overview of the discussion see A. Bückler, ‘A comprehensive Social Progress Protocol is needed more than ever’ *European Labour Law Journal* 4:1 (2013), pp. 4-23.

precedence. Economic freedoms are to be interpreted in a way that does not violate the exercise of fundamental social rights, including the right to negotiate, conclude, and enforce collective bargaining agreements. In addition, the Protocol mandated the EU institutions to take legislative action to ensure social progress. However, although the Lisbon Treaty made a number of changes to the EU and its treaties, only few concern the chapters on employment and social policy.¹²⁸ In addition, article 6(1) TEU elevated the status of the Charter to that of a legally binding document.¹²⁹ Academic commentaries at the time hoped that the CJEU would use the Charter's provisions, particularly those contained in the 'Solidarity Chapter' to develop a unifying ideology and normalization of social standards, particularly against the backdrop of the OMC's potentially deregulatory guidelines and the decisions in *Viking* and *Laval*.¹³⁰ The early signs regarding the Court's willingness to apply the Charter's provisions were promising.¹³¹ However, this hope was not long lived. Thus, in the British case of *Alemo-Herron v. Parkwood Leisure Ltd*¹³² decided in 2011, the CJEU found that collective agreements applicable to public-sector workers would not apply after the transfer of an undertaking to the private sector unless the future employer agreed to be bound by the collective agreement. In doing so, the CJEU overturned long-standing British acceptance of the practice. In the British cases of *BET Catering Services Ltd v Ball*¹³³ and *Whent v T Cartledge Ltd*¹³⁴, the UK courts had found that a collective agreement negotiated before the transfer of an undertaking which had been properly incorporated into the contract of employment could apply to the new employer provided there was no subsequent variation of the employment contract. This premise led Lord Hope to observe in *Alemo* that 'had this issue been solely one of domestic law, the question would

¹²⁸ See article 151 TFEU.

¹²⁹ The UK and Poland secured an opt-out from the Charter (Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom). The exact meaning of the opt-out is unclear but the CJEU confirmed in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* [2011] ECR I-13905 that the Charter still applies in both countries.

¹³⁰ See Bercusson, *European Labour Law*, 2009, chapter 7.

¹³¹ See C-236/09 *Association Belge des Consommateurs Test-Achats v Conseil des Ministres* [2011] 2 CMLR 38; joined cases C-159/10 and C-160/10, *Fuchs and Köhler v Land Hessen* [2011] ECR I-06919; and C-78/11 *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and others* ECLI:EU:C:2012:372.

¹³² Case C-426/11, ECLI:EU:C:2013:521.

¹³³ Unreported, 28 November 1996.

¹³⁴ [1997] IRLR 153.

have been open only to one answer';¹³⁵ namely, that the employer could be bound by the collectively agreed terms before the transfer.

The CJEU disagreed and, in doing so, adopted the same approach as in *Viking* and *Laval* in prioritizing economic over social rights. It found that the UK's approach limited 'considerably the room for manoeuvre necessary for a private transferee to make [significant adjustments and changes to working conditions which are required in the case of the transfer of an undertaking from the public to the private sector]'¹³⁶ and would upset the balance between the interests of the transferee on the one hand and the employee on the other.¹³⁷ The CJEU found further support for this conclusion in relying on Article 16 of the Charter which enshrines the freedom to conduct a business and which makes it:

[A]pparent that ... the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.¹³⁸

In the UK, the decision was described as a 'forthright assault on collective bargaining'.¹³⁹ The judgment fortifies the view that, while previous case law focused on the need for the protection of workers' rights and recognized the EU's limited competence in the social policy sphere, the CJEU is now following the Commission in prioritizing market priorities over social rights. Subsequent cases concretize the CJEU's reluctance to endow collective labour rights with a constitutional nature despite their inclusion in the Charter.¹⁴⁰ The Charter therefore does little to disturb the *status quo* which has developed over the EU's life time as regards the subordination of social policy to single-market integration. Rather than relying on the Charter's Solidarity provisions to give social rights the same constitutional status as economic rights, the CJEU has instead used the Charter to entrench the primary nature of economic rights. In doing so, it has required member-states' labour law systems to adjust whenever

¹³⁵ *Parkwood Leisure Limited v Alemo-Herron and others* [2011] UKSC 26, para, 7.

¹³⁶ CJEU judgment in *Alemo*, para. 28, with insertion from para. 27.

¹³⁷ *Ibid*, para. 29.

¹³⁸ *Ibid*, para. 33.

¹³⁹ L. Hayes, 'New holes in the floor of labour rights: Alemo-Herron v Parkwood Leisure' available at <http://www.onlabourlaw.blogspot.co.uk/2014/01/new-holes-in-floor-of-labour-rights.html>.

¹⁴⁰ See, for example, Case C-176/12 *AMS v CGT* ECLI:EU:C:2014:2.

these conflict with EU economic rights despite the EU's limited competence in the social-policy field.

At a legislative level, the Lisbon Strategy was replaced in 2010 by the Europe2020 Strategy whose aim is to 'turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion'¹⁴¹ The strategy combines five EU headline targets, which are to be translated into national targets, a number of flagship initiatives and integrated guidelines for employment and economic policies.¹⁴² Thus, as with Lisbon 2010, the coexistence of soft law mechanisms alongside policy goals under the Europe2020 Strategy leaves little room for the development of new legislative initiatives. This is confirmed by the launch, in December 2012, of the European Commission's Regulatory Fitness and Performance Programme (REFIT) which aims 'to make EU law lighter, simpler and less costly so that it benefits citizens and businesses and helps to create the conditions for growth and jobs.'¹⁴³ Under this Programme, the Commission regularly screens EU legislation for inefficiencies and has outlined actions to be taken in order to reduce the regulatory burden, with a number in the fields of employment and social policy. The European Parliament and the ETUC have criticized the REFIT agenda as lacking in social aspects and further encouraging deregulation.¹⁴⁴

The switch from hard to soft law mechanisms as the preferred instruments for the europeanization of national labour law systems – and their use in promoting deregulation – makes it difficult to predict the future development of the ESM. Although the Open Method of Co-ordination keeps social issues on the EU's agenda, it is not primarily aimed at advancing social policy, but rather at structural change of the economies of the member-states. This is evident in the wake of the 2008 financial and economic crisis which has at least threatened the ESM, if not its very existence.¹⁴⁵ At a national level, spending cuts to reduce public deficits have entailed a reduction in social, welfare and public services. At a European level the response has focused on recovery plans and rescue packages targeted at the financial sector, although the financial assistance

¹⁴¹ COM(2010) 2020.

¹⁴² COM(2012) 173.

¹⁴³ COM(2013) 685 final.

¹⁴⁴ ETUC Resolution, 'Stop the deregulation of Europe: Rethink REFIT' adopted on 3-4 December 2013.

¹⁴⁵ See further D. Vaughan-Whitehead (ed), *The European Social Model in Crisis: Is Europe Losing Its Soul?* (Cheltenham, Edward Elgar and ILO, Geneva: 2015).

packages for Ireland, Portugal and particularly Greece have also, directly or indirectly, been the source of major initiatives to amend employment protection regulation, and to deregulate collective bargaining and wage-setting systems in these countries.¹⁴⁶ In parallel, the European Commission has also, under the umbrella of economic policy co-ordination as part of its Europe2020 Strategy, criticized a number of countries' labour law and collective-bargaining systems as being too inflexible to respond effectively to the crisis by protecting workers' pay and conditions.¹⁴⁷ Both of these forms of intervention in national labour law systems have taken place outside the social policy provisions found in the TFEU; the former through bilateral measures addressed directly to member-states; and, the latter through Commission-driven administrative measures based on articles 121 (on economic policy) and 148 (on employment policy) TFEU. Challenges to the measures based on the Charter of Fundamental Rights have been unsuccessful before the CJEU.¹⁴⁸ The europeanization of systems of national labour law is therefore becoming increasingly diffuse and attempts at legitimizing the europeanization of such national systems through the development of a 'human face' to European integration or the involvement of the social partners are long gone. Given that such aims do not feature in the Europe2020 Strategy, they are unlikely to resurface in the near future. Yet even when considering the EU's targets on employment under Europe2020 – 75% of people aged 20-64 to be in work – then the EU's attempts at europeanization through co-ordination have failed to achieve this goal.¹⁴⁹

There have, of course, been calls for the EU to adopt a different approach to europeanization by focusing on 'measures to integrate those who are excluded from the labour market, invest in social and health services and improve social protection systems.'¹⁵⁰ Yet, although the EU institutions now –

¹⁴⁶ For an overview see K.D. Ewing, 'The Death of Social Europe' *King's Law Journal* 26:1 (2015), pp. 76-98.

¹⁴⁷ *Ibid*, pp. 87-90.

¹⁴⁸ See Case C-128/12 *Sindicato dos Bancarios do Norte v BPN* ECLI:EU:C:2013:149.

¹⁴⁹ In 2015, the EU employment average was 70.1% although this disguises wide discrepancies in employment ranging from 80.5% in Sweden to 54.9% in Greece despite major EU-driven labour market reforms in recent years. Up-to-date statistics are available here: https://ec.europa.eu/info/strategy/european-semester/framework/draft-europe-2020-strategy/europe-2020-targets-statistics-and-indicators-eu-level_en.

¹⁵⁰ Van Reisen, M., Stocker, S. and Vogiazides, L. 2009. *Europe's response to the global financial crisis*, Social Watch Report available at http://www.socialwatch.org/sites/default/files/eepa-eurostep2009_eng.pdf, p. 44.

unlike in earlier decades – have the competence under the Treaty to adopt harmonizing labour standards, there have been no significant legislative developments for workers’ rights in recent years; indeed attempts to reform the Working Time Directive or the Posted Workers’ Directive 96/71/EC have languished. Serious questions have also been raised about the future operation of the Social OMC. Crespy and Menz argue that EU ‘social policy is becoming increasingly ... subsumed to economic objectives focused on competitiveness, narrowly defined as low labour costs ... and stringent fiscal discipline.’¹⁵¹ Although recent research also suggests that Country Specific Recommendations issued as part of the implementation of the Europe2020 Strategy have increasingly emphasized social and employment issues,¹⁵² the absence of enforcement mechanisms means that their implementation depends on national preferences. In the UK, the impact of the Social OMC in terms of policy change appears to have been limited; on the contrary, the UK has actively used the OMC to transfer its own agenda to the EU level.¹⁵³ Although some authors find limited evidence that involvement in the OMC has empowered civil society organizations and had a positive effect on social inclusion,¹⁵⁴ the TUC argues that unions have only been involved as a part of a range of organizations invited to advise the government on its response to the Social OMC and there is little involvement from employers and employers’ organizations.¹⁵⁵

In recognition of the ongoing tensions between the economic and the social, the Juncker Commission, in 2016, launched the European Pillar of Social Rights¹⁵⁶ which sets out twenty principles that should renew and guide convergence towards better working and living conditions among participating member-states. Unlike other recent initiatives, its aim is to support rather than

¹⁵¹ A. Crespy, and G. Menz, ‘Commission entrepreneurship and the debasing of Social Europe before and after the Eurocrisis’, *Journal of Common Market Studies* 53:4 (2015), pp. 753-68.

¹⁵² S. Bekker, and S. Klosse, ‘EU governance of economic and social policies: chances and challenges for social Europe’, *European Journal of Social Law* 2 (2013), pp. 103-20; M. Jessoula, ‘Europe 2020 and the fight against poverty – beyond competence clash, towards ‘hybrid’ governance solutions?’ *Social Policy & Administration* 49:4 (2015), pp. 490-511.

¹⁵³ See the references in H. Schönheinz, ‘The Social OMC in the UK: Beyond Cheap Talk?’ in E. Barcevicus, T. Weishaupt, J. Zeitlin, (eds) *Assessing the Open Method of Co-ordination* (Palgrave, Macmillan: 2014).

¹⁵⁴ *Ibid.*

¹⁵⁵ <https://www.tuc.org.uk/research-analysis/reports/reinforcing-open-method-coordination-social-protection-and-social>.

¹⁵⁶ COM(2016) 127 final.

deregulate systems of national labour law.¹⁵⁷ To that end, it is centred around three themes: equal opportunities and access to the labour market; fair working conditions; and social protection and inclusion. These themes are similar (although not identical) to those of the first Social Action Programme although any reference to involvement of the social partners in the headline themes is absent. Instead, the social partners are to be consulted and encouraged to negotiate agreements where appropriate. Overall, the Pillar of Social Rights proposes little that would suggest a resurgence of a 'social Europe' akin to that of the 1990s: to date, there is no proposal for an ambitious accompanying (legislative) action programme;¹⁵⁸ much of the language of the guiding principles is aimed at ensuring the adaptability of workers to flexible labour markets; no proposals have been put forward for strengthening the social dialogue at a time when national structures of collective bargaining are being dismantled; and the proposals for 'fair working conditions' remain non-binding recommendations.¹⁵⁹ The only legislative initiative to emerge by April 2017 is a proposal to improve the conditions for working parents and carers so as to allow them to combine their family lives and professional careers.¹⁶⁰ Such a proposal sits more comfortably with the EU's focus on strengthening and mainstreaming equality rights over the years than as an indication of a renewed commitment to the development of European labour law. Of course, much depends on how the Pillar of Social Rights will be interpreted by the Commission and the member-states, although even if it were to act as a trigger for legislative change in the social sphere, it is unlikely to apply to the UK (Brexit notwithstanding).¹⁶¹

What then has the ESM's impact been on the UK? Has it successfully europeanized the British labour law system in light of its aims? Overall, UK labour law has changed fundamentally since membership began and it is impossible to disentangle domestic preferences from European preferences for

¹⁵⁷ I. Schömann, *Labour Law Reforms in Europe: Adjusting Employment Protection Legislation for the worse?* Working Paper 2014.02, (ETUI, Brussels), p. 7.

¹⁵⁸ Although the social partners have been consulted on a possible revision of the Written Statement Directive 91/533/EC and on a new instrument which would address the challenges of access to social protection for people in all forms of employment. See COM(2017) 2611 final and COM(2017) 2610 final.

¹⁵⁹ For a critique see A. Bogg and K.D. Ewing, 'The Continuing Evolution of European Labor Law and the Changing Context for Trade Union Organizing' *Comparative Labor Law and Policy Journal* 38:2 (2017), pp. 211-32.

¹⁶⁰ http://europa.eu/rapid/press-release_IP-17-1006_en.htm.

¹⁶¹ The Pillar of Social Rights will apply, in the first instance, to Eurozone member-states with other states being able to opt-in.

reform. Legislation adopted under the ESM, particularly in the 1990s, and interpreted progressively by the CJEU, has bestowed a number of individual rights – including equality rights – and collective employment rights on workers, has led to the establishment of a patchwork floor of social rights that limits the UK government’s legislative capabilities, and has opened up new avenues for (British) social-partner and civil society involvement (and private litigation). Although it is difficult to predict what would have happened if the UK had never joined the EU, it is likely that some of these rights would have been enacted regardless of the country’s EU membership; in some instances, the UK has gone further than required under EU law. In other cases, EU rules have been used as an excuse to deregulate the British system of industrial relations or have introduced rights into UK employment law which sit uneasily with the British system of industrial relations and which have either had a negligible effect in introducing collective rights or have resulted in substantial criticism of the ESM (an obvious example of the latter being the Lindsey Oil Refinery dispute). Although the ESM has failed to achieve its stated aims, viewed over the course of its membership, attempts to europeanize the British labour law system through an ESM have nonetheless had a positive effect, particularly in the field of equality law, by constraining government action and creating a minimum floor of rights for workers in one of the least regulated labour markets among Organization for Economic Co-operation and Development (OECD) countries.¹⁶² It is therefore perhaps not surprising that workers’ rights were invoked repeatedly as a reason to oppose a British exit from the EU in the run-up to the UK’s referendum.

The ESM and Brexit

On 23 June 2016, based on a turnout of 72.2%, 51.9% of the electorate voted for Leave, while 48.1% supported Remain.¹⁶³ There have been countless analyses of reasons for the Leave victory; many of which point to demographic,

¹⁶² According to the OECD’s employment protection index, the UK comes in at 31 out of 34 rich countries.

¹⁶³ <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

economic and social differences in determining the outcome.¹⁶⁴ Most British trade unions, 'after much debate and deliberation', encouraged a Remain vote on the basis that 'hard won' EU-derived employment rights – 'including maternity and paternity rights, equal treatment for full-time, part-time and agency workers, and the right to paid leave – continue to underpin and protect working rights for British people.'¹⁶⁵ With the exception of the rules on agency workers, these rights stemmed from the 1990s. Delors's plan of a social Europe thus served its purpose of turning 'trade union movements of Europe from potential opponents into reliable allies.'¹⁶⁶ However, many of these rights, although creating a minimum floor of rights in the UK, were not 'publicized' as having an EU origin and were fiercely opposed and watered down by successive UK governments (Conservative and Labour). Their impact on British workers has thus been limited and any suggestions that workers' rights may be threatened by a Leave vote did not seem to convince a majority of voters, particularly those on low incomes, to vote to remain in the EU.¹⁶⁷

The lack of clarity over the purpose and content of the ESM which has shifted over time and failed to achieve its stated aims, made it difficult to 'sell' continued EU membership on the basis of its contribution to protecting workers. In popular discourse, it was conflated with debates on (EU) immigration. As Bourdieu argued in 2003, 'discourses on "social Europe" have so far failed to be translated in any significant way into concrete norms governing the daily life of citizens in matters of work, health, housing, retirement.'¹⁶⁸ Although this was never the ESM's aim (nor could it be due to limited legislative competence), the limited impact of europeanization in the social sphere and the UK government's oft-minimal approach to implementation of EU Directives, made it difficult to

¹⁶⁴ For an overview of British attitudes to the EU before and after the referendum see here: https://whatukthinks.org/eu/?gclid=CNSm68Oc2NICFfUV0wodu_wL-w

¹⁶⁵ See Len McCluskey et al., Letter, *Trade Union Members Should Vote to Stay in the EU*, The Guardian, 6 June 2016 available at <http://www.theguardian.com/politics/2016/jun/05/trade-union-members-should-vote-to-stay-in-the-eu>.

¹⁶⁶ Hyman, 'Trade Unions and the Politics of the European Social Model' *Economic and Industrial Democracy*, p. 27.

¹⁶⁷ See M. Godwin and O. Heath, *Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities*, Joseph Rowntree Foundation (JRF) Report, 31 August 2016 available at <https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities>.

¹⁶⁸ P. Bourdieu, *Firing Back: Against the Tyranny of the Market 2*, (Verso, London: 2003), p. 53.

identify a coherent catalogue of workers' rights attributable to the EU. Instead, the increasing 'anglicization' of continental employment relations¹⁶⁹ whereby British preferences for deregulation and flexibility have been transposed to an EU level and, in turn, been implemented across EU member-states has meant that the europeanization process in recent years has reinforced British deregulatory trends. As Shanks had pointed out in the 1970s, '[t]he Community has to be seen to be more than a device to enable capitalists to exploit the common market; otherwise it might not be possible to persuade the peoples of the Community to accept the disciplines of the market.'¹⁷⁰ In the context of the Brexit referendum, the limited rights adopted under the ESM were clearly insufficient to persuade a majority of the British public that the EU was a social as well as an economic union, membership of which was worth preserving.

After the vote to leave the EU, the government guaranteed that Brexit would pose no immediate threat to workers' rights.¹⁷¹ The impact of Brexit on UK employment law is, for obvious reasons, difficult to predict. Much depends on the future relationship between the UK and the EU as well as future UK governments. Post-Brexit, the UK government, Parliament and courts will have the option to consider whether EU law developments in a given policy field might be usefully borrowed and incorporated into future UK legal and policy developments. Existing EU-derived employment rules, to which successive governments have been opposed, may be subject to amendment or repeal. The jurisprudence of the CJEU in *Viking*, *Laval* and *Alemo*, which will initially become part of 'retained EU law' and will have the status of a UK Supreme Court judgment following the adoption of the European Union (Withdrawal) Bill, could be overturned by an Act of Parliament or a future decision by the UK Supreme Court. In the absence of an obligation to abide by future EU laws, some areas where the ESM has been successful at europeanizing systems of national labour law may be subject to neglect in that future (positive) developments for workers may not be implemented in the UK. Examples include equality law where a proposal aimed at improving the conditions for working parents and carers to combine their family lives and professional careers is under negotiation as part of the Pillar of Social Rights, or in the area of health and safety where the

¹⁶⁹ Hyman, 'Britain and the European Social Model' *IES Working Paper*.

¹⁷⁰ Shanks, 'The Social Policy of the European Communities' *CMLR*, p. 377.

¹⁷¹ Department for Exiting the EU, *The United Kingdom's exit from and new partnership with the European Union White Paper*, 2 February 2017, Cm9417.

European Commission has begun a review of all existing health and safety regulations and is planning considerable changes to improve a number of existing directives and enforcement mechanisms.¹⁷²

Much also depends on the future relationship between the EU and the UK. Potential options that have been discussed include participation in the European Economic Area (EEA) and/or the European Free Trade Association (EFTA); a series of bilateral deals with the EU; or a 'hard' Brexit whereby the UK exits both the single market and the customs union. Should the UK negotiate participation in the EEA, then most EU laws on workers' rights would continue to apply and future EU laws in this area would need to be implemented by the UK government. The case law of both the EFTA Court and the CJEU would be of relevance. In addition, those EFTA states under the EEA Agreement participate in some aspects of the European Employment Strategy.¹⁷³ The 'bilateral' option could take one of a number of different forms. Closest to the status quo under this category would be a 'Swiss' style agreement under which it is likely that the UK will continue to have to abide by EU employment laws so as to prevent distortions of competition. However, in both scenarios, the UK would be subject to EU law from a position of non-membership which does not bring with it the ability to shape those same laws in a co-operative way with the UK's nearest neighbours, nor to access the remedies and state accountability checks that the EU offers to individuals and businesses such as access to the CJEU.

A 'hard' Brexit, that is an exit from both the single market and the customs union, and with it no obligation to abide by any EU rules, has been advocated as opening up the possibility of radically departing from the UK's current economic and social model. Leaving the EU is seen in such circles as opening up the constitutional space necessary to fundamentally redefine the contract between citizen and state.¹⁷⁴

On the one hand, it has been suggested that the UK government could seek competitive advantages through a major programme of deregulation by (in the labour law sphere) implementing labour standards that are less onerous for

¹⁷² See further

https://www.tuc.org.uk/sites/default/files/Protecting%20health%20and%20safety%20after%20Brexit%20pdf_0.pdf.

¹⁷³ See article 15, Protocol 31 of the Agreement on the European Economic Area, OJ L 1, 3.1.1994, pp. 3-522.

¹⁷⁴ See also <https://eulawatliv.wordpress.com/professor-dougan-the-peterhouse-inaugural-law-lecture/>.

employers than those required of their counterparts in the European Union.¹⁷⁵ This may be limited by the requirements of a future UK-EU trade deal – the European Parliament has already made it clear that any future agreement between the UK and the EU should be conditional on continued adherence to EU social legislation and policies.¹⁷⁶ If existing EU trade agreements are to serve as a template for a future EU-UK post-Brexit relationship then it is probable that a labour clause may be inserted. The majority of trade agreements negotiated by the EU in recent years have included an obligation on the parties to co-operate on social issues; abide by core labour standards and other International Labour Organization (ILO) instruments, including providing for mechanisms for implementation and co-operation, due regard being had to stakeholder involvement (such as trade unions); and a commitment to no dilution of domestic labour protection for the purpose of attracting investment or increasing trade. However, the EU has taken a soft law approach to enforcement of such labour clauses and labour violations are excluded from the general dispute settlement procedures of the agreements although such a free-trade agreement could encourage the maintenance of the status quo in terms of employment rights.

On the other hand, it has been argued that Brexit should be viewed as an opportunity to assert democratic control at the level of the nation state over the direction of economic and social development.¹⁷⁷ This would allow a future UK government to pursue a policy of public procurement, public ownership and public investment along with (re)creating collective labour rights which are seen to be incompatible with EU membership. Critics of such an approach point out that EU rules do not prevent the UK from pursuing an alternative social or economic model.¹⁷⁸ In addition, future trade arrangements whether with the EU or other countries may impose some limits on whether such a radical

¹⁷⁵ This was threatened by the Chancellor, Philip Hammond. See <https://www.welt.de/english-news/article161182946/Philip-Hammond-issues-threat-to-EU-partners.html>. Indeed, some of the Beecroft proposals fall foul of EU law and could be revived post-Brexit. See A Beecroft, *Report on Employment Law*, (2011).

¹⁷⁶ <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2017-0237&language=EN>.

¹⁷⁷ See J. Foster, *The Left and the neoliberal European integration – perspectives from Britain* (Paper to conference on 100th Anniversary of the October Revolution, Prometheus Research Institute, European University Cyprus, 22-23 September 2017); and, <https://www.newstatesman.com/politics/staggers/2017/08/what-next-lexit-left-wing-eurosceptics-and-their-vision-brexit?page=9&qt-trending=1>.

¹⁷⁸ <http://renewal.org.uk/blog/eu-law-is-no-barrier-to-labours-economic-programme>.

restructuring of the UK economic is feasible. Trade agreements are likely to include provisions on investment, trade in services and public procurement which could constrain the ability of the UK government to support higher labour standards and may include provisions regarding temporary movement of natural persons which could mean that similar issues relating to posted work as seen in the *Laval* case or the Lindsey Oil Refinery dispute may arise.¹⁷⁹ Some form of indirect europeanization (both in terms of improving protections or constraining government action) over UK employment laws may well therefore persist post-Brexit if trade with the EU (and other countries) is to continue on the same or similar basis.

What then is the verdict on the attempts through an ESM to europeanize national labour law systems? Overall, it has resulted in the creation of a patchwork of minimum labour rights and harmonizing procedures applicable across the member-states, and has involved a diverse range of actors in the europeanization process. Unlike in 1973, it is now possible to talk of a 'ESM'. At the same time, this model has consistently fallen short of its own goals to (for the first half of its existence) develop a 'human face' to European integration, and (in the second half of its existence) promote social cohesion and better jobs, while respecting national peculiarities. European social integration has largely been driven by the top and, in doing so, it has failed to improve the living and working conditions of the less skilled and more welfare-dependent.¹⁸⁰ Its limited success in europeanizing national systems of labour law by providing for continued social progress (despite its overall positive impact on the UK) meant that it was not a sufficient incentive to entice voters to back continued UK membership of the EU.

A lack of consistency from the beginning over the aims of the ESM and the limited legislative competence given to the EU institutions in its realization mean that the ESM was inherently vulnerable to changing political preferences at national and EU level. The 'Delorsian' concept of 'social Europe' did not dismantle the traditional hierarchy that places economic above social rights, and was not the starting point for the development of a ESM that would consistently raise labour standards across the member-states. Rather it reflected a temporary shift

¹⁷⁹ See T. Novitz, 'Collective Bargaining, Equality and Migration: The Journey to and from Brexit' (2017) 46(1) *Industrial Law Journal* 46:1 (2017), pp. 109-33, pp. 131-3.

¹⁸⁰ J. Wickham, *Unequal Europe: Social Divisions and Social Cohesion in an Old Continent* (Routledge: 2016).

in aims that could easily change, depending on political priorities. Although the subsequent move away from harmonizing legislation to co-ordination with a focus on encouraging deregulation in the social sphere has primarily been associated with the European Commission, member-states also ensured that a fragmented and incomplete legal framework characterized the ESM – whether as a result of encouraging deregulation (led principally by the UK) or due to their reluctance to transfer competence for social policy harmonization to the EU level. The economic crisis illustrated the weaknesses and ambiguities of the EU's limited competence and ambition in the social field and made visible the inadequacies of the new forms of governance under Europe2020 which the Pillar of Social Rights failed to address. In the past, the CJEU stepped in when limited legislative competence or member-states' political preferences stood in the way of the development of the ESM so as to render EU-derived labour laws effective while respecting national divergences. However, the *Viking* and *Laval* judgments and subsequent case law, along with increased reliance on monetary and economic governance mechanisms to europeanize national systems of labour law have led to increased convergence of national social models and brought national labour law systems within the EU's institutions regulatory sphere despite their exclusion from the Treaty. This development has contributed to a crisis over the future direction of europeanization in the social sphere, particularly in the area of collective labour law; a crisis which takes as its aspirational benchmark the ESM's aims of the 1990s. The UK's role in dismantling this vision of 'social Europe' by pushing for deregulation and limited europeanization through harmonization in the social sphere should not be underestimated. As Bogg and Ewing point out:

[T]he desire perversely seems to be to make the European Union more like the United Kingdom, with a highly decentralized system of collective bargaining covering a smaller and smaller proportion of the workforce, along with a raft of minimum standards legislation of varying degrees of effectiveness. In other words, to recreate the ESM in way that would be readily familiar to readers ... in the Anglo-Saxon world, the American

model adopted by the United Kingdom now being imposed on the European Union.¹⁸¹

The early attempts at developing an ESM coincided with the UK's accession to the EEC; the process of europeanization of the ESM may take a different turn once the 'anglicizing' influence has been removed but only if existing policy trends to de-regulation can be reversed.¹⁸²

Appendix – Abbreviations

CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
EC	European Community
EEA	European Economic Area
EEC	European Economic Community
EES	European Employment Strategy
EFTA	European Free Trade Association
ESM	European Social Model
ETUC	European Trade Union Confederation
EU	European Union
ILO	International Labour Organization
OECD	Organization for Economic Cooperation and Development
OMC	Open Method of Co-ordination
REFIT	Regulatory Fitness and Performance Programme
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TUC	Trades Union Congress
UK	United Kingdom

¹⁸¹ Bogg and Ewing, 'The Continuing Evolution of European Labor Law and the Changing Context for Trade Union Organizing', *Comp Lab L & Pol'y J*, p. 212.

¹⁸² Wickham, *Unequal Europe*.