



**Repatriating EU social policy:  
The best choice for jobs and growth?**

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## EXECUTIVE SUMMARY

- EU social law has constantly evolved and now has a wide-ranging impact on the UK economy and British society. Based on the Government's own Impact Assessments, we estimate that EU social law currently costs UK business and the public sector £8.6bn a year. Social and employment law is necessary and clearly comes with benefits. However, on balance, it remains unclear that there is any significant merit to deciding these laws at the EU level rather than nationally or sometimes locally.
- Two parallel developments have brought new urgency to the question of EU influence over the British economy and labour market. First, the UK's fragile economic recovery requires that regulations, including those currently locked in at the EU-level, be tailored to ensure they do not stifle jobs and growth. Second, the crisis in the eurozone is forcing its 17 members closer together, with a risk that these countries start to act and vote as a 'caucus' in areas which do not directly relate to eurozone governance. This could leave Britain consistently outvoted on measures with a profound impact on its economy, potentially including single market legislation and social policy.
- The time is therefore ripe for the UK Government to look at ways to regain more control over laws and policies that are currently being decided in Brussels. It should explore both safeguards against eurozone caucusing and the repatriation of specific powers, which could include social laws.
- Should the UK Government decide to, and succeed in, repatriating social policy, these laws – or the benefits and costs stemming from them – would not magically disappear overnight. The UK Government and Parliament would probably want to keep many of these laws in part or in full, such as anti-discrimination rules. In some areas, such as working hours for pilots, they may even wish to go further than existing EU rules.
- However, the big difference would be that the regulations themselves, and the benefits and costs they generate, would be under the control of Westminster, empowering MPs and voters to change them to better reflect local circumstances, and national democratic preferences.
- We set out a number of ways in which repatriation can be achieved. Due to the blurring of EU social policy with other areas of competence, and the history of the EU institutions imposing social policy on the UK via the backdoor, protocols or political assurances setting out a UK carve-out from this area are unlikely to be effective on their own. Instead, we argue for a 'double lock' solution:

First, a legally binding protocol – which could take one of several different forms – would be attached to the EU Treaties exempting the UK from EU social policy, while still allowing it to participate in the single market. Second, if a dispute arises over a proposal's potential impact on UK social policy, the British Government should have the right to refer that proposal to the European Council, where unanimity applies. This would give the UK an effective veto over the entire proposal, requiring it to be re-drafted so as not to have an impact on British social policy. The ECJ should also be stripped of its right to review the application of the opt-out, which would radically reduce the risk of EU social policy being introduced via the backdoor.

- Repatriating EU social law could allow the UK to seek changes and cost savings that would be very difficult to achieve if they were subject to agreement at the EU level. We consider various scenarios to illustrate what impact such changes would have on the UK economy. For example, cutting the cost of EU regulations in this area by 50% could result in the equivalent of 140,000 new jobs in Britain or 58,000 jobs in case of a 25% cut, if the entire increase in output as a result of the saving goes into employment. In reality, however, the benefits from deregulation would likely be split between employment and productivity. Under such a scenario, a 50% cut in the cost of regulation could create the equivalent of 60,000 new jobs in the UK in addition to adding £4.3bn to the country's economic output. We also estimate that 100% deregulation of EU social law would yield an annual £14.8bn boost to UK GDP – though this figure is merely illustrative as complete deregulation is not a practical option.
- However, there may also be some marginal benefits from having social policy regulated at the EU-level on which the UK Government may wish to consult. For example, EU single market rules allow large, cross-border companies to comply with one set of common rules rather than 27 national standards, which is a potential convenience. But, on the other hand, smaller firms – which account for around two-thirds of private sector employment in Europe – do not typically operate in more than one country. However, they still have to comply with the same top-heavy regulation as cross-border firms, but have comparatively limited resources to spend on compliance.

- In the past, the concept of ‘Social Europe’ has served as a form of ‘sweetener’ to get approval of the single market from trade unions. However, as EU social policy is effectively a half-way house, it is increasingly losing appeal on both the right and left. The right and many businesses complain about the costs of EU social law, while the left and trade unions increasingly consider that EU intervention is not only failing to provide adequate worker protection, but is also actively undermining it, as Brussels-backed austerity measures sweep across Europe. While they will naturally maintain strongly opposing views on the content of social policy itself, the right and left should both have strong grounds to argue against the principle of EU involvement in this area.
- Any attempt by the UK Government to repatriate substantial powers over social policy will be a challenge, given that this will require agreement from the other 26 member states and renegotiation of the EU Treaties. However, it would not be impossible. Given the severity of the situation, Britain should not seek to use the immediate eurozone crisis for this purpose – which could prove counter-productive. Instead it should target the long-term political settlement that is likely to be needed to reshape Europe in the wake of the crisis, where it could use its potential veto over future EU Treaty changes or other leverage to seek repatriation or opt-outs.
- Repatriating EU social policy could provide a significant economic boost and help to close the democratic deficit caused by the one-size-fits-all nature of EU regulation. Ultimately though, it is up to the UK Government and Parliament to decide when and how much political capital should be invested in repatriating EU social law and what concessions may have to be made in return. The Government and MPs also need to consider where social policy ranks alongside other areas of EU policy of major importance to Britain, such as financial services.

#### Box 1: What is EU social policy?

The level of social protection in the labour market will always be driven to a large degree by ideological and political persuasions. Traditionally, the right has wanted less, while the left has wanted more. However, EU social law not only regulates, but can also liberalise. It therefore touches on strongly held principles on both the left and right. Rather than a discussion about the optimal degree of social protection per se, this paper will focus on the merits or otherwise of major decisions on social policy being made at the EU-level, as opposed to nationally or even locally.

EU social law comprises a broad range of legislation, from social and employment law to health and safety law, but it also overlaps with the EU’s single market. As with many other areas of EU competence, it has constantly evolved with new treaties and rulings by the European Court of Justice (ECJ). The result is that there are several existing and potential sources of EU influence over UK social and employment and health and safety legislation that need to be considered. For reasons discussed in Section 2, in this paper, the term “social policy” refers to EU law which has an impact on employment law, social security, rights legislation and health and safety rules – irrespective of the legal base for it in the EU Treaties.

EU social law therefore includes employment regulations, such as the Working Time Directive (WTD), on working time and rest periods, the Agency Workers Directive (AWD), on agency workers’ pay, but also a range of health and safety laws, such as Directives on exposure to asbestos and restrictions on noise levels at work. Decisions on social policy are usually taken by so-called qualified majority voting (QMV) in the Council of Ministers, with the European Parliament as co-legislator, meaning that MEPs and national ministers must both agree before a proposal can become law.<sup>1</sup>

In this paper, we examine the nature of EU social policy and look at the potential ways in which a UK Government could repatriate this area of EU law. Repatriation would present the UK with both legal and political challenges, which we set out in more detail in Section 4. The options for repatriating social policy without a Treaty change are limited to seeking derogations or opt-outs from existing EU Directives. Options requiring Treaty changes range from opting out of specific areas of the EU Treaties, such as the articles on social policy, targeted Treaty amendments that specify certain articles cannot be used to introduce social legislation, or a blanket ‘social policy’ opt-out. These solutions could be cemented in a new Treaty protocol setting out the revised legal status of the UK regarding EU social policy.

However, there are two further complications which need to be considered. Firstly, the EU institutions, and the ECJ in particular, have substantial powers to interpret the Treaties and its protocols in unpredictable ways, possibly circumventing country-specific carve-outs.

Secondly, due to how it has developed, EU social policy has become increasingly hard to define as it now overlaps with the single market in general and in specific areas such as transport policy, making the task of ring-fencing this area more complicated than might first appear to be the case – particularly if the UK wants to continue to participate in the single market. In this paper, we will consider all these aspects.

<sup>1</sup> Some areas remain subject to unanimity, such as the fields: “social security and social protection of workers”, “protection of workers where their employment contract is terminated”, “representation and collective defence of the interests of workers and employers”, and “conditions of employment for third-country nationals legally residing in Union territory”

# 1. REPATRIATION: WHAT WOULD IT INVOLVE?

## 1.1. Why now?

### i) Jobs and growth

The changing political landscape of the European Union, as a result of the continuing eurozone crisis, and the United Kingdom's fragile economic recovery has given a new impetus to the debate regarding the UK's relationship with the EU, and the influence that Europe has over Britain's economy. Britain is currently faced with the unenviable task of trying to cut a large budget deficit, while also trying to create jobs and growth. With the option of fiscal policy limited, regulation is one of the few remaining policy levers at the Government's disposal.

Well-targeted and effective regulation creates the necessary conditions for sustainable economic growth and employment, providing employers and employees alike with a level playing field on which to compete and create wealth. Ideally, where social law does impose burdens on businesses, these costs are transferred as benefits to employees, resulting in better conditions or pay, which may be viewed as wider benefits to society.<sup>2</sup> Likewise, at the most basic level, effective health and safety law reduces the chances of work-related injuries or fatalities. The UK Government is proud of the fact that the UK has "the lowest number of non-fatal accidents and the second lowest number of fatal accidents at work in Europe".<sup>3</sup>

On the other hand, badly targeted or over-burdensome regulation does the opposite. In particular, small and medium sized businesses (SMEs), which, in 2009, together accounted for 99.9% of all enterprises, 59.8% of private sector employment and 49% of private sector turnover in the UK,<sup>4</sup> need all the help they can get. Regulatory costs tend to have a disproportionate effect on SMEs, because they tend to carry out their own administration and do not have the ability to employ specialists in various fields of regulation.<sup>5</sup>

At the EU-level, the opportunities that the EU's single market offers British businesses for trade and growth remain important to the UK's economic interests. At the same time, there is a growing feeling among policymakers in Whitehall and MPs in Westminster that the Government is increasingly constrained by rules locked in at the EU level, the added value of which are far from clear. Even if the Government deems EU regulations to be detrimental to jobs and growth, changing them requires successful negotiations with 26 other member states and the European Parliament. As Employment Minister Chris Grayling recently told the Federation of Small Businesses,

*"Whilst there are many things that we can change ourselves, we also have to deal with the European dimension of health and safety law. From there, the tide of regulation seems endless. It will hold back growth, it will cost jobs, it will make Europe more uncompetitive, and it has to stop. My philosophy on health and safety is very simple. We should be tough on employers who risk death or serious injury, but we should leave the rest to work with as little interference as possible."*<sup>6</sup>

In this climate, it is vital that we thoroughly examine the benefits of taking decisions at a European level versus the cost of constraining national and local decision making. EU social policy, for example, has a real and profound impact on the UK economy – it cannot therefore be excluded from the ongoing discussion about how to best create jobs and stimulate growth.

### ii) The potential for eurozone 'caucusing'

In parallel, the eurozone crisis is already changing how Europe operates politically, a trend that is only likely to continue. The current response to the crisis could potentially force its 17 members closer together – in what could eventually become a fiscal union to accompany the shared single currency. As the UK Government itself has pointed out, there is a genuine risk that the eurozone starts to act and vote as a

2 For example, Health and safety legislation is seen as an important factor in increasing productivity, as well as reducing the associated costs of employee illness and absence. *Health and Safety Executive*, 'Benefits of good health and safety'; <http://www.hse.gov.uk/leadership/benefits.htm>, accessed October 2011

3 Lord Young of Graffham, 'Common sense common safety', *HM Government*, 2010, p25; [http://www.number10.gov.uk/wp-content/uploads/402906\\_CommonSense\\_acc.pdf](http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf)

4 *BIS*, 'Small and medium-sized enterprise (SME) statistics for the UK and regions 2009', statistical press release, 13 October 2010, p1 [http://webarchive.nationalarchives.gov.uk/20110218135832/http://stats.berr.gov.uk/ed/sme/Stats\\_Press\\_Release\\_2009.pdf](http://webarchive.nationalarchives.gov.uk/20110218135832/http://stats.berr.gov.uk/ed/sme/Stats_Press_Release_2009.pdf)

5 According to the OECD, smaller firms (with 1–19 employees) face more than three times higher regulatory costs per employee than medium firms (20–49 employees) and more than five times higher costs than the largest firms (50–500 employees). For example, the average total spent in the UK on health and safety per employee in 2001/02 was £149 for small businesses, £166 for medium businesses and £21 for large business. *Health and Safety Executive*, 'Costs of compliance with health and safety regulations in SMEs', Research report 174, 2003, p17

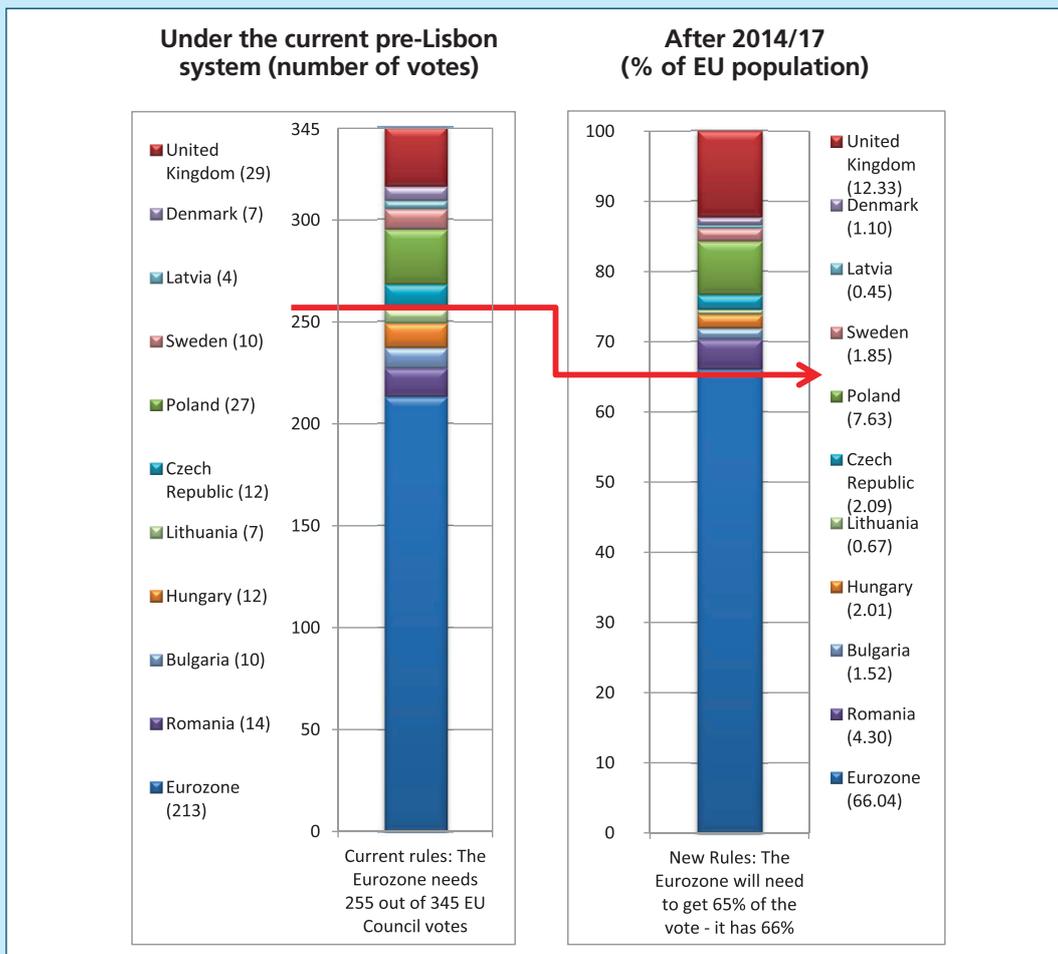
6 Quoted in the *Telegraph*, 'Britain's pledge to stem the tide of EU regulation', 3 November 2011 <http://www.telegraph.co.uk/news/worldnews/europe/eu/8866286/Britains-pledge-to-stem-the-tide-of-EU-regulation.html>

'caucus' in areas which do not directly relate to eurozone governance, including single market legislation and social policy. This could leave Britain consistently outvoted on measures with a profound impact on its economy, simply because it is outside this new inner core.

**Box 2: How the UK can be outvoted by a eurozone caucus**

Decisions in the Council of Ministers – where national ministers meet – are normally taken by QMV. The current voting rules will remain in force until November 2014 (or April 2017 if a state specifically requests). Under these rules the UK can, with difficulty, form a blocking minority. However, when new voting rules entailed in the Lisbon Treaty come into force after 2014/17, based on member states' population, the UK will never be able to form a blocking minority if the eurozone votes as a caucus.

The chart on the left shows how the eurozone, under the current rules, falls short of a qualified majority (255 votes) on its own. Although with the help of a few non-eurozone states such as Romania and Bulgaria it could still push through EU laws. The chart on the right shows that, after 2014/17, if the eurozone votes as a caucus, the UK will never be able to block an EU law as the eurozone has over 65% of the EU's population.



In other words, under the current rules, the eurozone has 213 Council votes out of 345 – just short of a qualified majority. Under the Lisbon Treaty rules, that come into force in 2014/17, the eurozone needs votes from states representing 65% of the EU population to push through an EU law – they currently have 66% on their own giving them a permanent inbuilt majority.

While the Government and many commentators are understandably most concerned about the threat that caucusing poses to the UK's financial services industry, social policy is another area to which similar logic applies. The centre of gravity in the eurozone block would clearly lean more towards Continental and Latin labour market models (see Box 5) than the UK's Anglo-Saxon model. If the above voting patterns were realised, this could take the EU as a whole in a more interventionist direction. The Government is therefore right to consider potential safeguards against eurozone caucusing, including the potential repatriation of some key laws or entire policy areas.

## 1.2 What would the repatriation of EU law mean?

“Repatriation” is a broad term that potentially encompasses varying degrees of action, from returning individual EU laws to the UK level at one end of the scale and regaining power over an entire policy area at the other. In the case of social policy, all would require negotiation with the UK’s EU partners.

### Box 3: Different types of EU legislation, the ECJ and ‘gold-plating’

**Regulations**, not to be confused with the generic term “regulation”, are directly applicable in EU member states and become immediately enforceable in law without further implementation by the member states. In practice, however, EU Regulations are sometimes subject to additional implementing measures. In the UK, Regulations are rarely subject to Impact Assessment and their resulting cost is therefore often unknown.

**Directives** are not directly applicable, in that they usually require further measures in order to be transposed into national law. They are binding on member states, but have no effect in national law until they are transposed. In the UK, they can be implemented by either primary (Acts) or secondary legislation (Statutory Instruments (SIs)). In practice, in the UK, the majority of Directives are implemented by SIs.

**Decisions** are used for any purpose other than approximating the laws and regulations of the member states. They are binding, but very few EU decisions generate new UK laws.

**ECJ rulings** can have a significant impact on EU legislation. The ECJ has a huge amount of power to interpret individual Regulations and Directives, which means that its case law can have a significant impact on how EU regulation evolves and affects individuals and member states.

**‘Gold-plating’** describes a situation where national governments add extra requirements to EU legislation, which in turn can increase regulatory burdens to business and others. This almost exclusively applies to EU Directives as these allow member states room for interpretation when implementing them into national law. However it should be noted that, although gold-plating is a problem in the UK, it is not the main driver of regulatory cost stemming from EU law.<sup>7</sup>

### i) Repatriating a law does not mean repealing it

Should the UK Government succeed in repatriating powers, EU-derived laws would not magically disappear over night, nor would the benefits and costs arising from them. EU Directives (as opposed to EU Regulations) – which comprise the bulk of EU social policy laws – require UK implementing laws in order to take effect and they would therefore remain in force as UK law. In other words, even if the entire body of EU social law were repatriated, it would require acts of Parliament to amend or repeal the UK laws that currently implement EU Directives.

This would no doubt give rise to a lively and vibrant debate. The Government and many MPs are likely to want to keep many of these laws, either in their entirety or in part, for example anti-discrimination laws, but they would be free to significantly amend others, such as the WTD – a stated aim of the Coalition agreement. The crucial point is that both the regulations themselves and the benefits and costs they generate would be under the control of Westminster, empowering MPs and, in turn, voters to influence them.

### ii) How would repatriation be achieved?

#### a) Legally

There are a number of options that the Government could pursue, which we set out in more detail in Section 4, but they can be divided broadly into three categories:

- Repatriation without changes to the EU Treaties but a renegotiation of individual Directives
- Repatriation with EU Treaty changes
- Repatriation through unilateral action by the Government or Parliament

The two first options would be playing ‘within the rules’, subject to the agreement of other EU countries, while the unilateral ‘nuclear’ option would have potentially far-reaching and unpredictable political consequences.

<sup>7</sup> See discussion in Open Europe, ‘Still out of control’, 2010, p13; <http://www.openeurope.org.uk/research/stilloutofcontrol.pdf>

## b) Politically

It is clear that any attempt to repatriate powers will be a huge challenge, given that this will require agreement from 26 other national governments and that a comprehensive approach will require re-negotiation of the EU Treaties. It is also clear that if a UK Government is to successfully repatriate powers, it needs to have leverage with its EU partners and be willing to spend a lot of political capital. In addition, it may have to make other concessions in return.

This does not mean that repatriating powers is an impossible task. Greater eurozone integration may need one or more EU Treaty changes, over which the UK has a veto. This could provide the UK with the opportunity to insert a protocol, potentially on social policy, as part of the wider reshaping of the EU architecture.

However, it will be important to separate short-term eurozone crisis management, a crisis which could have direct economic consequences for the UK if it spirals out of control, from the political settlement that is likely to follow in its wake and which can be spread over years. The former is not suitable for horse-trading, while, just as any other member state, the UK has little choice but to engage and seek to maximise its national interest in the shaping of the latter – particularly in light of the potential formation of a tightly integrated eurozone core.

Regardless, the risk with this strategy is that Germany, France and the other eurozone members push ahead with a eurozone-only treaty, outside the wider EU framework, with a similar structure to the original Schengen Treaty. This would strip Britain of its veto and therefore leverage. But even so, Britain potentially has the size and clout to achieve comparable concessions – it is one of the EU's 'Big Three', presides over a big market and is a major net contributor to the EU budget.

The EU often works by consensus, and if a member state – and one of the biggest in particular – sets its mind on a certain task, it is very difficult for the rest of the club to ignore it. No matter what happens, Britain will need to play a long strategic game and prioritise what it really wants to get out of the EU – social policy would be one of many areas to consider. Winning in Europe is rarely achieved through a big bang strategy, but through agenda setting and endless repetition.

## 2. THE DEVELOPMENT, COSTS AND BENEFITS OF EU SOCIAL POLICY

### 2.1. How has EU social policy developed?

The EU's Maastricht Treaty, which came into force in November 1993, attached what was informally known as the "Social Chapter" to the EU Treaties in the form of a "Protocol on Social Policy". This gave the EU the mandate to legislate on a broad range of social and employment issues. During the Maastricht Treaty negotiations, John Major's Government negotiated an opt-out from the "Social Protocol", which meant that these competences did not apply to the UK.

In 1997, Tony Blair's Labour Government ended the UK's opt-out, and two years later, with the Amsterdam Treaty, the Social Protocol was incorporated into the main body of the EU Treaties.<sup>8</sup> This means that the "Social Chapter" or "Social Protocol" no longer exists in legal terms. Instead, the legal basis for the EU's social and employment policy has taken the form of 11 articles in the Treaties – Articles 151 to 161 Treaty on the Functioning of the European Union (TFEU).

These articles specify in which areas of social and employment policy the EU is allowed to take action, based on a proposal from the European Commission, and dictates how such decision should be made. In the case of social policy, usually by QMV.

#### i) EU social policy: employment law, health and safety and anti-discrimination

It is now impossible to distinguish between EU social and employment law on the one hand, and EU health and safety law on the other. Article 153 TFEU, which sits in the 'social policy title' of the EU Treaties, is not only the legal base for the most far-reaching EU social and employment regulations, such as the WTD and the AWD, but it is also the basis for a range of health and safety laws, such as Directives on exposure to asbestos<sup>9</sup> and restrictions on noise levels at work.<sup>10</sup>

Equally, the social policy articles in the Treaties are not the only means that the EU has used to introduce social law. For example, the UK's Employment Equality (Age) Regulations 2006 implement Directive 2000/78/EC, which is based on the EU Treaties' Article 19 TFEU on anti-discrimination. Likewise, working time restrictions for transport workers are based, at least partially, on the section in the Treaties regulating the EU's single market in transport.<sup>11</sup>

#### ii) EU social policy is intertwined with the single market and free movement

At the same time, while some EU health and safety regulations are imposed under the legal basis of 'social policy', others are imposed on the legal basis regulating the internal market. For example, the EU's REACH Regulations (Registration, Evaluation, Authorisation and Restriction of Chemicals), require manufacturers or importers of substances to register them with the central European Chemicals Agency (ECHA). If manufacturers fail to register their substances, then the data on them will not be available and, as a result, they will no longer be able to manufacture or supply them legally in the EU.

Although the aim of these regulations is to improve health and safety, they work on the principle of harmonising standards as a requirement to manufacture and market substances within the internal market. This is quite different from social or health and safety law that changes working practices, such as those regulating noise levels or exposure to asbestos, for example, which apply to a given workplace in a member state. Leaving aside the particular merits of the REACH regulation, it would be difficult for the UK to opt out of such a regulation and maintain access to the single market.

On the other hand, the internal market has been used as the basis for what might be considered social or employment law. For example, the UK's Transfer of Undertakings Regulations (TUPE), which set out the

<sup>8</sup> The UK's decision to opt in to these measures resulted in an additional, significant precedent. Before they were enshrined in amendments to the Treaties, the Directives that had already been adopted by other member states on the basis of the Protocol on Social Policy were applied to the UK through internal market articles in the treaties using what is now Article 115 TFEU (then article 100 of the Treaty of Rome, later article 94 TEC) – despite the fact that this article does not concern social policy but only the "functioning of the internal market"; See Gennard, John, "Labour Government: change in employment law", *Employee Relations*: 20, 1, 1998.

<sup>9</sup> Directive 2009/148/EC of the European Parliament and the Council on the protection of workers from the risks related to exposure to asbestos at work (codified version)

<sup>10</sup> Directive 2003/10/EC of the European Parliament and the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise)

<sup>11</sup> In particular, the Road Transport (Working Time) Regulations 2005, which is based on Directive 2002/15/EC Working Time in Mobile Road Transport Directive

rights of employees when their employer's business is bought or services outsourced, implement a Directive introduced under single market Article 115.<sup>12</sup>

Another politically sensitive issue is EU citizens' access to social security benefits as a result of the EU's principle of free movement. The Commission recently threatened the UK with legal action<sup>13</sup> over its "right to reside" test, which non-UK EU citizens need to pass before being able to access a range of UK social security entitlements – including child benefit, child tax credit, state pension credit, jobseekers' allowance and employment and support allowance.

The Commission argues that EU-wide "habitual residence" rules are a sufficient safeguard against 'benefit tourism' and that the UK is imposing an additional test, which indirectly discriminates against non-UK EU nationals because, while UK nationals can easily prove their "right to reside" based on their UK citizenship, other EU nationals have their applications heard on a case-by-case basis. This is an area where the UK is likely to want to continue to participate in EU law but where it would probably want stronger safeguards in defining who and who is not eligible for UK social security benefits.

The development of EU social law demonstrates the difficulty in defining it in a legal sense and the practical challenge of separating it from the single market. Any attempt to repatriate this policy area, without an agreed definition, or a definition of EU social policy decided by the UK, would therefore be susceptible to legal confusion.

#### Box 4: The Charter of Fundamental Rights

Under the Lisbon Treaty, the EU's Charter of Fundamental Rights became an integral part of EU law carrying the "same legal value as the Treaties."<sup>14</sup> The Charter, and particularly its interpretation by the ECJ, is therefore potentially another unpredictable vehicle for greater EU influence over UK social and employment law.

The UK does not currently have an 'opt-out' from the Charter but secured a protocol to the Lisbon Treaty that, according to then Europe Minister Jim Murphy, "clarifies the effect that the Charter will have in the UK".<sup>15</sup> However, irrespective of the UK protocol, ECJ case law seems to suggest that the UK is bound by and required to implement the Court's rulings based on the Charter (see section 3.1.v). The House of Commons European Scrutiny Committee concluded that,

*Since the Protocol is to operate subject to the UK's obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation.<sup>16</sup>*

## 2.2. The economics of EU social policy

Since 1998, the UK Government has been committed to producing 'impact assessments' (IAs) for new regulations deemed to have a significant impact on the economy or businesses. Our estimate of the annual cost and benefits of EU social law is based on an analysis of over 2,300 of these IAs, conducted by Open Europe over the last two years, and reached by extracting the costs from the 48 IAs that deal with EU social law.<sup>17</sup>

12 The Transfer of Undertakings (Protection of Employment) Regulations 2006 are based on Directive 2001/23/EC.

13 European Commission, 'Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits', 29 September 2011; <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1118&format=HTML&aged=0&language=EN&guiLanguage=en>

14 Article 6 TEU

15 See Barnard, Catherine, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?', *Trinity College Cambridge*, 2010, p18

16 House of Commons European Scrutiny Committee, 'European Union Intergovernmental Conference: Follow-up report', 14 November 2007, p11-12; <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

17 Open Europe, 'Still out of control: measuring eleven years of EU regulation', 2010; <http://www.openeurope.org.uk/research/stillofcontrol.pdf> and Open Europe, 'Out of control: measuring a decade of EU regulation', 2009; <http://www.openeurope.org.uk/research/outofcontrol.pdf>

## i) Quantifiable benefits

Many of the benefits of EU social law are difficult to quantify in economic terms and, until recently, UK Government IAs have rarely quantified the benefits of regulation. For example, the benefits of the WTD have not been quantified but the expected benefits include “a better work life balance”, “improvements to health and safety”, and “a more committed workforce”.<sup>18</sup> On the other hand, the AWD, which introduces equal pay and holiday for temporary workers after 12 weeks on an assignment, is expected to generate benefits of £1.4bn a year, £1.1bn of which through increased wage and paid holiday increases. However, this is known as a so-called “transfer payment”, which simultaneously imposes costs on businesses and the public sector.<sup>19</sup>

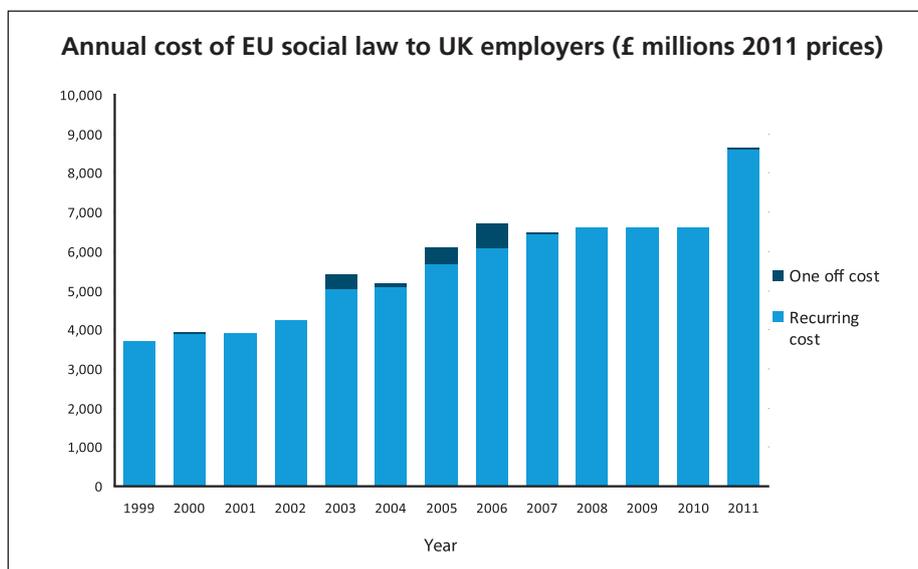
Data extracted from the Government’s IAs shows that the total quantified benefits of EU social law stand at £3.4bn a year. However, given the lack of data, it is difficult to compare these quantified benefits with the quantified costs of EU social law outlined in the cost section below.

## ii) Quantifiable costs

We estimate that the annual cost to UK businesses and the public sector of EU social policy stands at £8.6bn a year. To put this in context, the wealth lost through EU social policy is roughly equal to the money that the Treasury raised from its stamp duty in 2010-11.<sup>20</sup>

The most “expensive” EU regulations are the WTD, AWD, the Control of Vibration at Work Regulations and the Fixed-term Employees’ Regulations. Again, should the UK Government succeed in repatriating powers over social policy, the cost arising from these laws would not immediately disappear – it would merely bring these costs under the control of Westminster MPs.

The graph below, shows how the annual cost of EU social law has increased year on year – although this graph takes no account of potential benefits that have arisen from these laws over the same time period.



Source: Government impact assessments, Open Europe calculations

Although our £8.6bn figure is driven mostly by a few very costly Directives, it could also well be a conservative estimate, as many IAs tend to underestimate costs, our analysis only includes EU regulations introduced after 1998 (the date after IAs were introduced), and IAs usually only account for administrative and policy costs (see Box 5 and Annex I).

<sup>18</sup> Department of Trade and Industry, 2003 compendium of regulatory impact assessments, 2004, p135; <http://www.berr.gov.uk/files/file11496.pdf>

<sup>19</sup> In 2009 prices. See Department for Business Innovation and Skills, 'Impact Assessment of the European Parliament and of the Council Directive on working conditions for temporary agency workers', January 2010, p9; [http://www.legislation.gov.uk/uksi/2010/93/pdfs/uksi20100093\\_en.pdf](http://www.legislation.gov.uk/uksi/2010/93/pdfs/uksi20100093_en.pdf);

<sup>20</sup> HMRC, 'Tax and NIC receipts', October 2011; [http://www.hmrc.gov.uk/stats/tax\\_receipts/tax-nic-receipts-info-analysis.pdf](http://www.hmrc.gov.uk/stats/tax_receipts/tax-nic-receipts-info-analysis.pdf)

### Box 5: Different types of regulatory costs

**Administrative costs** are those incurred by companies from providing information to a third party, such as the Government or shareholders, or complying with administrative tasks such as record-keeping or invoicing.

**Policy costs** are those incurred through meeting the aims of the regulations, such as installing new computer software to facilitate information sharing.

**Financial costs** are costs arising from a direct transfer of money to the Government or other relevant authority, because of a tax or levy, for example regulations increasing national insurance contributions.

**Wider effects** are those costs not directly imposed by a regulation, but caused by its knock-on effects in the wider economy. For example, regulations making it more difficult to sell property could lead to stagnation in the housing market. These costs are rarely quantified in IAs.

### iii) The potential benefits of deregulation

£8.6bn represents a cost to business and the public sector in the UK but does not in itself account for the potential wider positive effects of cutting back on regulation. However, by taking this figure, we are able to estimate the positive knock-on effects and overall impact which varying levels of deregulation could have on the UK economy. Again, we are not suggesting that these benefits will automatically be realised should the UK manage to repatriate EU social laws. Rather, it will be up to Government and Parliament to decide whether these potential benefits outweigh the cost of the social laws currently on the UK statute book.

We have looked at the potential positive knock-on effects on UK output, productivity and job creation from cutting back on EU social laws. We consider three levels of deregulation – 100%, 50% and 25%. Clearly, completely eliminating all the costs of these regulations is not realistic and the 100% scenario is purely an illustrative one.

Benefits of de-regulation				
Level of deregulation	Total increase in output (£ million, 2011 prices)	Rise in output per worker (%)	Total increase in employment	
			Scenario 1	Scenario 2
	All scenarios	Scenario 1	Scenario 1	Scenario 2
100%	14,823	0.56	116,853	279,374
50%	7,412	0.28	58,426	139,687
25%	3,706	0.14	29,213	69,843

Sources: Europe Economics, Open Europe; ONS, HM Treasury

We estimate that 100% deregulation would yield an annual £14.8bn boost to UK GDP, while lower levels would also generate some substantial effects (see table).

We have considered two scenarios which help demonstrate the potential impact that GDP increases could have on employment and productivity (for a full discussion of our estimates see the Methodology section, Annex I).

**Scenario 1:** Here we envisage a situation where the increased output arises from a split between productivity increases and employment increases, after the burden of the relevant regulations is removed. The employment impact would be equivalent to the creation of between 29,213 (25% deregulation) and 116,853 jobs (100% deregulation) based on the current output per UK worker. Meanwhile, the productivity increase would be equivalent to an average of between 0.14% (£75) and 0.56% (£300) for every UK worker. This suggests that there is a significant boost to productivity from deregulation. These impacts are amalgamated at the UK economy level. In reality, however, they would likely be concentrated in certain sectors and industries which are the most affected by these regulations, meaning some areas of the economy could post more significant productivity increases.

**Scenario 2:** In this case, we assume that the entire output increase arises from an increase in employment after deregulation. In this scenario the employment impact would be equivalent to the creation of between 69,843 (25% deregulation) and 279,374 jobs (100% deregulation).

In reality, the actual distribution between productivity and employment increases is likely to fall somewhere between these two scenarios, as such these figures are illustrative of the potential boost which the UK economy could receive from deregulation of social law, and the distribution is not set in stone. Therefore, the potential impact of 50% deregulation in this area (our central estimate) could be equivalent to a £4.3bn direct boost to output as well as a 60,000 increase in employment or it could be equivalent to a total increase in employment of 140,000.

#### iv) How could cost savings be made?

There are clearly some significant benefits from cutting the cost of regulation in this area. So could a 25% or 50% cut in the cost of these regulations be achieved without compromising workers' protection? Some potential areas of savings that we have identified include:

**A general small business exemption:** The European Commission has taken positive steps by introducing the Small Business Act, which proposes exempting smaller firms from some rules and requirements, for example accounting standards. This could be extended to involve a general exemption from the main bulk of EU social law, which does not have essential cross-border importance (which would be the majority), for firms with less than 250 employees. This could save a huge amount of money, but given the difficulty in changing EU law, is unlikely to happen unless the UK regains control over EU social law.

**Scrap obligation to conduct risk assessments for low-risk firms:** EU Directives require that risk assessments be updated on a regular basis, and immediately after a firm goes through "significant changes" in its working practices.<sup>21</sup> Exempting companies that qualify as low-risk after the first assessment from this requirement could save businesses – particularly small ones – substantial costs without compromising safety. The UK would need to either renegotiate this law or repatriate social policy to achieve this.

**Exclude self-employed from EU health and safety law:** Currently, self-employed workers are not covered by many EU health and safety Directives<sup>22</sup> – for example EU laws regulating vibration<sup>23</sup> and noise<sup>24</sup> in the work place. However, the UK has "gold-plated" some of these laws, also requiring the self-employed to comply.<sup>25</sup> The UK could scrap such requirements unilaterally following an initial risk assessment.<sup>26</sup> However, this would not prevent the EU tightening this regulation by extending it to the self-employed in future.

**Scrap the WTD's on-call time and compensatory rest rules:** Overturning the ECJ's controversial *SiMAP* and *Jaeger* rulings on time spent resident on call and mandatory compensatory rest, could potentially save the NHS hundreds of millions of pounds every year (see section 3.1). The British Medical Association has estimated that the effect of the *Jaeger* ruling alone was tantamount to losing between 4,300 and 9,900 junior doctors by 2009, when the full 48-hour limit for junior doctors came into effect.<sup>27</sup> The UK would need to negotiate an opt-out from EU rules, either within the WTD itself or for EU social policy as a whole, for it to be able to scrap these rules.

**Exempt firms that negotiate wages on an individual basis from the AWD:** The Institute of Directors (IoD) has argued that UK businesses could save £1.16bn a year if the Government allowed firms that decide employment terms through individual negotiations with their employees – rather than through company level collective agreements – to opt out of the Directive. The IoD argues that letters from the Commission indicate that this option would be permissible under the terms of the Directive, meaning that, again, the UK could be gold-plating.<sup>28</sup> However, it would still be unclear whether such an approach would survive a legal challenge, and the only guaranteed way for the UK to limit the scope of the Directive would be to opt out of it altogether.

21 For example, see here for the Control of Noise at Work Regulations, <http://www.legislation.gov.uk/uksi/2005/1643/regulation/5/made>; and here for the Control of Vibration at Work Regulations, <http://www.legislation.gov.uk/uksi/2005/1093/regulation/5/made>

22 See the European Commission's website, <http://ec.europa.eu/social/main.jsp?catId=716&langId=en&intPageId=221> At the EU level, the protection of the health and safety of self-employed workers is currently only covered by Council Recommendation 2003/104/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:053:0045:0046:EN:PDF>, but recommendations are not legally binding on member states

23 See <http://www.legislation.gov.uk/uksi/2005/1093/regulation/3/made>

24 See <http://www.legislation.gov.uk/uksi/2005/1643/regulation/3/made>

25 As pointed out by the *British Chambers of Commerce* for example. *British Chambers of Commerce, 'Health and safety – A risky business?', May 2011, p11*

26 See also the Davidson review, p98

27 See *Open Europe, 'Time's up! The case against the EU's 48-hour working week', March 2009, p25* <http://www.openeurope.org.uk/research/wtdoptout2.pdf>

28 Letters from the European Commission, obtained by the Association of Recruitment Consultancies (ARC) and the Institute of Directors (IoD), confirm that the Directive requires an agency worker to be given the same "basic working and employment conditions" in relation to pay and holiday as a permanent employee of the hirer taken on to do the same job. However, the Commission defines "basic working and employment conditions" on pay and holiday as only what is set down in a country's laws, collective agreements and other "binding general provisions." As the ARC and IoD point out, as an example, a "binding general provision" is basically a company level collective agreement or a pay scale. However, pay arrangements in the vast majority of the UK's private sector are set by individual negotiation. Only the largest employers have binding pay scales or operate under collective agreements. The ARC and IoD estimate that £1.16bn could be saved every year by avoiding this gold-plating.

### 3. THE ARGUMENTS FOR AND AGAINST REPATRIATION

#### 3.1. The arguments for repatriation

##### i) A one-size-fits-all approach to regulation leads to disproportionate costs

Labour market models and levels of economic development differ substantially between EU member states, and regulating them centrally will always risk imposing awkward pan-European rules that conflict with local circumstances and practices, imposing unnecessary economic and political costs.

###### Box 6: Europe's mosaic of labour market models

The labour market models employed by EU member states can be divided into five broad categories<sup>29</sup> – though even within these categories, there are important nuances, while some countries' labour markets are a hybrid of a number of the models below, for example the Dutch model.

The Continental model has had the most influence on EU social and employment regulation, with a large role for the state and legislation, and therefore the countries with differing models have encountered the most difficulties with implementing EU labour market regulations.

###### *The Continental model* (Austria, Belgium, France and Germany)

Heavily statist, with legislation governing industrial relations. Centrally regulated collective agreements are binding for unions and employer organisations. Labour markets tend to be rigid with a less mobile workforce.

###### *The Latin/Mediterranean model* (Greece, Portugal, Spain and Italy)

Low degrees of union density, but with high collective bargaining coverage. Highly politicised unions, and high levels of industrial conflict. Segmented labour market with protected (often prime age and older) workers on one hand, and more vulnerable (predominantly young) workers on the other. Substantial 'informal' sector in the economy.

###### *The Scandinavian model* (Denmark, Finland and Sweden)

High levels of social protection expenditure and universal welfare provision. Compressed wage structures and relatively high tax rates. Wages agreed through voluntary agreements between unions and employer organisations, with limited role for the state. Conflicts between social partners are rare.

###### *The Anglo-Saxon model* (Ireland, the UK)

More flexible labour markets, e.g. more temporary workers, with wages usually determined through individual negotiation, rather than collective bargaining. Access to welfare predominantly dependent on circumstances. Significant variances across wage distribution scale. Union presence and influence much stronger in public than private sector.

###### *The Post-Communist model* (Central and Eastern Europe)

Mix of residual statist tendencies with liberalisation measures introduced during the transition period. Typically, entrenched privileges for public sector workers, less so for private sector. Medium levels of union density and collective bargaining coverage.

For instance, the UK's preference for labour market flexibility means that regulations such as the AWD have a disproportionate impact on Britain. In 2009, agency workers made up around 3.6% of the UK workforce, compared to a European average of 1.5%.<sup>30</sup>

For the same reason, EU social law can also create particular problems for individual sectors. The NHS is severely affected by the WTD, but a whole range of other sectors with specific needs and circumstances are also disproportionately affected.

##### ii) Undermining national democratic settlements

Employment law in particular is inextricably linked to the "social contract" that exists between governments and citizens, an evolutionary process resulting from decades of domestic political debate. The evolution of EU-level social policy has therefore clashed with both the left and right sides of the political divide.

<sup>29</sup> Rovelli, R. & Bruno, R., 'Labour market policies, institutions, and employment rates in the EU-27', IZA, May 2008; <http://politiquessociales.net/IMG/pdf/dp3502.pdf>; Karlson, N. & Lindberg, H., 'The corporative cartels and the challenges for the European labour market models', Ratio Institute, 2011; [http://www.econhist.gu.se/digitalAssets/1341/1341241\\_corporative-cartels\\_nils-karlson-new-version.pdf](http://www.econhist.gu.se/digitalAssets/1341/1341241_corporative-cartels_nils-karlson-new-version.pdf)

<sup>30</sup> International Confederation of Private Employment Agencies, 'The agency work industry around the world', 2011 edition, p24; [http://www.ciett.org/fileadmin/templates/eurociett/docs/stats/Ciett\\_Economic\\_Report\\_2011.pdf](http://www.ciett.org/fileadmin/templates/eurociett/docs/stats/Ciett_Economic_Report_2011.pdf)

### Box 7: EU social policy – the left's gamble?

Under former Commission Presidents Jacques Delors and Romano Prodi, the EU moved broadly towards the 'Social Europe' model.<sup>31</sup> But this agenda has lost some momentum in recent years – though as we argue throughout the paper, it re-asserts itself intermittently through some Commission proposals and ECJ case law.

In the past, many people on the left – including several national unions – championed greater EU competence over areas of social and employment law because they saw the opportunity for aspects of the social model to be 'locked in' at the European level, and safeguarded from potential future revision by centre-right and liberal governments at the national level. The big prize was always EU competence in wage setting, and, ultimately, an EU-wide minimum wage. However, as social policy has become increasingly blurred with other areas of EU competence such as health and safety and internal market regulation, in particular the free movement of people, a number of cases have shown that allowing extensive EU involvement in this area can backfire. Notable examples include:

**EU Minimum Wage:** A comprehensive minimum wage structure at the EU level has long been an ambition for many trade unions and politicians across the European left; many argued that workers should be paid at least 60% of the average national or sectoral wage in their member state<sup>32</sup>. This ambition has been voiced by mainstream politicians. However, recent EU-level trends towards flexible labour markets, combined with EU-backed austerity measures to deal with the immediate debt crisis have turned many former enthusiasts against the idea. They fear that rather than entrenching higher wage levels, EU competence in this area would be a factor in further pushing them down; for example the EU recently urged Greece to lower its minimum wage, which is higher than in countries with a similar standard of living.<sup>33</sup>

**The Laval case:** An ECJ ruling in 2007 on Latvian workers posted in Sweden illustrated the tension between EU law on the freedom of movement and the Scandinavian labour market model<sup>34</sup>. The ECJ ruled that Swedish unions had been wrong to demand that a Latvian construction company had to sign a collective agreement with the Swedish unions, stipulating that the Latvian company was required to pay its workers, posted in Sweden, the local going rate, rather than the wage agreed in a national collective agreement. The Court's ruling emphasised that member states can impose minimum rates of pay on posted workers, either via legislation or collective agreement, but this must take place in accordance with the terms of the Posted Workers Directive. The ECJ simultaneously extended its powers by effectively defining when unions in member states have the right to take strike action in cross-border disputes. The ruling therefore had a huge impact on those member states (mainly the Scandinavian countries) which rely upon voluntary and autonomous collective bargaining by the social partners (employer and employee organisations) for the regulation of pay and working conditions.<sup>35</sup>

**Proposed increase in pilot flying hours:** The EU has proposed to increase the amount of time aircraft pilots can operate to 13 hours 55 minutes per day, a significant increase on the 10 hours 15 minutes currently allowed by UK rules. The proposal has been condemned by both the UK Government and the British Air Line Pilots' Association, who have argued that this would force pilots to operate above and beyond levels deemed safe by scientists and medical experts.<sup>36</sup>

**New National Boatmasters' Licence:** In 2007, the UK introduced a new system of licensing boatmasters in order to comply with the EU's Directive on the harmonisation of national boatmasters' certificates<sup>37</sup>. While it was acknowledged the new licence would push up overall safety standards, significant concerns were expressed that the new BML would have a detrimental impact on the standards of boatmasters' qualifications on the Thames. In their submission to Parliament's Transport Select Committee, the RMT argued that safety would be compromised by the removal of mandatory college based training, reducing the number of examinations to one as opposed to the four that were previously required, substantially reducing the scope of the local knowledge required, and reducing the overall qualifying service from five years to only two years<sup>38</sup>. The legislation was also strongly opposed by the Transport and General Workers Union and the Marchioness Action Group.

At present, the mainstream political left and trade union movement's criticism has been confined to specific EU social and employment measures that they feel have gone against them on substance – but, reasonably, they rarely object to the principle of EU involvement in itself, having argued for it in the first place (the reverse is of course true for the right).<sup>39</sup>

The status-quo is rapidly running out of supporters; the right and business community complain about the excessive compliance costs stemming from EU regulations, while the left and trade unions are increasingly coming around to the view that not only is the EU failing to provide the sort of worker protection they would like to see, it is actively undermining it. The situation therefore offers a unique opportunity for different ideological groups from across the political spectrum to declare a temporary ceasefire; while they will naturally maintain strongly opposing views on the nature and specific content of social policy itself, they can work towards achieving their common objective of limited EU involvement in this area.

31 European Council Nice 7 – 10 December 2000, Conclusions of the Presidency, Annex 2; Modernising and improving the European social model [http://www.europarl.europa.eu/summits/nice2\\_en.htm](http://www.europarl.europa.eu/summits/nice2_en.htm)

32 See for example Thorsten Schulten 'A European Minimum Wage Policy for a More Sustainable Wage-Led Growth Model 8 June 2010 <http://www.social-europe.eu/2010/06/a-european-minimum-wage-policy-for-a-more-sustainable-wage-led-growth-model/>

33 AFP 'Greece urged to lower minimum wage to boost jobs' 13 October 2011 <http://www.google.com/hostednews/afp/article/ALeqM5jL6iyghsVwHgcMW1P2TleDDzw?docId=CNG.0b47324644de1b191c44ad6aa1b85137.1e1>

34 Case C-341/05, available here: <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070098en.pdf>

### iii) EU laws are very difficult to change

Unlike national legislation, EU regulation is very difficult to repeal, even if it proves overly burdensome or inappropriate in light of evidence and experience. Repealing or amending an EU measure, law or policy area requires the reopening and successful conclusion of negotiations with all 27 member states and, usually, the European Parliament – which is very hard to achieve.

### iv) EU laws can take on a life of their own

Equally, if an existing Directive is opened up for renegotiation, a government may even lose concessions it has previously won. National governments can be outvoted not only on an initial proposal for a new regulation but also on subsequent amendments. The Commission's 'right of initiative' gives it the power to amend existing EU Directives, reopening the entire legislative process, which brings the European Parliament as well as other national governments into play. Again, the consequences can be unpredictable.

- For example, in 2008, the Commission proposed an amendment to the Pregnant Workers Directive (92/85/EEC) – negotiations are currently ongoing – extending the minimum period of maternity leave from 14 to 18 weeks. Under the Commission's proposal, workers would receive 100% remuneration during the first six weeks of maternity leave. For the remainder of the leave, the Commission recommended granting full pay but left member states able to specify a ceiling (which must be equal to statutory sick pay).

However, in October 2010, the European Parliament subsequently agreed amendments to the Commission proposal, overturning the non-binding recommendation on pay, whereby maternity leave would be extended to 20 weeks on full pay.<sup>40</sup> An IA produced on behalf of the Parliament showed that increasing maternity leave to 20 weeks on full pay would cost UK private sector employers an extra €3.03bn (£2.63bn) a year.<sup>41</sup>

- In December 2008, the European Parliament voted to scrap the UK's opt-out from the maximum 48-hour working week, enshrined in the WTD, after the Commission had reopened the Directive in order to resolve problems created by the ECJ's rulings on rest periods and time spent on call. The UK, backed by a number of other member states, managed to maintain the opt-out. However, the European Parliament's desire to abolish it remains a barrier to addressing the burdensome impact that the ECJ's *SiMAP* and *Jaeger* rulings have had, in particular, on public healthcare systems around Europe.

### v) The ECJ can reinterpret an EU law in unpredictable ways

In addition to the often unpredictable EU decision-making process, the ECJ has a huge amount of power to interpret individual Regulations and Directives, often extending them far beyond what policymakers had intended.

- In March 2011, the ECJ ruled to scrap the derogation in the EU's 2004 Gender Directive<sup>42</sup> allowing the insurance industry to charge men and women different premiums based on their gender, if it can be statistically proven that they present different degrees of risk. The ruling fundamentally altered how these companies assess risk and therefore created additional costs for both insurers and consumers.<sup>43</sup> In its ruling, the ECJ drew heavily on the Lisbon Treaty's Charter of Fundamental Rights. Despite the UK allegedly having an opt-out from the Charter, the ruling has full effect in the UK.<sup>44</sup>

35 See *Open Europe*, 'Strikes over foreign labour – what's really going on?', 4 February 2009; <http://www.openeurope.org.uk/research/postedworkers.pdf> and Institute of Employment Rights, 'Understanding Viking and Laval', May 2008; <http://www.iier.org.uk/system/files/Understanding+the+Viking+and+Laval+cases.pdf>

36 BALPA Press Release: 'Pilots lobby ministers and MPs to oppose EU lower safety standards' 3 February 2011 <http://www.balpa.org/News-and-campaigns/News/PILOTS-LOBBY-MINISTERS-AND-MPS-TO-OPPOSE-EU-LOWER-.aspx>

37 House of Commons Transport Committee 'The new National Boatmasters' Licence' Sixth Report of Session 2006–07, Volume I <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmtran/320/320i.pdf>

38 RMT Submission to the House of Commons Transport Committee, February 2007 <http://www.rmt.org.uk/templates/internal.asp?nodeid=101055>

39 However, discontent on the left is growing, which was evidenced by the pan-EU trade union and left-wing campaign against the proposed European Constitution and subsequently the Lisbon Treaty. In the UK, a group of trade unionists and politicians set up the 'No2EU – Yes to Democracy' alliance which contested the 2009 European Parliament elections. In a publication they argued, "Successive EU Directives and ECJ decisions have been used to attack trade union collective bargaining, the right to strike and workers' pay and conditions...[They] are implementing a programme to narrow the scope for member states to preside over their different social models and labour markets". See Phil Katz and Brian Denny, 'Reflections on the campaign; No2EU: Yes to Democracy'

40 *European Parliament*, 'Extending maternity leave to 20 weeks with full pay', 20 October 2010; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20101020IPR88388+0+DOC+XML+V0//EN&language=EN>

41 *European Parliament*, 'Costs and benefits of maternity and paternity leave', 5 October 2010, Annex 3; <http://www.europarl.europa.eu/document/activities/cont/201010/20101005ATT85068/20101005ATT85068EN.pdf>

42 Case C-236/09, available here: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/09>

43 *Open Europe*, 'ECJ ruling could cost young women drivers an extra £4,300', February 2011; <http://www.openeurope.org.uk/research/ECJgenderdirective.pdf>

44 Looking at the full text of the ruling, it becomes clear that the ECJ rules that the insurance industry's derogation from the Gender Directive is incompatible with both the spirit of the Directive itself and articles 21 (non-discrimination) and 23 (equality between men and women) of the Charter of Fundamental Rights, see for example clauses 17 and 32 <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/09>

- In 1990, the Commission switched the legal base of its proposed WTD from a social policy legal base, over which the UK still had a veto, to a health and safety legal base, whereby the UK could be outvoted. Then Employment Secretary David Hunt said:

*"This Working Time Directive is an abuse of the Treaty of Rome because to try to regulate the work time of people on phony health and safety grounds is an abuse... We challenge its validity because we say the Commission has no jurisdiction in this matter. It cannot be said by any stretch of the imagination that this is a matter of health and safety."*<sup>45</sup>

The UK took the Commission to the ECJ in 1994, but, ruling in 1996, the ECJ upheld the Commission's decision on the legal base of the Directive.

- Since its adoption, the scope of the WTD has been extended by a series of rulings by the Luxembourg court. Then Health Minister John Hutton said that, "Had it not been for the *SiMAP* and *Jaeger* rulings I do not think that we would have had a problem in the NHS in dealing with the Directive."<sup>46</sup>

The history of the ECJ's interventions in EU social policy illustrates that any plan to repatriate this policy area would need to include a carve out from the ECJ's jurisdiction in this field.

## 3.2. The arguments against repatriation

### i) EU-wide rules can reduce compliance costs and uncertainty

Ideally, EU single market rules allow companies to comply with one set of common rules rather than 27 national standards. For manufacturers and exporters this can result in reduced costs and makes it easier for them to trade across the EU. Similar arguments can potentially be made for EU-wide health and safety rules. Large businesses operating in several member states tend to be in favour of greater EU harmonisation of rules because it is likely to reduce the cost of compliance, as less staff are likely to be needed to ensure familiarisation with national rules. Similarly, common rules create greater procedural certainty for cross-border companies, for example, if a worker is injured in an accident.

However, the benefit arising from a single EU framework is likely to be almost exclusively enjoyed by larger, multinational firms with offices and factories in more than one member state. Approximately only 15.9% of the EU's workforce was employed by foreign-owned companies in 2006<sup>47</sup> and 99.8% of all EU enterprises are SMEs, which provide around two-thirds of non-financial private sector employment and nearly 59% of gross value added in Europe.<sup>48</sup> This would suggest that the vast majority of businesses in the EU do not enjoy the potential benefits of cheaper compliance costs as a result of cross-border rules but nevertheless shoulder the additional burden resulting from the EU's one-size-fits-all rules.

### ii) Cross-border firms enjoy the political certainty of EU regulation

Having one set of rules, decided in Brussels rather than in 27 different national capitals, can potentially also create greater political certainty for companies about the timing and type of new regulations that could affect them.

It is far from clear whether this is the case, however. The examples highlighted above illustrate that regulating at the EU level, rather than at a national level, often makes regulatory outcomes no less unpredictable. The ECJ's ruling on the Gender Directive demonstrates that existing EU rules can result in unexpected future additional costs to business. A centralised system is also potentially more conducive to big-business lobbying.

<sup>45</sup> Press Association, "Britain to sue Commission over working hours", 7 March 1994

<sup>46</sup> House of Lords EU Select Committee, 'The Working Time Directive: A Response to the European Commission's Review', 8 April 2004, Chapter 3; <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldecom/67/6706.htm>

<sup>47</sup> Figures for 2006 based on data from 21 of 27 member states – no data available for Bulgaria, Czech Republic, Cyprus, Greece, Latvia & Netherlands. In European Foundation for the improvement of living and working conditions – 'Multinational companies and collective bargaining', July 2009, p4; [http://www.lex.unict.it/eurolabor/documentazione/altridoc/fe/Multinational\\_bargaining\\_Jul09.pdf](http://www.lex.unict.it/eurolabor/documentazione/altridoc/fe/Multinational_bargaining_Jul09.pdf)

<sup>48</sup> Figures for 2010 in European Commission, 'Are SMEs recovering from the crisis? Annual report on EU small and medium sized businesses 2010/2011', 2011, p7-8; [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/pdf/2010\\_2011/are\\_the\\_eus\\_smes\\_recovering.pdf](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/pdf/2010_2011/are_the_eus_smes_recovering.pdf)

### iii) EU-wide rules promote 'fair competition'

It is not entirely clear whether this could be considered a potential 'benefit' of EU social law, as the concepts of 'fair competition' and 'social dumping' are difficult to define. The European Commission of Jacques Delors, backed by many of the founding member states of the EU, viewed a social dimension ('*espace sociale*') as a necessary accompaniment to the creation of the single market in the early 1990s. Many trade unions and the traditionally protectionist member states needed to be assured that the expansion of the internal market would not lead to a 'race to the bottom'. In the words of the Commission, EU social and labour market law was designed with the aim of ensuring that the creation of the single market did not "lead to a lowering of labour standards or distortions in competition."<sup>49</sup>

An EU body, the European Foundation for the Improvement of Living and Working Conditions (Eurofound), notes that 'social dumping' poses two conflicting options:

*"One scenario envisages the transfer of social policy jurisdiction to the EU level. Harmonised or uniform social and labour standards throughout the Community, established through EU legal measures, would secure the objective of greater equalisation of indirect labour costs for all enterprises, and reduce, if not eliminate, the threat of unequal standards distorting competition in favour of Member States with lower standards. The second scenario favours the opposite: retention of national competence over social and labour standards, thus accepting social dumping as a consequence of direct competition between different Member State social regimes."*

Equally, proponents of the 'European social model', who see a commitment to high levels of social protection as an economic asset, are likely to be in favour of EU-wide social law in order to make the single market more competitive in global terms.<sup>50</sup> From this point of view, the EU is a useful vehicle for ensuring high levels of social protection across Europe. However, the argument that social policy jurisdiction should be progressively transferred to the EU-level is increasingly difficult to make as EU officials, alongside their counterparts at the International Monetary Fund, are actively pushing labour market liberalisation in the likes of Greece, Portugal, Spain and Italy, in order to boost their competitiveness.

Regarding health and safety, there is also an argument that uniform rules across Europe can ensure that companies are operating on a level playing field and that standards of worker safety are therefore maintained across all 27 countries. The Commission argues that:

*"It is essential that the Community acquis be implemented effectively in order to protect the lives and health of workers and ensure that the companies operating within the large European market are placed on an equal footing."<sup>51</sup>*

### iv) The price the UK pays for access to the single market

A related argument is that the cost of social law is, in effect, a 'subscription fee' imposed on the UK for membership of the single market. In this sense, it is similar to other policies that impose costs on the UK, such as the Common Agricultural Policy or increases to the Structural Funds as a result of EU enlargement, which are seen as the necessary costs for accessing the wider benefits of EU membership. In other words, 'social law' gives politicians cover to impose liberalising measures – such as the Services Directive – which are economically beneficial on the whole but can be unpopular with certain sections of society.

### v) Maintaining EU-level social regulation will avoid a political row

The 'pay to play' argument rests on the premise that the more 'statist' member states, such as France would reject the single market "if it allowed members to embark on what they would consider a race to the bottom on green or labour-market standards".<sup>52</sup> This is a view likely to be shared by other EU member states, which would not want to allow the UK to 'free ride' on the internal market without signing up to social regulation that they see as integral to it.

49 European Commission DG Employment, Social Affairs and Inclusion, 'Labour law'; <http://ec.europa.eu/social/main.jsp?catId=157&langId=en>, accessed October 2011

50 Trubek, D.M. and Trubek, L.G., 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', *European Law Journal*, Vol. 11, No. 3, May 2005, p 343–364

51 European Commission, 'Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work', 2007, p5; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0062:FIN:EN:PDF>

52 *Economist*, 'English for Schadenfreude', 17 September 2011; <http://www.economist.com/node/21529018>

In these member states, the idea of a 'social Europe' is something that has been sold to voters by politicians arguing for further European integration. For example, during France's 2005 referendum campaign on the Constitutional Treaty, which later became the Lisbon Treaty, President Jacques Chirac and the French Socialists both argued that the Treaty would create a more 'political', 'social' and less 'liberal' Europe.<sup>53</sup> The eventual rejection of the Constitution was, in large part, the result of a significant number of traditionally centre-left voters voting against. As the academic Henry Milner noted:

*"The Constitution was defeated because a large enough group of left-of-centre voters sympathetic to European integration accepted the standard against which it was judged advanced by the far left, i.e., not the existing state of affairs the Treaty sought to improve, but an undefined and indeed unattainable ideal of 'l'Europe Sociale'".*<sup>54</sup>

Given the strong linkage that exists in public opinion in many member states between European integration and an often undefined 'social dimension', many national leaders would find it difficult to justify to a domestic audience any moves to allow the UK to opt out of EU 'social law'.

On a recent trip to London, German Finance Minister Wolfgang Schäuble reportedly told Chancellor George Osborne to forget any attempts to use the eurozone crisis to repatriate EU social and employment laws.<sup>55</sup> This account illustrates the fierce resistance the UK is likely to face from several of the large member states, should it choose to try to repatriate social and employment law.

From a UK perspective, maintaining the existing levels of EU social law could therefore have the benefit of avoiding a political row with other member states – but ultimately this is a matter of political will.

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53 Marthaler, S. 'Referendum briefing paper No 12: The French referendum on ratification of the Constitutional Treaty', *Sussex University*, 2005, p6; <http://www.sussex.ac.uk/sei/documents/epern-ref-no-12.pdf>; *Federal Trust*, 'What do French voters want from the European Constitution?', 2005; <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief11.pdf>

54 Milner, H., "Yes to the Europe I want; No to this one.' Some Reflections on France's Rejection of the EU Constitution', *PS: Political Science & Politics*, Vol. 39 (2), 2006 p257-260.

55 *Guardian*, 'David Cameron told by Berlin: drop demands for repatriation of powers', 19 October 2011; <http://www.guardian.co.uk/politics/wintour-and-watt/2011/oct/19/germany-euro>

## 4. WHAT ARE THE OPTIONS FOR THE UK?

### 4.1 Options involving no changes to the EU Treaties

#### Option 1) Status quo

If the Government decides that, for one reason or another, the costs of engaging in negotiations with European partners over EU social policy outweigh the benefits, then the EU laws which give rise to regulations in the UK will remain in place, and the cost stemming from these laws will not be brought under the control of MPs in Westminster.

There may be reasons for the Government to leave this policy area untouched, including fears of losing political capital in Europe which may be needed for a wider renegotiation, and concerns relating to limitations imposed by coalition Government.

#### Option 2) Secure opt-outs and limit the impact of existing Directives

The Coalition Agreement between the Conservatives and the Liberal Democrats suggests exploring the possibility of taking advantage of a provision in the WTD, which allows member states to exempt sections of the public sector from certain aspects of the Directive.<sup>56</sup> Similarly, there have been suggestions that the AWD, which came into force in October 2011, can be implemented in a substantially less burdensome way than it has been (see section 2.2).

A dual strategy of maximising opt-outs within existing Directives, and implementing the laws in the least cumbersome way possible, has the benefit of not requiring complicated Treaty changes and could be seen as consistent with the Coalition Agreement. Naturally, it would also be far less controversial with EU partners, compared to a comprehensive opt-out.

*Drawbacks:* There are a number of problems with this approach. Firstly, it would inevitably leave much of the cost stemming from EU laws untouched, such as the on-call time rules in the WTD. Neither would it be sufficient to secure protection against future EU regulation in this area, for example stricter legislation on maternity and paternity leave, which is in the pipeline. Again, given that most proposals in this area are decided by QMV, and by the European Parliament which has co-decision rights, the UK could always be outvoted in future negotiations or overruled by the ECJ. Therefore, securing opt-outs from existing Directives would require vast amounts of time and political capital but with no guarantee that achieved gains would survive.

### 4.2. Options involving Treaty changes

#### Option 3) Opt out of all social policy articles in the EU Treaties

A more ambitious option would be to seek an opt-out exempting the UK from Articles 151-161 TFEU, which constitutes the 'social policy' title of the Treaties. This would require some form of Treaty change, and the agreement of all 27 member states. Such a Treaty change can be achieved in two different ways:

- a Convention composed of representatives of the national parliaments, national governments, the European Parliament and the Commission
- an Intergovernmental Conference (IGC) of EU leaders<sup>57</sup>

Importantly, it probably would not be possible to agree such a Treaty change through the so-called "simplified revision procedure", which has recently been used to change the Treaties to accommodate for the creation of a permanent bailout facility for the eurozone. Although the social policy title of the TFEU falls inside the part of the Treaties for which the simplified revisions procedure can be used, a new protocol for repatriation would not only alter the content of a policy area but the entire structure of the EU Treaties, meaning that a "full" Treaty change may be required.

<sup>56</sup> Directive 2003/88/EC concerning certain aspects of the organisation of working time. Article 17(3)c(i) allows derogations "in the case of activities involving the need for continuity of service or production, particularly: (i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons;"

<sup>57</sup> Article 48(3) TEU states that national governments can decide "not to convene a Convention should this not be justified by the extent of the proposed amendments".

Under this option, a new protocol, similar to that which excludes the UK from all articles in the EU Treaties that relate to the third stage of European Monetary Union (EMU)<sup>58</sup>, could exempt the UK from Articles 151 to 161 and any legislation or decisions adopted on the basis of these articles. The result would be that new or existing Directives or Regulations based on these articles – for example the AWD and WTD – would no longer be applicable to the UK. The UK laws implementing the Directives that formerly applied to the UK would remain in place but, crucially, Parliament would become free to amend or repeal them.

In order for the protocol to be properly anchored in EU decision-making, it is conceivable that a provision would be added, stating that the UK would no longer take part in Council votes on proposals based on these articles. Similarly, as almost all laws in these areas are subject to co-decision with the European Parliament, it may be necessary to make arrangements to exclude UK MEPs from votes on proposals which stem from these articles – though this is not currently the case for other UK exemptions, such as that on justice and home affairs.

The political consequences of such an arrangement would be unclear. On the one hand, it would potentially grant other member states more freedom to progress with greater integration in this area if they so wish. On the other, with the UK – which carries significant voting weight in the Council – absent, it would be more difficult for liberally inclined member states to assemble a blocking minority against new laws in this area. Such a risk could possibly create an incentive for other liberal member states, for example the Czechs, to seek a similar protocol to avoid being outvoted. If so, the process would become a form of ‘reversed’ structural cooperation, allowing a group of member states to opt out of existing laws, to allow others to press ahead with new measures in this area.

*Drawbacks:* As we illustrate above, in the past, employment and health and safety laws have been introduced using a range of articles, not only Articles 151 to 161. Therefore, the Commission and other member states could get around the UK’s opt-out by introducing laws through other Treaty articles. Historical precedent and ECJ case law suggest that there is very little to stop the Commission from doing so, and the ECJ from upholding it, meaning that a carve out from Articles 151 to 161 could prove ineffective in insulating the UK from EU social policy.

## Option 4) Addressing the ‘non-social’ articles in the EU Treaties

### a) Targeted Treaty amendments

Another option would be to, in addition to the protocol set out under Option 3, identify all those articles which might give rise to social policy, and seek Treaty amendments inserting language into each of these articles, specifying that they cannot be used to introduce such legislation. This could be desirable for the UK since these additional articles are likely to include provisions from which the UK would not want a blanket opt-out, such as Article 19 TFEU on non-discrimination or various single market articles.

There are already precedents for this in the EU Treaties. Article 114 on the approximation of internal market laws contains the qualification that it shall “not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.” Likewise, Article 352, or the ‘flexibility clause’, rules out its use for “objectives pertaining to the common foreign and security policy.”

*Drawbacks:* Given the history of EU social law, which has developed from a patchwork of legal bases in the EU Treaties, there is always the possibility that the European Commission could use additional Treaty articles to further EU social policy in the future, such as articles relating to the freedom of movement. For example, it is not inconceivable that Article 46 TFEU on the freedom of movement of workers could be used to override national laws on employment rights in general. For instance, it could be deemed that fewer employment rights in one EU member state acted as a barrier to workers from member states with greater rights, on the grounds that these workers could not take up employment in the former member state without giving up various entitlements. This approach would require the UK to successfully identify every potential article that could be used to introduce social policy.

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<sup>58</sup> See Protocol (No 15) of the TEC, “on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992)”, <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

## b) Addressing the ‘non-social’ articles and the Charter of Fundamental Rights with a blanket safeguard

An alternative to the ‘targeted approach’ would be to seek a safeguard against any aspect of the EU Treaties or decisions by the EU institutions that might impact on UK social law. This would have the benefit of capturing all the possible articles in the Treaties that could give rise to social law, including the Charter of Fundamental Rights.

The new protocol could state that,

*“notwithstanding anything in the EU Treaties or any act or decision of the EU bodies or institutions, nothing in the EU Treaties, and no act or decision of the EU bodies or institutions, shall affect British social and employment policy or law or health and safety policy or law in the United Kingdom.”*

To add additional certainty, the protocol could state explicitly that it prevents any effect of EU fundamental rights or general principles on UK social and employment and health and safety law. This would seek to address the potential for rights enshrined in the Charter of Fundamental Rights or the ‘general principles’ formulated by ECJ case law from impacting UK social and employment rights.

**Drawbacks:** Given the UK’s likely preference to remain part of the internal market, it may want to retain certain social laws at the EU-level, such as the right of other EU nationals to transfer their social security benefits to the UK when coming to work, given that such laws are enjoyed by UK nationals working throughout the Union. Crucially, these laws stem from the EU’s free movement legislation, rather than social law per se. A blanket opt-out from the EU Treaties could create legal and practical difficulties for the UK if it wanted to take part in single market legislation that had a social dimension.

However, the common drawback of all the options outlined so far is that they would leave the legal interpretation of the UK opt-out – and the ultimate decisions over what proposals fall into the category of “social and employment law” and “health and safety law” – in the hands of the ECJ, which, as history shows, would not amount to an opt-out at all.

### Option 5) The double-lock: A safeguard not policed by the ECJ

If the Government really wants a comprehensive opt-out from EU social law, it needs to seek exemptions from the EU Treaties – but exemptions that are not policed by the ECJ, and which remove the jurisdiction of the Luxembourg Court from the appeal process.

In addition to providing a tougher legal safeguard, this approach could avoid the need for a blanket social policy opt-out from the EU Treaties (suggested under Option 4b), with the potential legal and practical complications this would create for the UK’s participation in the single market.

This could be achieved through a “double lock”:

First, a legally binding protocol would be attached to the EU Treaties. This would give the UK an opt-out from Articles 151-161 TFEU, as suggested under Option 3, and provide the first lock. The protocol would also stipulate that the UK has the right, on a case-by-case basis, to opt out of laws based on other articles in the Treaties apart from 151-161 TFEU, if these affect British social and employment policy or law or health and safety policy or law – but could also choose to be bound by them if they facilitate single market access, for example.

However, it is possible that a dispute might arise, for example if the Commission argues that a given piece of law should apply to all 27 member states, but the UK maintains that the proposal, fully or in part, impacts on UK social law.

In the event of such a dispute, the UK (possibly through a vote in Parliament) should have the right to unilaterally block the law, suspending both QMV, and the jurisdiction of the ECJ in reviewing the application of the opt-out. This would be the second part of the lock. Suspending QMV would have the additional benefit of countering the threat of being outvoted by a eurozone caucus.

In part, there is a precedent for this kind of “emergency brake” in the EU Treaties, which could serve as a model. For example, Article 82(3) TFEU, dealing with criminal justice law, states that if a proposal impacts on the “fundamental aspects” of a country’s criminal justice system, the concerned country may ask the proposal to be referred to the European Council (the meeting of heads of state), where unanimity applies, meaning an effective veto over the entire proposal. The jurisdiction of the ECJ would need to be suspended to prevent another member state or the Commission challenging the use of the emergency break at the ECJ, which could see the UK overruled.

The wording in the protocol could be:

*“Where the United Kingdom considers that a draft directive or regulation as referred to in XXX, would affect any aspect of its social and employment and health and safety policy or system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended and the validity of such a request shall not be called into question whether by the ECJ or in any other way.”*

This would effectively give the UK a veto over new draft laws that the Government or Parliament considered a threat to UK social law, with the final say resting with the UK, rather than the ECJ.

**Drawbacks:** However, even this ‘double lock’ would not completely protect against the ECJ reinterpreting existing Directives or Treaty provisions in a way that would impinge on social law in Britain. In theory, the ECJ could still rule the UK opt-out invalid in relation to an existing Directive, arguing that it violates the general principles of the EU Treaties.

The recent ECJ ruling on the Gender Directive is an example of such a case. The Directive contained a derogation allowing the insurance industry to discriminate on the basis of gender in order to calculate insurance premiums only in so far as their assumptions could be evidenced with statistical data. However, the ECJ ruled that the derogation, agreed under the original negotiation of the Directive, was incompatible with both the general principles of EU law and the specific purpose of the Directive, which is to outlaw discrimination on the basis of gender. The Court also based its reasoning on the Charter of Fundamental Rights, despite the UK having an ‘opt-out’ from the Charter. There would be no guarantees that similar occurrences would not arise in social law, notwithstanding a UK social policy opt-out.

There might therefore be a case for inserting a further safeguard which would protect the UK against the secondary effects of ECJ case law on an ongoing basis – but how such a safeguard can be achieved without completely undermining the EU Treaties and the ECJ’s role altogether is unclear. Regardless, the ‘double lock’ option would still grant the UK a hugely significant level of control over its social policy and allow for the repatriation of the most significant social policy laws, such as the WTD, AWD and the most significant health and safety laws.

Politically, securing an opt-out from existing ECJ jurisdiction would be unprecedented and therefore likely to meet significant resistance.

#### **Box 8: Ensuring Parliamentary scrutiny of Government decisions**

In order to ensure that a UK Government could not waive the rights within the new protocol, Parliament might want to create a mechanism by which to oversee Government decisions on whether proposed Directives or decisions of the EU institutions are designated as falling under social law.

### 4.3 What can the UK do in the absence of EU agreement

Should the UK be faced with a situation where it cannot reach agreement with all 26 other EU member states on securing a Treaty protocol with safeguards for UK social law, it would be left facing a unilateral option.

The legal repercussions of this option are relatively simple. However, the political implications are hugely uncertain and impossible to predict. As Parliament is sovereign – which was re-affirmed in the recently passed European Union Act<sup>59</sup> – it could pass a law stating that the powers previously delegated to the EU over social law are now to be determined solely by Parliament, not by the EU institutions. This would mean that Parliament would decide whether or not to apply EU social laws and could decide to ignore rulings from the ECJ. It would also be free to disapply any existing EU derived social law. An alternative to an indefinite withdrawal from EU social policy could be a temporary suspension of EU social law, giving businesses a temporary break from burdensome regulation to cope with the tough economic climate.

Legally, there is no doubt that a unilateral decision by the UK of this sort would be in breach of its EU Treaty obligations. This would lead to infraction procedures being launched against the UK either by the Commission, under Article 258 TFEU, or another member state, under Article 259 TFEU.

This infraction process would involve the following stages:

- 1) The Commission delivers a “reasoned opinion” to the UK deeming it to be in breach of the Treaties, demanding that it change its relevant laws in order to comply with the Treaties within a given time frame.
- 2) If the UK maintained its non-compliance the matter would be taken to the ECJ, which would make an initial ruling. The UK could contest the case.
- 3) In the month following the initial ECJ judgement, the Commission would send a letter requesting information on the measures taken to end the infringement.
- 4) The UK’s failure to comply with the ECJ ruling would result in the Commission taking the UK back to court and asking the ECJ to impose a lump sum or penalty payment on the UK in the shape of a fine. The maximum fine that can currently be imposed on the UK is €703,104 a day or €256.6m (£225.6m) a year.<sup>60</sup>
- 5) It is unclear what happens if the UK refuses to pay the fines.

In the past, infringement procedures of this kind have taken years and it has never led to any fines close to the maximum. For example, Sweden has so far refused to implement the EU’s Data Retention Directive, which requires data on electronic communications to be stored by service providers, over fears that it restricts basic rights and freedoms. The Directive was adopted by the EU in 2006 and member states had until 15 September 2007 to transpose it into national law, and until 15 March 2009 to implement the retention of communications data relating to Internet services. The European Commission has launched infringement proceedings at the ECJ asking for fines to be imposed but Sweden has appealed and the ECJ has yet to make its final ruling.

However, given that no country has unilaterally opted out of an entire policy area before, it is very difficult to predict the timescale and intensity of the legal infringement process that would follow. The Commission is likely to take firm action and the ECJ also has an “accelerated procedure” at its disposal that it can use to deal with cases of an urgent nature.

Politically, the consequences would be far more unpredictable. Unilateral withdrawal from EU social and employment law would certainly result in a massive political row with the EU and the other member states. Despite the expected political fall-out and however unlikely, it might be possible to come to a negotiated settlement following a messy, unilateral UK withdrawal, if the alternative is the UK leaving the EU altogether. There is a real risk, however, of a mutual stand-off that could not be resolved in any other way than for the UK to renegotiate its entire EU membership. It is very unlikely that it will ever come to this, under any Government. In addition, it is unclear whether such a move would be supported by businesses, due to the uncertainty a unilateral withdrawal or suspension of social law would create.

<sup>59</sup> Section 18 of The European Union Act 2011 states that “Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

<sup>60</sup> The ECJ can either impose a daily penalty payment or a lump sum penalty. The basic flat-rate penalty payment is €640 a day. This is multiplied by a coefficient for seriousness (ranging between 1 and 20) and a coefficient for duration (a multiplier of between 1 and 3, calculated at a rate of 0.10 per month from the date of the first ECJ ruling). This is then multiplied by a country specific coefficient (currently 18.31 for the UK). See Application of ‘Article 228 of the EC Treaty’ [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/sec\\_2005\\_1658\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/sec_2005_1658_en.pdf); and ‘Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings’ [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/sec\\_2010\\_923\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/sec_2010_923_en.pdf)

## ANNEX I: METHODOLOGY

In this section we outline the methodology and calculations which we made to reach our estimates for the cost of EU social law and the impact of deregulating these laws on the UK economy.<sup>61</sup>

### The benefits and costs of regulations

Our estimates of the benefits and costs of EU social law are extracted from our database containing 2,300 Impact Assessments (IAs) produced by the UK Government between 1998 and 2011 – compiled by Open Europe over the last three years. We extracted the costs from the 48 IAs which analysed laws which we categorised as “EU social law”. We defined this as regulations which have an impact on employment law, social security, rights legislation and health and safety rules – irrespective of the legal base for it in the EU Treaties.

Costs are expressed as “cost to business and the public sector”, meaning that ‘transfer payments’ are treated as costs if they impose burdens on businesses and the public sector. To reflect the fact that IAs in different years are likely to present estimated costs and benefits in terms of different years’ prices, estimates have been adjusted for inflation so that all figures are presented in 2011 prices. Where an IA does not state which year’s prices have been used, it has been assumed that costs and benefits are expressed in terms of prices in the year that the IA was published. To present the costs in 2011 prices, the annual inflation level dating back to 1998 has been reached using the Treasury’s GDP Deflator Series.

Though the costs are driven to a large extent by two laws – the WTD and the AWD – which skew the figures, our cost estimate could well prove to be an under-estimate, for several reasons:

- Many IAs do not include any cost quantifications at all;
- Our analysis only includes EU regulations introduced after 1998, as there were no IAs produced before that date;
- IAs usually account for only administrative and policy costs (see box 5), while rarely quantifying the wider effects of a regulation to the economy. For example, a new working time regulation in the transport sector increases the cost for the businesses directly affected, but also raises costs for other companies that depend on transport – which includes most wholesale and retail businesses.

For a full methodological note on our regulation database, please see Annex 1 of our report “Out of Control: Measuring a decade of EU regulation”.<sup>62</sup>

### The benefits of de-regulation<sup>63</sup>

Given the breadth and variety in the types of legislation, social employment law has a widespread impact on the UK economy. Taken from the Government’s IAs the total cost of these regulations to UK business is £8.6bn.<sup>64</sup> From this base we looked at the various benefits which the UK economy could accrue if these laws were repatriated or if costs were cut (to varying extents: 100%, 50%, 25%).

#### UK Output

To examine the impact on UK Output (UK GDP) we first assume that the costs of the regulations (outlined in the IAs) would be removed when the laws were repatriated and as such constitute a direct injection or boost to UK GDP.<sup>65</sup> These direct effects will also have knock-on indirect effects, which can be estimated using an all economy output multiplier. This multiplier was chosen mostly due to the wide scope and

61 This section was compiled in consultation with Europe Economics, which provided advice and assistance on how best to measure the benefit of deregulation on the UK economy.

62 <http://www.openeurope.org.uk/research/outofcontrol.pdf>

63 This section was compiled in consultation with Europe Economics, who provided advice and assistance on how best to measure the benefit of deregulation on the UK economy.

64 Some aspects of these costs are naturally transfers between different actors in the economy (such as employers and employees) since these represent only the cost to UK business. For simplicity we assume here that any transfer from businesses to other parts of the economy would likely be crowding out already productive investment, as such we see the entire cost to business here as a dead weight loss to the economy, which would be returned with deregulation or repatriation.

65 In treating the cost as an injection, we are assuming that the regulation uses up resources and assets that could have been deployed productively in other ways, and that those other uses would have produced a direct value equivalent to the regulatory cost.

variety of the regulations, but also given the data constraints on assessing the impacts on a more sector or industry based level. Therefore the overall impact of removing all these regulations entirely would be an annual boost to the UK economy of £14.8bn.

Level of deregulation	Direct Savings from deregulation (£ million, 2011 prices)	All economy output multiplier	Indirect effects on output (£ million, 2011 prices)	Total increase in output (£ million, 2011 prices)
100%	8,623	1.719	6,200	14,823
50%	4,312	1.719	3,100	7,412
25%	2,156	1.719	1,550	3,706

Sources: Europe Economics, Open Europe; ONS - United Kingdom Input-Output Analytical Tables, 2005

### UK Employment and Productivity

This increased output would likely come from two sources: increased employment and increased productivity due to the removal of burdensome regulation. Below we consider two scenarios for how the effects would be distributed. In the first scenario we suggest a mixed impact, with the direct effects boosting productivity and the indirect effects boosting employment. In the second scenario we assume the full output increase comes from solely boosting employment. In reality, the likely scenario would be somewhere in between these two but since the distribution would be incredibly difficult to estimate these examples provide the best assessments of the potential impact.

#### Scenario 1: Mixed impact

Level of deregulation	Indirect GDP rise from deregulation (£ million, 2011 prices)	Percentage increase in GDP	Total increase in employment	of which full-time	of which part-time
100%	6,200	0.40	116,853	85,302	31,550
50%	3,100	0.20	58,426	42,651	15,775
25%	1,550	0.10	29,213	21,326	7,888

Sources: Europe Economics, Open Europe; ONS, HM Treasury

Level of deregulation	Direct GDP rise from deregulation (£ million, 2011 prices)	GDP after direct impacts (£bn)	Output per worker (£)	Rise in output per worker (%)
100%	8,623	1,553	53,058	0.56
50%	4,312	1,548	53,058	0.28
25%	2,156	1,546	53,058	0.14

Sources: Europe Economics, Open Europe; ONS, HM Treasury

To calculate the impact on employment here we assume, as mentioned, that all the indirect increase in output comes from changes in employment. We take UK GDP for 2011-2012 to be £1,544bn and total employment to be 29.1m.<sup>66</sup> We assume that the indirect impact on GDP will be proportionately the same on employment, therefore giving us an increase of up to 116,900 jobs. We assume that the current 73/27 full-time to part-time split in UK employment stays the same after deregulation.

For the productivity effect we assume that all the direct effects come from an increase in productivity. Using the same GDP and employment figures, we calculate that the output per worker is £53,058. We then apply the increase in GDP from the direct effects and recalculate the output per worker. In the case of 100% deregulation we would expect, on average, a 0.52% increase in productivity for all UK workers. For both effects we work from the basis of current GDP and employment and apply the impacts separately rather than together or one after another.

66 Taken from Budget 2011.

## Scenario 2: Full employment impact

Level of deregulation	Total GDP rise from deregulation (£ million, 2011 prices)	Percentage increase in GDP	Total increase in employment	of which full-time	of which part-time
100%	14,823	0.96	279,374	203,943	75,431
50%	7,412	0.48	139,687	101,971	37,715
25%	3,706	0.24	69,843	50,986	18,858

Sources: Europe Economics, Open Europe; ONS, HM Treasury

Under this scenario we assume that the full increase in output from deregulation comes from increases in employment. In reality this is unlikely, but it is illustrative of the number of jobs which various levels of deregulation could create (or at least what the level of value they create is equivalent to in jobs terms). We do the same calculation as for the employment effects in scenario 1, however obviously with a higher starting figure since we use the total GDP increase not just direct increases.

## Summary table

Level of deregulation	Total increase in output (£ million, 2011 prices)	Rise in output per worker (%)	Total increase in employment	
			Scenario 1	Scenario 2
	All scenarios	Scenario 1	Scenario 1	Scenario 2
100%	14,823	0.56	116,853	279,374
50%	7,412	0.28	58,426	139,687
25%	3,706	0.14	29,213	69,843

Sources: Europe Economics, Open Europe; ONS, HM Treasury

## ANNEX II: EU SOCIAL LEGISLATION IN FORCE (UPDATED SEPTEMBER 2011)

<b>GENDER EQUALITY</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 2000/78/EC	Establishing a general framework for equal treatment in employment and occupation	Article 19	
Council Directive 2004/113/EC	Implementing the principle of equal treatment between men and women in the access to and supply of goods and services	Article 19	
Directive 2006/54/EC of the European Parliament and the Council	On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)	Article 157	
Directive 2010/41/EU of the European Parliament and the Council	On the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC	Article 157	
<b>WORKING CONDITIONS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Directive 96/71/EC of the European Parliament and the Council	Concerning the posting of workers in the framework of the provision of services	Articles 53, 62	
Council Directive 97/81/EC	Concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC	Agreement on Social Policy (Annexed to Protocol 14, TEC)	Agreement incorporated into Amsterdam Treaty (Articles 137-145, now 153-161)
Council Directive 98/23/EC	On the extension of Directive 97/81/EC [...] to the United Kingdom of Great Britain and Northern Ireland	Agreement on Social Policy (Annexed to Protocol 14, TEC)	Agreement incorporated into Amsterdam Treaty (Articles 137-145, now 153-161)
Directive 2005/45/EC of the European Parliament and the Council	On the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25/EC	Article 100	
Council Directive 2005/47/EC	On the Agreement between CER and ETF on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector	Article 155	
Directive 2008/104/EC of the European Parliament and the Council	On temporary agency work	Article 153	
Directive 2008/106/EC of the European Parliament and the Council	On the minimum level of training of seafarers (recast)	Article 100	
<b>SAFETY AT WORK</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 89/391/EEC	On the introduction of measures to encourage improvements in the safety and health of workers at work	Article 154	Amended by Regulation (EC) No 1882/2003, Directive 2007/30/EC, and Regulation (EC) No 1137/2008

SAFETY AT WORK			
EU legislation	On	Lisbon Treaty legal base (TFEU)	Notes
Regulation (EC) No 1882/2003 of the European Parliament and the Council	Adapting to Council Decision 1999/468/EC the provisions relating to Committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty	Various (including Article 153)	Amends Directive 89/391/EEC and others
Directive 2007/30/EC of the European Parliament and the Council	Amending Council Directive 89/391/EEC, its individual Directives and other Council Directives with a view to simplifying and rationalising the reports on practical implementation	Article 153	Amends Directive 89/391/EEC and others
Regulation (EC) No 1137/2008 of the European Parliament and the Council	Adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny – Adaptation to the regulatory procedure with scrutiny – Part One	Various (including Article 153)	Amends Directive 89/391/EEC and others
Council Directive 89/654/EEC	Concerning the minimum safety and health requirements for the workplace	Article 154	First individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 89/656/EEC	On the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace	Article 154	Third individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 90/269/EEC	On the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers	Article 154	Fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 90/270/EEC	On the minimum safety and health requirements for work with display screen equipment	Article 154	Fifth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Commission Directive 91/322/EEC	Establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work	/	Implements Directive 80/1107/EEC, based on Article 115
Commission Directive 2006/15/EC	Establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC	/	Implements Directive 98/24/EC, based on Article 153 - Amends Directive 91/322/EEC and Directive 2000/39/EC
Council Directive 91/692/EEC	Standardising and rationalising reports on the implementation of certain Directives relating to the environment	Article 192	Amended by Regulation (EC) No 1882/2003
Council Directive 92/29/EEC	On the minimum safety and health requirements for improved medical treatment on board vessels	Article 154	Amended by Regulation (EC) No 1882/2003, Directive 2007/30/EC, and Regulation (EC) No 1137/2008
Council Directive 92/57/EEC	On the implementation of minimum safety and health requirements at temporary or mobile construction sites	Article 154	Eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC

SAFETY AT WORK			
EU legislation	On	Lisbon Treaty legal base (TFEU)	Notes
Council Directive 92/58/EEC	On the minimum requirements for the provision of safety and/or health signs at work	Article 154	Ninth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 92/85/EEC	On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding	Article 154	Tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 92/91/EEC	Concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling	Article 154	Eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 92/104/EEC	On the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries	Article 154	Twelfth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 93/103/EC	Concerning the minimum safety and health requirements for work on board fishing vessels	Article 154	Thirteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Council Directive 94/33/EC	On the protection of young people at work	Article 154	Amended by Directive 2007/30/EC
Council Directive 96/82/EC	On the control of major-accident hazards involving dangerous substances	Article 192	Amended by Regulation (EC) No 1882/2003 and Regulation (EC) No 1137/2008
Directive 2003/105/EC of the European Parliament and the Council	Amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances	Article 192	Amends Directive 96/82/EC
Council Directive 98/24/EC	On the protection of the health and safety of workers from the risks related to chemical agents at work	Article 154	Fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Directive 2009/148/EC of the European Parliament and the Council	On the protection of workers from the risks related to exposure to asbestos at work (codified version)	Article 153	Amends Directive 98/24/EC
Directive 1999/92/EC	On minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres	Article 153	Fifteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC
Commission Directive 2000/39/EC	Establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC	/	Implements Directive 98/24/EC, based on Article 154 - Amended by Directive 2006/15/EC and Directive 2009/16/1/EU
Commission Directive 2009/161/EU	Establishing a third list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Commission Directive 2000/39/EC	/	Implements Directive 98/24/EC, based on Article 154 - Amends Directive 2000/39/EC
Directive 2000/54/EC of the European Parliament and the Council	On the protection of workers from risks related to exposure to biological agents at work	Article 153	Seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC

SAFETY AT WORK			
EU legislation	On	Lisbon Treaty legal base (TFEU)	Notes
Directive 2003/10/EC of the European Parliament and the Council	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise)	Article 153	Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC and Regulation (EC) No 1137/2008
Directive 2004/37/EC of the European Parliament and the Council	On the protection of workers from the risks related to exposure to carcinogens or mutagens at work (codified version)	Article 153	Sixth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC
Directive 2004/40/EC of the European Parliament and the Council	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields)	Article 153	Eighteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directives 2007/30/EC, 2008/46/EC, and Regulation (EC) No 1137/2008
Directive 2008/46/EC of the European Parliament and the Council	Amending Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields)	Article 153	Amends Directive 2004/40/EC
Regulation (EC) No 1907/2006 of the European Parliament and the Council	Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, etc.	Article 114	Amended by several Regulations (see below)
Commission Regulation (EC) No 987/2008	Amending REACH as regards Annexes IV and V	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Regulation (EC) No 1272/2008	On classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending REACH	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EC) No 134/2009	Amending REACH as regards Annex XI	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EC) No 552/2009	Amending REACH as regards Annex XVII	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EU) No 276/2010	Amending REACH as regards Annex XVII (dichloromethane, lamp oils and grill lighter fluids and organostannic compounds)	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EU) No 453/2010	Amending REACH	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EU) No 143/2011	Amending REACH as regards Annex XIV	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EU) No 207/2011	Amending REACH as regards Annex XVII (diphenylether, pentabromo derivative and PFOS)	/	Amends Regulation (EC) No 1907/2006, based on Article 114
Commission Regulation (EU) No 252/2011	Amending REACH as regards Annex I	/	Amends Regulation (EC) No 1907/2006, based on Article 114

SAFETY AT WORK					
EU legislation	On	Lisbon Treaty legal base (TFEU)	Notes		
Commission Regulation (EU) No 253/2011	Amending REACH as regards Annex XIII	/	Amends Regulation (EC) No 1907/2006, based on Article 114		
Commission Regulation (EU) No 366/2011	Amending REACH as regards Annex XVII (acrylamide)	/			
Commission Regulation (EU) No 494/2011	Amending REACH as regards Annex XVII (cadmium)	/	Amends Regulation (EC) No 1907/2006, based on Article 114		
Commission Regulation (EC) No 340/2008	On the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 (REACH)	Article 114			
Council Regulation (EC) No 440/2008	Laying down test methods pursuant to Regulation (EC) No 1907/2006 (REACH)	Article 114	Amended by Regulation (EC) No 761/2009 and Regulation (EU) No 1152/2010		
Commission Regulation (EC) No 761/2009	Amending, for the purpose of its adaptation to technical progress, Regulation (EC) No 440/2008	Article 114	Amends Regulation (EC) No 440/2008		
Commission Regulation (EU) No 1152/2010	Amending, for the purpose of its adaptation to technical progress, Regulation (EC) No 440/2008	Article 114	Amends Regulation (EC) No 440/2008		
Directive 2009/104/EC of the European Parliament and the Council	Concerning the minimum safety and health requirements for the use of work equipment by workers at work (codified version)	Article 153	Second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC		
Council Directive 2010/32/EU	Implementing the Framework Agreement on prevention from sharp injuries in the hospital and health sector concluded by HOSPEEM and EPSU	Article 155			
WAGES, INCOME AND WORKING HOURS					
EU legislation	On	Lisbon Treaty legal base (TFEU)	Notes		
Council Directive 91/383/EEC	Supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship	Article 154	Amended by Directive 2007/30/EC		
Council Directive 91/533/EEC	On an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship	Article 115			
Council Directive 1999/63/EC	Concerning the Agreement on the organisation of working time of seafarers concluded by ECSA and the FST	Article 155	Amended by Directive 2009/13/EC		
Council Directive 2009/13/EC	Implementing the Agreement concluded by ECSA and ETF on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC	Article 155	Amends Directive 1999/63/EC		
Council Directive 1999/70/EC	Concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP	Article 155			
Directive 1999/95/EC of the European Parliament and the Council	Concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports	Article 100			

<b>WAGES, INCOME AND WORKING HOURS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 2000/79/EC	Concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by AEA, ETF, ECA, ERA and IACA	Article 155	
Directive 2002/15/EC of the European Parliament and the Council	On the organisation of the working time of persons performing mobile road transport activities	Articles 91, 153	
Directive 2003/88/EC of the European Parliament and the Council	Concerning certain aspects of the organisation of working time	Article 153	
<b>INDUSTRIAL RELATIONS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 97/74/EC	Extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees	Article 115	
Directive 2002/14/EC of the European Parliament and the Council	Establishing a general framework for informing and consulting employees in the European Community	Article 153	
Directive 2008/94/EC of the European Parliament and the Council	On the protection of employees in the event of the insolvency of their employer (codified version)	Article 153	
Directive 2009/38/EC of the European Parliament and the Council	On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees (recast)	Article 153	
<b>EMPLOYMENT AND UNEMPLOYMENT</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Regulation (EEC) No 1888/84	Introducing special measures of Community interest in the field of employment	Article 352	
<b>PROTECTION OF WORKERS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 89/105/EEC	Relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems	Article 114	
Council Directive 96/34/EC	On the framework agreement on parental leave concluded by UNICE, CEEP and ETUC	Agreement on Social Policy (Annexed to Protocol 14, TEC)	Agreement incorporated into Amsterdam Treaty (Articles 137-145, now 153-161) - Amended by Directive 97/75/EC
Council Directive 97/75/EC	Amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC	Article 115	Amends Directive 96/34/EC

<b>PROTECTION OF WORKERS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Council Directive 98/59/EC	On the approximation of the laws of the Member States relating to collective redundancies	Article 115	
Council Directive 2001/23/EC	On the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses	Article 115	
Directive 2002/44/EC of the European Parliament and the Council	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration)	Article 153	Sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC - Amended by Directive 2007/30/EC and Regulation (EC) No 1137/2008
Directive 2003/41/EC of the European Parliament and the Council	On the activities and supervision of institutions for occupational retirement provision	Articles 53, 62, 114	Amended by Directive 2009/138/EC (Solvency II), Directive 2010/78/EU, and Directive 2011/61/EU (AIFMD)
<b>APPROXIMATION OF CERTAIN SOCIAL PROVISIONS</b>			
<b>EU legislation</b>	<b>On</b>	<b>Lisbon Treaty legal base (TFEU)</b>	<b>Notes</b>
Regulation (EC) No 561/2006 of the European Parliament and the Council	On the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85	Article 91	Amends Regulations (EC) 3821/85 and (EC) No 2135/98 - Repeals Regulation (EEC) No 3820/85 - Amended by Regulation (EC) No 1073/2009
Regulation (EC) No 1073/2009 of the European Parliament and the Council	On common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006	Article 91	Amends Regulation (EC) No 561/2006
Commission Regulation (EU) No 581/2010	On the maximum periods for the downloading of relevant data from vehicle units and from driver cards	Article 91	
<b>PRINCIPLES OF SOCIAL SECURITY</b>			
Council Directive 79/7/EEC	On the progressive implementation of the principle of equal treatment for men and women in matters of social security	Article 352	
<b>APPLICATION TO MIGRANT WORKERS</b>			
Regulation (EEC) No 1408/71 of the Council	On the application of social security schemes to employed persons and their families moving within the Community	Articles 48, 352	
Council Regulation (EEC) No 1390/81	Extending to self-employed persons and members of their families Regulation (EEC) No 1408/71	Articles 2, 48, 352	Amends Regulation (EEC) No 1408/71
Council Regulation (EEC) No 1247/92	Amending Regulation (EEC) No 1408/71	Articles 48, 352	Amends Regulation (EEC) No 1408/71 - Amended by Regulation (EEC) No 1945/93 and Regulation (EC) No 3095/95

Source: EUR-Lex, 'Directory of European Union legislation in force', 5. Freedom of movement for workers and social policy  
<http://eur-lex.europa.eu/en/legis/latest/chap05.htm>