

HISTORY OF EUROPEAN UNION SOCIAL LAW

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Abstract: *This paper aims to highlight some key facts of the development of EU labour law and EU social security law.*

The aim is not to be exhaustive but to situate those highlights against the canvas of some fundamental dimensions/tensions which underpin European Union social law.

- 1. On which organizational level is social law made in the EU? Is it mainly made at Member State level and/or at EU level?*
- 2. What is the role of the European Union? Is it about negative integration (removal of artificial obstacles) and/or positive integration?*
- 3. What is the function of EU social law? Is it rather market correcting and/or market making?*
- 4. What is the character of EU social law? Is it mainly hard law (legally enforceable rights) and/or soft law?*
- 5. What is the aim of EU social law? Coordination and convergence and/or harmonisation?*

These dimensions should be considered as a continuum and not as opposites.

Keywords: *History – European Union – Social Law.*

ИСТОРИЯ НА СОЦИАЛНОТО ПРАВО НА ЕВРОПЕЙСКИЯ СЪЮЗ

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Резюме: *Настоящата статия има за цел да открие някои ключови факти от развитието на трудовото право на ЕС и правото на социална сигурност на ЕС. Целта не е изчерпателност, а поставяне на тези акценти в контекста на някои основни измерения, които са в основата на социалното право на Европейския съюз.*

- 1. На кое организационно равнище се създава социалното право в ЕС? Основно на ниво държави членки и/или на ниво ЕС?*
- 2. Каква е ролята на Европейския съюз? Става ли дума за отрицателна интеграция (премахване на изкуствени пречки) и/или за положителна интеграция?*
- 3. Каква е функцията на социалното право на ЕС? По-скоро коригиращо пазара и/или създаващо пазара?*
- 4. Какъв е характерът на социалното право на ЕС? Основно „твърдо право“ (юридически приложими права) и/или „меко право“?*
- 5. Каква е целта на социалното право на ЕС? Координация и сближаване и/или хармонизация?*

Тези измерения следва да се разглеждат като континуум, а не като противоположности.

Ключови думи: *история, Европейски съюз, социално право.*

Introduction

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Treaty of Rome 1957

The 1957 Treaty of Rome, establishing the European Economic Community (EEC) created a common market based on the free movement of products (goods and services) and production factors (labour and capital). So the basic thrust was economic and negative integration.

In order to facilitate the free movement of workers the first measures were adopted to coordinate social security systems through regulations No 3 and No 4 of 1958. They are upgraded regularly and now the coordination is established by Regulation (EC) No 883/2004 and Implementing Regulation (EC) No 987/2009.

Concerning social policy, the six Member States believed that the equalisation of living and working conditions in an upward direction would “*result not only from the functioning of the Common Market which will favour the harmonisation of social systems, but also from the procedures provided for under this Treaty and from the approximation of legislative and administrative provisions.*” (Art. 117 EEC, now Art. 151 TFEU)

This view relied on the earlier Ohlin report of ILO experts. It argued for the transnational harmonization of social policy in some areas, such as equal pay for men and women, but, invoking the economic theory of comparative advantage, reflected the German preference for laissez-faire and rejected a general role for harmonization of social policy. This caused a constitutional asymmetry between negative integration as a default standard and positive integration. In the Treaty of Rome the Court of Justice and the Commission were well-equipped to dismantle national regulations using primary law but the legislature lacked the legal and institutional capacity to reconstruct regulatory standards at the supranational level. This caused a sort of implicit division of tasks¹: market efficiency at European level, and redistribution at national level.

It was France that took for economic reasons the initiative to insert the principle of equal remuneration for equal work as between men and women workers in the Treaty of Rome.

At the time of drafting the fear existed that Member States that had not yet ratified the ILO Equal Remuneration Convention 1951 (No.100) could have a competitive advantage by employing women as a cheaper source of labour. Therefore, this would amount to a distortion of competition by social dumping.

The article 119 EEC (now Art. 157 TFEU) was addressed to the Member States but in the Defrenne cases the Court of Justice decided that the article was horizontally and vertically directly effective and could thus give rise to ‘individual rights which the courts may protect’ and that its role was not purely economic but that the article ‘forms part of the social objectives of the Treaty’.

The Treaty of Rome also established a European Social Fund (ESF) with “*the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility*”.

First social action programme (SAP) 1974

The approach of the EEC changed in the early 1970s because of the social unrest in 1968 and the economic recession following the twin oil shocks. It was realised that a social dimension was necessary to persuade the ‘losers’ (individuals and companies) that the Community was more than a device enabling business to exploit the Common Market.

¹ This division of tasks was summarised by David Natali (2012): ‘Adam Smith at European level and Keynes at national level’.

The Council adopted in 1974 a social action programme (SAP) that precipitated extensive legislative activity in certain areas of employment law under the general Treaty bases requiring unanimity among all the Member States.

Without any amendments made to the treaty, two of the European Union's flagship policies were developed: gender equality and occupational health and safety (OSH).

The principle of equal pay was enshrined in a directive² adopted by the Council in February 1975 and further enforced by a ruling from the Court of Justice the same year, stating that the Treaty article was of direct effect in cases of 'direct and overt discrimination' (Gabrielle Defrenne v Sabena, Case 43/75).

As an example, we can also mention the insolvency directive 80/987/EEC³ requiring Member States to put in place an institution guaranteeing employees the payment of their outstanding claims to remuneration for a specific period.

Jacques Delors

At the beginning of the 1980s, the European Economic Community operated within an economic context shaped by a new phase of globalization, commonly referred to as "neoliberalism," underpinned by the principles of the "Washington Consensus."

The arrival in 1979 of the new Conservative government in the UK, led by Margeret Thatcher led to a stagnation in the Community legislative process.

However, the arrival of Jacques Delors as President of the European Commission in 1985 marked a significant turning-point. In his view, the European contract is defined by "*Competition that stimulates, co-operation that strengthens, and solidarity that unites*".

He argued strongly that the Commission's flagship project, completion of the single market by 31 December 1992, should be matched by a drive towards a European social area ('Espace social européen') in order to 'humanize' the market. This is also described as the market-correcting approach to social policy.

In the 1986 Single European Act (SEA) Delors ensured that, as a quid pro quo for the introduction of qualified majority voting (QMV) in the Council of Ministers on single market legislation, the same decision-making method, together with a stronger legal base, would be provided for health and safety at work (OSH).

As a result, Article 118a provided the legal basis for the successful adoption of certain important Directives on Working Time, on Pregnant Workers and on Young Workers.

² The Equal Treatment Directive (76/207/EEC) and the Equal Pay Directive (75/117/EEC) are now replaced by the Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

³ It is now replaced by directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

A conscious policy of promoting the social partners at European level was also launched, with the Commission invited by the SEA to *‘develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement’*.

Community Charter of the Fundamental Social Rights of Workers

Delors maintained the momentum of Social Europe by proposing the non-binding Charter on the Fundamental Social Rights of Workers– which was adopted by the European Council, meeting in Strasbourg in December 1989 in an eleven-to-one vote in which Thatcher was defeated – and a ‘Social Action Programme’ of 47 items of legislation to give substance to the aspirations contained in the Charter.

This approach was a defensive one in the face of liberalisation, deregulation and globalisation.

The Charter gave rights only to workers, suggesting that the social aspect of the internal market substituted the concept of the European social area.

The Action Programme led to the enactment of important pieces of social legislation, such as the 1992 Directive on Pregnant Workers, the 1993 Working Time Directive (WTD), the 1994 European Works Council Directive (EWCD) and the 1996 Posted Workers Directive (PWD)⁴ which is a key instrument both to ensure freedom to provide services and to prevent social dumping.

Maastricht Treaty 1992

The 1992 Maastricht Treaty introduced the new Treaty on the European Union and changed the Treaty on the European Economic Community (EEC) into the Treaty on the European Community (EC).

The constraints imposed by the newly established Economic and Monetary Union (EMU) on national government expenditure through the convergence criteria of the euro and the Stability and Growth Pact (SGP) had inevitably an effect on the ability of national governments to control their own social policy. Also, a new method of governance was put in place based on broad economic policy guidelines (BEPGs) laid down by the European Council to steer Member State policies combined with multilateral surveillance. This methodology provided the template for EU action in other areas, notably employment.

⁴ The original PWD is now replaced by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

At that time 11 of the 12 Member States also agreed to further strengthen the social provisions in the Treaties – both by making Union competence more explicit and widening the field of QMV – through adoption of the Agreement on Social Policy.

An opt-out for the United Kingdom was negotiated by Thatcher's successor as prime minister, John Major in a protocol, annexed to the Treaties until Major's own successor, Tony Blair, ended his anomaly in the 1997 Amsterdam Treaty.

A unique feature of these new provisions is that the Commission's obligation to consult social partners on legislative proposals in the social policy field and allow them to negotiate agreements which can then be enacted in EU law. Use of this route requires the Commission to agree to make a proposal for adoption by the Council. The European Parliament has no standing whatever in such a process, not even being consulted on such measures.

The Parental Leave Directive 96/34/EC (PLD)⁵ was the first result of this new collective route to legislation, followed by the 1997 Part-time Work Directive and 1999 Fixed Term Work Directive.

Amsterdam Treaty 1997

A new article (now Article 19 TFEU) conferred on the Council the ability to '*take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*'

Shortly afterwards, in 2000, two 'second generation' ant-discrimination law directives were adopted: on equal treatment between persons irrespective of racial or ethnic origin and on a general framework for equal treatment in employment and education.

The Amsterdam Treaty also included promoting a high level of employment among EU-objectives and conferred on the Community a responsibility to support and complement the activities of the Member States in this area, including by developing a 'coordinated strategy', namely the European employment strategy (EES) based on an open method of coordination (now Articles 145-150 TFEU).

Lisbon Strategy 2000

At the Lisbon summit in March 2000 the Union set itself a new and ambitious strategic goal "*to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*"

⁵ The original PLD is now replaced by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

This is to be achieved not only by the traditional legislative and financial processes but also by a new method of governance, the Open Method of Coordination (OMC)⁶ as the means for spreading best practice and achieving greater convergence towards the EU's main goals by helping Member States develop their own policies. This had already been applied to economic and employment policies in the nineties and is now progressively applied to the fight against social exclusion and poverty, pensions, education and public health.

In the light of the 2005 mid-term review the Commission decided to focus more on the coordination of economic and employment policy. The employment guidelines adopted as part of the EES were incorporated into the integrated guidelines for growth and jobs. Common principles of flexicurity were adopted by the Council for the modernisation of labour markets (flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies, and adequate and sustainable social protection systems). The OMCs related to poverty, pensions and health were merged in a single OMC related to social protection and inclusion, which lays down three aims in each of these areas.

Charter of Fundamental Rights 2001

In 2001, together with the minor Treaty of Nice, the Charter of Fundamental Rights of the EU (CFREU) was adopted in Nice. It contains in a single document certain political, social, and economic rights for European Union (EU) citizens and residents. In the beginning it had soft law status, but it became legally binding in the Union through the Lisbon Treaty in December 2009.

This Charter includes provisions on social rights under six Titles: I. Dignity (e.g., protection from inhuman or degrading treatment, prohibition of slavery and forced labour), II. Freedoms (e.g., freedom of expression, the right to marry, and the right to choose one's profession), III. Equality (e.g., prohibition of discrimination, right to equal pay for equal work, and protection of workers' rights), IV. Solidarity (e.g., workers' rights, social security, and the right to strike), V. Citizens' rights (e.g., right to vote in European Parliament elections and the right to good administration), VI. Justice (e.g., the right to an effective remedy and a fair trial).

Lisbon Treaty 2007

The Lisbon Treaty amends the Treaty on European Union (TEU), as well as the Treaty of Rome (1957), renamed as the Treaty on the Functioning of the European Union (TFEU). Both treaties have equal value and form the constitutional basis of the European Union (EU).

⁶ The Open Method of Coordination is a flexible way to try and reach quantified European targets, jointly established by the national ministers in their respective Council formations, via national plans, the results of which are evaluated using shared indicators. This is done with a view to achieving convergence in the social performance of Member States, by improving national policies through a process of on-going mutual learning.

The Lisbon Treaty strengthened the EU's commitment to the values of the European Union (Art 2 TEU).

It made the Charter of Fundamental Rights legally binding (Article 6(1) TEU) and introduced a horizontal social clause (Article 9 TFEU), which requires the EU to ensure that the social objectives mentioned in article 3, paragraph 3 TEU⁷ are taken into account when defining and implementing EU policies.

Article 153 TFEU contains the main shared competences in the social field. In order to support and complement the activities of the Member States the European Parliament and the Council are to adopt both measures designed to encourage cooperation between Member States and also directives embodying minimum requirements.

Art. 153 TFEU is inapplicable in the case of pay, the right of association, the right to strike and the right to impose lock-outs.

European Semester and Europe 2020 Strategy

The European Semester was established in 2010 and provides an overarching framework to multiple procedures for stronger EU socio-economic governance and better coordination between national economic and fiscal policies. The 2008 banking crisis which became in 2010 a sovereign debt crisis had revealed the need for such an exercise.

During the first phase, EU Member States discuss their economic and budgetary plans and agree on key priorities. In July the Council adopts country-specific recommendations (CSRs). In the second part of the cycle, known as the 'national Semester', Member States are expected to align national policies, notably the national budgets for the subsequent year.

In order to gain access to funding, Member States need to show how their plans address the challenges set out in the CSR's. In this way financial instruments and funds are used an incentivising "carrot", using so-called conditionalities.

The first European Semester cycle began in January 2011 when the Commission published the annual growth survey and Joint Employment Report. More recent Semester cycles commence in November, with the 'national semester' lasting from June until October.

The European Semester provides an overarching framework to multiple procedures that promote a more stable and prosperous EU.

Europe 2020 is a 10-year strategy proposed by the European Commission on 3 March 2010 for advancement of the economy of the European Union. It aims at a "smart, sustainable, inclusive growth" with greater coordination of national and European policy. It follows the

⁷ In this paragraph about the internal market, the EU is required to go after the goal of a highly competitive social market economy for the first time. It contains far more social and other non-economic objectives in comparison with the previous Treaties.

Lisbon Strategy for the period 2000–2010. The focus was on coordination of economic and employment policies with some social components (e.g. reduction of the number of Europeans living below the national poverty lines with 20 million people, a target of 75% employment for the 20-64 age group)

European Pillar of Social Rights 2017

The European Pillar of Social Rights (EPSR) was proclaimed in 2017, providing a framework of 20 non-binding principles and rights related to three main areas: fair working conditions, equal opportunities, and social protection. It is a soft law document in order to guide the future direction of EU social policy.

The 2021 action plan set out concrete initiatives to reach three headline targets by 2030: at least 78% of the population aged 20 to 64 should be in employment by 2030, at least 60% of all adults should participate in training every year, the number of people at risk of poverty or social exclusion (AROPE) should be reduced by at least 15 million by 2030. Also, a Social Scoreboard was established to monitor and assess EPSR implementation at national level.

A milestone in EU social policymaking is the Adequate Minimum Wages Directive (AMWD) 2022/2041. It is explicitly not about setting a uniform minimum wage level across the EU, but about specifying criteria to ensure adequate minimum wages at national level. Member States with collective bargaining coverage of less than 80 % shall promote collective bargaining. The Directive is one of the most significant expressions of the paradigm shift in the EU's approach to wages and collective bargaining acknowledging the fact that the handling of the economic and financial crisis in the early 2010s had been dysfunctional for the EU in every respect⁸. Adequate minimum wages and comprehensive collective bargaining are no longer seen as obstacles to competitiveness and economic growth, but as an important institutional prerequisite for sustainable and inclusive economic development.

Also a non-binding Council Recommendation of 30 January 2023 on adequate minimum income (AMI) ensuring active inclusion was adopted.

Other important legislative instruments are for instance Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms and Directive (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work (PWD)

Conclusion

⁸ Müller T. and Schulten T. (2024) The European Minimum Wage Directive: a milestone for EU social policymaking, in Vanhercke B., Sabato S. and Spasova S. (eds.) Social policy in the European Union: state of play 2023, An ambitious implementation of the Social Pillar, ETUI and OSE.

In summary, the history of labour law and social security law in the EU reflects an ongoing effort to balance economic integration with non-economic concerns such as social objectives. In the last decades since the Treaty of Maastricht negative integration has gradually become weaker and positive integration has gained in strength. Market-correcting policies have been promoted through a radical expansion in the range of policy fields in which the EU is active and through a variety of regulatory and non-regulatory tools of EU socio-economic governance like hard law, soft law, social dialogue, collective bargaining, open method of coordination and financial resources.

In this way the so-called social deficit of the EU can be reduced, and the social legitimacy of the EU can be increased.

But as the European Union struggles with geopolitical upheavals, economic shifts and the urgency of a just green transition, the future of strong social policies at EU level is uncertain.

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