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**KEY CONCLUSIONS**

- The European social model has suffered significant blows as a result of the financial crisis, both in ideological and practical terms;
- These challenges show that substantial future reform is required to strengthen and secure the European social model;
- Reform of the EU social model could include a range of measures:
  - the creation of a European Social Compact;
  - a protocol on future bailouts to mitigate their social impact;
  - a focus on market mechanisms to enforce social rights and an alignment of EU social and economic rights with the Council of Europe's position.

## The future of EU Social Policy

### Summary

In recent years, the European social model has faced unprecedented challenges, such as increasing austerity in public spending, severe welfare cuts, and rising youth unemployment. These have in turn led to significant crises of ideology, legitimacy and regulation in respect of EU social policy. Nevertheless, there are prospects for the creation of more meaningful social rights in the EU in the future. This policy briefing provides an overview of:

- the major challenges confronting the European social model in the aftermath of the financial crisis;
- the core strengths of the European social model and EU social policy;
- the prospects for strengthening European social policy in the future.

### Introduction

This policy briefing discusses the EU's social policy in the aftermath of the financial crisis. Whilst the European social model has come under increased pressure, it continues to offer important benefits, although there is an urgent need for future reform.

### Three crises for the European social model

Any discussion of the European social model requires consideration of what the EU is about. Even if the EU is seen primarily as an economic union based on freedom of movement, it is not possible to disregard its social dimension. When things go wrong within the single market, such as when people lose their jobs or get sick, social policy has an important role to play.

European social policy is intended to ensure equality, common values and employment across the EU. However, during the financial crisis, European social policy arguably failed fully to meet these objectives. Consequently, the European social model is currently suffering from three main crises: of ideology, of legitimacy and of regulation.

## The Crisis of Ideology

There has been a clear rise of neo-liberal thought, which sees labour law as an obstacle to the proper operation of the market. It is often argued that the EU's high minimum floor of rights has actually led to paternalist policies, which have hampered the market and led EU economies to fail.

There are also questions about what benefits transnational law provides for labour regulation. **EU social law is often perceived as an intrusion into national competences**, as it is considered that individual Member States are better placed than supranational institutions to address social issues. There is also considerable scepticism surrounding EU 'flexicurity' policies, which aim to reconcile employers' need for a flexible workforce with workers' need for security. The main argument here is that EU policies should focus on job creation, rather than re-integration schemes and training programmes.

These questions challenge some of the basic premises of the European social model, its goals and its functions. Prior to the financial crisis, there was some innovative rethinking of the ideological grounding of the European social model (for instance around substantive equality - preventing policies which fail to address the needs of particular groups of people - and capability creation - such as development schemes aiming to combat social exclusion.) However, this debate has largely disappeared since the emergence of the financial crisis.

## The Crisis of Legitimacy

EU social policy is squarely anchored in EU primary law, which names solidarity as one of the Union's core premises (Article 2 TEU); states that the Union is founded on the principles of a social market economy (Article 3(3) TEU); and enshrines the common goal of achieving a high level of employment, and a commitment to social protection and to combating social exclusion (Article 9 TFEU). The Charter of Fundamental Rights also contains a chapter entitled 'solidarity', together with provisions pertaining to equality and to dignity.

However, the financial crisis and its aftermath have prevented these provisions from being achieved in practice. Member States such as Greece, Portugal, Spain and Ireland have implemented severe (largely EU-recommended) austerity measures involving substantial cuts in their social provisions.

### RESTRICTING THE RIGHT TO STRIKE

In its 2007 judgments in *Viking* and *Laval*, the Court found that the exercise of the right to take collective action (now enshrined in Article 28 of the Charter of Fundamental Rights) is necessary to protect jobs. However, it also found that any restrictions placed on free movement through industrial action are subject to a strict proportionality test, based on the existence of less trade-restrictive alternatives. The judgments have been widely criticised for placing a limit on the exercise of fundamental social rights by ultimately subordinating them to the operation of the free market.

Taking these alongside a high and rising level of unemployment throughout the EU, **the aspirations of a European social model aiming at employment, equality and welfare appear to be almost empty rhetorical gestures**. Recent decisions of the Court of Justice of the European Union are also problematic as regards the legitimacy of social rights compared to market freedoms<sup>1</sup>. Additionally, most of the employment rights contained in the European Charter appear in fact to be unenforceable principles<sup>2</sup>.

## The Crisis of Regulation

Social measures are delivered partly by Member States and partly at the EU level and thus involve both national and supranational regulation. This has not worked well. The Open Method of Coordination, which has been used in this field, has been mostly unsuccessful; the social partners (i.e. employers' organizations and trade unions) have struggled to deliver results through dialogue; and there are increasing calls for repatriation of EU competences to the Member States in the area of 'solidarity', mostly impinging on rights at work. Two Member States in particular, the UK and Poland, may have secured an opt-out from the Charter's Solidarity chapter (although the precise reach of this opt-out is yet to be decided by the Court). Delivering the European social model has therefore proved to be far from a harmonious enterprise.

### THE PRINCIPLE OF SOLIDARITY IN THE EUROPEAN UNION:

Solidarity is a fundamental principle which encapsulates a commitment on sharing the advantages and the burdens of the Unions equally between member states. It is particularly relevant in the context of social rights.

Additionally, **social policy is not well integrated either into EU economic and fiscal policy or into the regulation of the internal market**. For example, the European Semester (the cycle of EU economic and fiscal policy coordination taking place during the first six months of each year) does little in respect of welfare. Nor has there been any concrete re-regulation of the right to strike, following Court of Justice judgments restricting collective action<sup>3</sup>.

### MONTI II: RE-REGULATING THE RIGHT TO STRIKE

In 2012, the European Commission put forward a proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, which was dubbed 'Monti II', as it followed suggestions made in **Mario Monti's single market report**. The Regulation sought to redefine the link between EU social law and the internal market, in the aftermath of the Court's judgments in *Viking* and *Laval*. It did not however provide substantial benefits for social rights, and instead codified a strong proportionality approach in respect of the exercise of the right to strike. The Commission withdrew the proposed Regulation after several Member States voiced objections concerning its legal basis, but has not made alternative proposals since.

<sup>1</sup> See for example Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] E.C.R. I-10779; Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767.

<sup>2</sup> Case C-176/12 Association de médiation sociale v Union locale des syndicats CGT Hichem Laboubi Union départementale CGT des Bouches-du-Rhône Confédération générale du travail (CGT), judgment of 15 January 2014, not yet reported.

<sup>3</sup> COM (2012) 130 final.

## Withstanding the challenge: Three core strengths of the European social model

Despite the crises outlined above, the history of EU social law is also one of pragmatism, adaptability and survival, as well as of capacity for reinvention. These characteristics can help to ensure that the social model survives the recent challenges.

### Pragmatism

Social policy was absent in the early years of European integration. Equality directives were first introduced in the 1970s; the 1990s then saw a series of changes to the law covering (among other things) working time, pregnant workers, and posted workers<sup>4</sup>; and flexicurity policies were then introduced in the 2000s. This gradual history shows how European labour law, a core element of the EU social policy, has **adapted and responded to current needs throughout the European social integration process** – a fundamentally pragmatic approach.

### Adaptability

EU social law has always had innovative features. The **different types of labour law implemented have been particularly flexible**, because they have been applied through diverse instruments as needed and have generally adapted to the demands of different Member States.

This has been clear even during the financial crisis: for example, the European Parliament has been successful in pushing for social measures in several kinds of legislation introduced since (such as the cross-border provision of services within the internal market or public procurement). Furthermore, Member States have been closely consulted in the development of social policies, which have taken account of individual country circumstances (for example, single contract forms have not been included in the Commission's country-specific recommendations for Spain under the European Semester, as they conflicted with that country's fundamental employment provisions).

While there is criticism of the lack of uniform standards, the adaptability of EU social policy has overall led to the acceptance of a greater degree of social protection across the EU, where no agreement could otherwise be reached.

### Survival

The challenges arising from the financial crisis have delivered heavy blows to the European level of protection of social rights, but important parts of it have remained intact. While things could have been done differently – and with stronger democratic safeguards – the social model has survived: **minimum European rules on employment and welfare are still in place and thus offer opportunities for further development**.

## The European social model and its capacity for reinvention in the future

The prospects for maintaining and improving the European social model in the future include consideration of the following reforms which would secure meaningful reinvention:

- the creation of a Social Compact;
- a protocol on future bailouts;
- more modest proposals on employment policy and enforcement of rights.

### A Social Compact

The European Trade Union Confederation (ETUC) has put forward proposals for a **European Social Compact**, which would include a broad set of provisions on collective bargaining and social dialogue, economic governance for sustainable growth and employment, and economic and social justice.

However, introducing these proposals into legislation would trigger a Treaty amendment, requiring unanimous agreement. Unanimity in this field would be near impossible to secure in the current climate of hostility towards the EU, as well as in view of the specific objections that some Member States have towards European social law.

An alternative therefore could be the creation of a **binding set of minimum standards for social rights**, additional to the Charter of Fundamental Rights, along the lines of the European Social Charter of 1961. Moreover, the European Central Bank's mandate could be modified to include clauses regarding the promotion of growth and employment, and not just price stability.

### Protocol on future bailouts

The creation of a protocol which would **regulate the social aspects of potential future bailouts of EU Member States**, by stipulating conditions in respect of the social impact of any future use of non-EU organisations and particularly of the European Stability Mechanism (ESM), could provide an important safeguard against further reduction of social rights through another financial crisis. Other important controls that could be achieved by virtue of such a protocol would be the institution of a judicial check by the Court of Justice of the European Union and the granting of observer status to the International Labour Organisation in respect of the ESM and/or in EU deliberations regarding future bailouts.

### Modest proposals on employment policy and enforcement of rights

More modest proposals for reform should also be considered. These emphasise and build on the adaptability and the pragmatism of EU social policy, rather than radically altering it:

**Employment policy:** there should be a fundamental debate about which groups most need protection under EU law. In particular **employment policy should be adapted to the EU's changing workforce**, comprising policies addressed to migrant workers, the

<sup>4</sup> Posted workers are those who are 'posted' to a different Member State in order to carry out a project and then return to their home state.

ageing population, and family life. In addition to their national dimension, these issues have a clear European dimension in the free market context.

**Enforcement of rights:** The EU has already set out many rights and the emphasis now should be on their enforcement. In addition to regulations affecting Member States, increasing privatisation is changing the way in which social policy needs to be regulated.

*Market mechanisms could be developed to foster employment rights,* such as obligations of transparency on private undertakings and creating awareness in the workforce about social rights and companies' performance in protecting them. Instituting corporate social responsibility rules might be one of the steps needed to actively improve the enforcement of social and economic rights in the EU. Centralised EU rules in this field can be particularly effective.

*Better enforcement of social rights through mechanisms external to the EU,* especially at the Council of Europe level, involving the adoption of the European Social Charter 1961 and of the decisions of the Committee of Social Rights. These decisions may not be binding, but aligning EU social policy with them can have legitimising effects and lead to better enforcement of a single standard throughout Europe.

## Conclusion

EU social law has managed to some extent to contain the effects of austerity measures which, in its absence, could have led to even more troubling developments. However, there are still a number of concrete steps that can be taken to improve the enforcement of EU social rights and ensure the future sustainability of the European social model.

## BACKGROUND

The 'Britain & Europe' Seminar Series is a collaborative attempt by UCL Laws, the UCL European Institute, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe, which seeks to shed light on the contentious relationship between the United Kingdom on the one hand, and the European Union and the Council of Europe on the other. The Series deals with several recent developments prone to affecting this relationship, with a special focus on their legal dimension. As such, it aims to provide a platform for informed public debate regarding Britain's position – as well as its future – in Europe.

The ninth and final seminar of the Series for 2013-14 was held at the UCL Faculty of Laws on 8 May 2014 and concerned 'The Future of European Social Policy'. The seminar, which also formed part of the Current Legal Problems Lecture Series 2013-14, was given by Professor Catherine Barnard (Cambridge). It was chaired by Professor Hugh Collins (Oxford), and was followed by a Q&A session. Professor Barnard's article is forthcoming in [Current Legal Problems](#).

