

## Towards a European Pillar of Social Rights: upgrading the EU social *acquis*

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### Executive Summary

> The European Commission has recently launched a 'European Pillar of Social Rights'. The Pillar consists of a broad range of social principles.

> The European Union's social *acquis*, comprised of the EU Charter of Fundamental Rights, Treaty provisions, legislation and case law, already provides a floor of social rights, protecting workers' health and safety, equal treatment and job security.

> However, several *lacunae* in, and challenges to, the EU social *acquis* currently exist, relating to its scope of protection, its effective enforcement and its possible conflict with other EU rights, such as the Charter's freedom to conduct a business.

> As a contribution to the consultation on the Pillar initiative, we have reflected on how these *lacunae* can be addressed and the EU social *acquis* strengthened to enhance the ability to live up to citizens' expectations that the Union indeed aims at the 'well-being of its people' (Art.3(1) TEU).

> This policy brief contributes to the much-needed broad reflection on 'social Europe' through a focused and realistic fourfold proposal for adopting (1) a Directive for the Protection of Dependent Workers, ensuring the application of the existing EU social and labour law measures to all dependent workers (2) a Protection against Precarious Work Directive, (3) a Directive for the Enforcement of Workers Rights and (4) a Declaration safeguarding the integrity of the social *acquis* as an EU floor for worker protection.

The legislative output in the area of European Union (EU) social policy has been rather meagre for the past two decades, even if the social implications of the process of European integration have anything but faded. Quite to the contrary, the social consequences of European policy in *other* areas than the Treaty's Social Policy Title amount to one of the most controversial aspects of European integration: a first controversy is located in mainstream EU (internal market) law and is best illustrated by the issue of posted workers; a second relates to more intense and wide-ranging EU mechanisms of economic governance; a third set of controversies comes from outside the EU Treaties as illustrated by Memoranda of Understanding signed with EU member states on behalf of the European Stability Mechanism, imposing strict conditionality requirements on beneficiaries; a fourth concern is that the legislative consensus expressed in the social *acquis* has been re-opened and questioned, in particular through the use of the EU Charter's freedom to conduct a business.

In this context, the invitation by Commission President Juncker to critically reflect on a fairer integration process is very welcome. The consultation on the so-called 'European Pillar of Social Rights' was launched in March 2016, and the Commission is expected to table the final outline of the Pillar alongside specific legislative and non-legislative initiatives in March 2017 (on the anniversary of the Treaty of Rome).

This policy brief contributes to the much-needed broad reflection on 'social Europe' through a focused and realistic fourfold proposal. The specific question it addresses is the following: how can the existing EU social *acquis* be strengthened across all EU member states to enhance the ability of the EU to live up to citizens' expectations that the EU indeed aims at the 'well-being of its people' (Art.3(1) TEU)?

## The EU social *acquis*

The EU's social objectives feature prominently in the Treaties: in the TFEU's preamble as the resolve to ensure the 'social progress of their States by common action to eliminate the barriers which divide Europe', in the TEU's preamble in its reference to 'fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers' and the promotion of 'social progress', and in the EU Charter of Fundamental Rights that recognises a wide range of social rights. Article 3 TEU conceptualises the EU as 'a social market economy' aiming at full employment and social progress, and provides that it 'shall combat social exclusion and discrimination, and shall promote social justice and protection'. These objectives shall furthermore be mainstreamed across all EU policies, in accordance with Article 9 TFEU, which provides that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion'.

More concretely, the EU boasts a rich body of legislation concerning *inter alia* non-standard employment, information and consultation of workers, health and safety at work, working time, protection of workers in the event of structural changes in a company, as well as maternity and parental leave and non-discrimination. These entitlements are distinct and usefully add to the *acquis* on the free movement of EU citizens and their families measures in favour of non-mobile workers. Some of these measures were adopted on the general internal market mandate (Article 114 TFEU) or the horizontal anti-discrimination legal base (Article 19 TFEU), but the bulk of this *corpus legi* has been developed on the basis of the now fully-fledged Social Title. This Title allows for the adoption of directives on a number of (employment-related) social issues in Article 153 TFEU, and for the conclusion of Social Partner Agreements that can be implemented by a Council directive in accordance with Article 155 TFEU.

This set of constitutional rights and principles, implemented by directives and given further shape in the Court of Justice of the EU (CJEU)'s case law, already constitutes an important floor of social rights protecting EU citizens against some of the most important vicissitudes of working life. However, two key priorities for completing and protecting this floor of social rights are apparent.

First, some people in the workplace risk missing out. The diversity of legal approaches to an increasingly complex network of economic activities creates uncertainties on the notion of 'worker' and thereby protection gaps. Recent years have seen an increase in particularly precarious employment relations such as 'zero-hours' contracts. Not only does the EU social *acquis* lack specific protection against abuse arising from the use of these types of contract, the *acquis* itself risks not being applied in such casual work situations. Furthermore, even where the *acquis* is relevant, it may be exceedingly difficult to enforce. Apart from the specific challenges that arise in the context of highly precarious atypical work, the scope of application and enforcement of the social *acquis* more generally leaves room for improvement.

Second, the floor provided by the social *acquis* is threatened by new unorthodox interpretations of other EU law sources. Such developments have damaged its solidity as a floor of social rights upon which the member states are free to build. The integrity of the floor should be solemnly reasserted in the EU Pillar of Social Rights.

## Four proposals for strengthening 'social Europe'

Four priority areas emerge from a critical analysis of the existing social *acquis*: (i) the need for an autonomous definition of 'worker' for the purpose of triggering the protection of EU social law, (ii) the need to protect those engaged in particularly flexible forms of employment, (iii) the need to ensure the better enforcement of existing rights and (iv) a solemn declaration addressed to all EU institutions that the EU social *acquis* is a baseline and should not be approached with a view to reducing worker protection.

### *An autonomous definition of worker: towards a Directive for the Protection of Dependent Workers*

In the context of Article 45 TFEU on the free movement of workers, the CJEU has long since held that the definition of 'worker' is autonomous and defined at European level. This is however different in the context of the EU social *acquis*. In the TFEU's Social Policy Title, Article 151(2) obliges the EU 'to take account of the diverse forms of national practices, in particular in the field of contractual relations'. Perhaps in light thereof, a number of EU labour law directives refer to national law and practices, for instance to determine to which

‘employment relationships’ they apply.<sup>1</sup> This deference to national regulators contrasts with the EU’s habitual concern for effective and uniform application of EU law.

Under the current state of EU law, it is an open question to what extent member states can limit the scope of application of EU labour law directives by such references to their own national legislation. This is a question of mounting importance considering the increase (in the use) of non-standard forms of employment, such as zero-hours contracts in the UK and so-called ‘civil law contracts’ in Poland.<sup>2</sup> It would seem harmful to the social objectives of the *acquis* if its scope of application could be unilaterally limited by member states, excluding certain forms of work or workers regardless of the material conditions of their employment.<sup>3</sup>

For certain directives, the CJEU has decided to give an autonomous definition of their scope of application, such as for the Working Time Directive<sup>4</sup> and Directive 98/59 on collective redundancies<sup>5</sup>, but these measures do not refer to national law. By contrast, in the context of the Part-Time Work Directive, which does make reference to national law and practice, the Court confirmed in *Wippel* concerning a zero-hours contract that it was for the national level to determine whether the Directive applied, following national legal definitions and practices.<sup>6</sup>

However, even when a Directive refers to national definitions, the member states’ discretion is not ‘wholly unfettered’, as the Court held in *Tümer* concerning the Insolvency Directive.<sup>7</sup> The Court ruled that the Netherlands could not exclude illegally resident third-country nationals from the scope of application of the Directive, as it had recognised such third-country nationals under its civil law as having the status of an ‘employee’ with an entitlement to pay. Similarly, as regards the Part-Time Work Directive, the CJEU held that while ‘it is for the member states to define the

concept of “workers who have an employment contract or an employment relationship” in Clause 2.1 of the Framework Agreement on part-time work [...] and, in particular, to determine whether judges fall within that concept’ this is ‘subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by [the] Directive’.<sup>8</sup>

Most recently, in *Ruhrlandklinik*,<sup>9</sup> the CJEU ruled on this very issue with regard to the Temporary Agency Work Directive, which similarly refers to ‘any person who, in the member state concerned, is protected as a worker under national employment law’. It held that such a reference ‘cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104, and accordingly the scope *ratione personae* of that directive’. The reference to national law meant only that the EU legislature intended to preserve the power of the member states to determine the persons falling within the scope of the concept of ‘worker’ for the purposes of national law and who must be protected under their domestic legislation.<sup>10</sup> The CJEU declared: ‘the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard’.<sup>11</sup>

While the case law of the CJEU therefore already goes a long way in the direction of a uniform and autonomously determined scope of application of the EU labour law directives, in light of legal certainty it would be desirable to clearly codify this case law and to apply it to the entire EU social *acquis* in a ‘Protection of Dependent Workers Directive’.

<sup>1</sup> E.g. the Fixed-Term Work Directive, the Part-Time Work Directive, the Temporary Agency Work Directive, the Information and Consultation Directive, the Insolvency Directive and the Written Statement Directive.

<sup>2</sup> See European Commission, ‘Employment and Social Developments in Europe 2015, Chapter 1.2. Labour Law’, SWD(2016) 7 final.

<sup>3</sup> See Opinion of AG Saugmandsgaard of 6 July 2016, in Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:518.

<sup>4</sup> Case C-428/09, *Union syndicale Solidaires Isère v Premier ministre and Others*, ECLI:EU:C:2010:612. The CJEU applies its case law concerning Article 45 TFEU.

<sup>5</sup> Case C-55/02, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2004:605, Case C-596/12, *European Commission v Italian Republic*, ECLI:EU:C:2014:77.

<sup>6</sup> Case C-313/02, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, ECLI:EU:C:2004:607, para. 40.

<sup>7</sup> Case C-311/13, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, ECLI:EU:C:2014:2337.

<sup>8</sup> Case C-393/10, *Dermod Patrick O’Brien v Ministry of Justice*, ECLI:EU:C:2012:110.

<sup>9</sup> *Op. cit.*, n. 3, ECLI:EU:C:2016:883.

<sup>10</sup> *Op. cit.*, n. 3, ECLI:EU:C:2016:883, para. 31.

<sup>11</sup> *Op. cit.*, n. 3, ECLI:EU:C:2016:883, para. 27.

This idea is in line with the recent draft report of the European Parliament on the Social Pillar,<sup>12</sup> which, in calling for a directive on fair working conditions, ‘requests that the EU *acquis* be updated accordingly so as to apply to all workers’.

This could be implemented in the form of a single Directive, amending the scope of application of all EU labour law directives at once. The planned revision of the Written Statement Directive may constitute an appropriate occasion for this reform. The definition of worker, triggering the application of the social *acquis*, could simply be the one developed in the context of Article 45 TFEU on the free movement of workers and extended to the Working Time Directive and the Temporary Agency Work Directive, namely ‘any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’.<sup>13</sup> The employment relationship is, as stated above, defined by the fact that ‘for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration’.

Extending the EU social *acquis* to ‘workers’ is a necessary but not a sufficient step. The issue of the bogus self-employed must also be addressed to ensure that all dependent wage labour receives the protection of the social *acquis*. While recognised by the Court of Justice and the EU legislature in specific instances, its inclusion in our proposed Protection of Dependent Workers Directive would ensure such recognition is mainstreamed across the social *acquis*. Legislative definition can build on existing EU practice, which stresses examining the reality of the relationship rather than its formal characterisation. The Court of Justice has stated in an equal pay case that, ‘The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker [for the EU Treaty equal pay Article] ... if his independence is merely notional, thereby disguising an employment relationship within the meaning of that Article’.<sup>14</sup> The 2014 Posting of Workers Enforcement Directive requires authorities to check whether those being posted are indeed ‘workers’,

being ‘guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties’.<sup>15</sup>

On a final note, any (measure introducing an) autonomous definition should make it clear that third-country nationals fulfilling the conditions above are covered by the *acquis*. Similarly, it should be made clear that domestic workers are already protected by many EU social law instruments while committing to review those exceptions that exist (Pavlou 2016).

### *Protecting those engaged in particularly flexible forms of employment: towards a Protection against Precarious Work Directive*

Besides ensuring the application of the *acquis* to workers in precarious, casual employment, it is also necessary to provide specific protection at EU level against abuse arising from the use of such atypical contacts.

No matter what they are called in national legal jargon, there are two important common features of the contracts in question. They guarantee only very few, or perhaps even zero, hours of work to the worker. Furthermore, the employer decides virtually at will when and for how many hours the worker will actually be employed in a given time period, which may be as short as a single day. The contracts are often of open-ended duration.

The precarity that arises from these contracts is at least threefold. First, the very low guaranteed hours mean that the worker is only ensured a very low income under the contract. Second, the variable nature of the actual hours provides flexibility to the employer, but insecurity and instability to the worker, who may have to ‘stand-by’ to wait for a work order that day or week, and who is prevented from planning ahead. Third, the fact that the employer can reduce the hours to the contractual minimum, which may be zero, without any limitation, equates to a situation where the worker can *de facto* be

<sup>12</sup> European Parliament, *Draft Report on A European Pillar of Social Rights* (2016/2095(INI))

<sup>13</sup> See e.g. C-428/09, *op. cit.*, para. 28, and C-316/13, *Gérard Fenoll v Centre d'aide par le travail "La Jouvène"*, ECLI:EU:C:2015:200, para. 27.

<sup>14</sup> Case C-256/01 *Allonby v Accrington and Rossendale College* ECLI:EU:C:2004:18, para. 71. See also Case C-413/13, *FNV Kunsten*

*Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 for the need to assess whether ‘self-employed’ substitute orchestral musicians are really self-employed in order to apply competition law provisions to a collective agreement setting minimum rates for them. The Court provides extensive guidance to determine if the orchestral musicians are ‘false self-employed’.

<sup>15</sup> Directive 2014/67, Article 4(5).

dismissed without notice. This makes it exceedingly difficult for workers to enforce the few rights that do apply to them, as any challenge or inconvenience to the employer may lead to *ad hoc* termination.

A way to address this at EU level would be to adopt a 'Protection Against Precarious Work Directive', modelled on the Fixed-Term and Part-Time Work Directives with reference to the equal treatment clause, the protection against abuses and facilitation of access to typical forms of employment.

This is in line with the draft report of the European Parliament, which calls for a directive on fair working conditions for precarious forms of employment, including limits regarding on-demand work, making sure that all workers are guaranteed core working hours.

For instance, such a directive could contain a provision like Clause 5 of the Fixed-Term Work Directive, obliging member states to provide for effective and adequate protection against abuse arising from the use of precarious contracts, by adopting one or more of the following measures: (i) inspired by the case law of the Dutch *Hoge Raad* on '*nul-uren contracten*', the introduction of a (rebuttable) presumption of a contract for the average amount of hours worked under such a zero-hours contract after six months; (ii) a requirement of objective reasons for the use of such contracts, accompanied by an effective overall time limit for the use of such a contract in relation to a worker; (iii) a limited range of hours between which the assigned working hours can fluctuate from week to week (e.g. 5-10, 10-15); (iv) providing a limited window for when the hours will be worked (e.g. in the morning) to enable workers to plan ahead. The directive could furthermore feature a right to request a regular contract, and lay down the principle of equal treatment as regards all employment conditions for such workers. Finally, it could feature a prohibition of using the variability of the hours as retaliatory action by the employer.

#### *Better enforcement of existing workers' rights: towards a Directive for the Enforcement of Workers Rights*

Numerous problems with the enforcement of the EU social *acquis* have been reported in the context of the

consultation on the European Pillar of Social Rights. Vulnerable fringes of the workforce, those most in need of protection, are those less likely to activate the network of norms that may be of assistance to them. They may lack the information, expertise and resources to engage in that direction.

In the absence of specific requirements, the enforcement of the EU *acquis* is left to the procedural autonomy of the member states. In the current state of the law, domestic procedural autonomy is heavily relied upon for the enforcement of the EU employment law *acquis*. Other than the general duties to provide effective protection of EU rights and to ensure that such rights benefit from a level of protection equivalent to that afforded to domestic employment rights<sup>16</sup>, member states are free to regulate rules on access to courts, costs and availability of external support to litigate a vast majority of EU employment rights for instance.

Yet, a comparison between employment law and other areas of EU law provides a wealth of examples of provisions designed to support the enforcement of specific policies that constitute a rich source of inspiration to work towards a proposal for an 'Enforcement of Workers Rights Directive'. EU anti-discrimination law and the law on the free movement of persons – addressing specific aspects of employment conditions – already include provisions that cover: access to and support in judicial or administrative procedures, partial reversal of the burden of proof, protection against victimisation, necessity to create specialised bodies to provide assistance to victims, minimum rules on sanctions, penalties, compensation and reparation as well as on dialogue with stakeholders and dissemination of information.<sup>17</sup>

Strong parallels can further be made with other areas of EU law featuring a power asymmetry between victims and authors of the alleged breach. Data protection and consumer legislation among others<sup>18</sup> have been subject to much legislative activity over the past few years in order to indeed enhance compliance with EU rules. Both fields illustrate among other elements the importance of special watchdogs and of dispute resolution mechanisms out of court.

<sup>16</sup> Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para.5. See also the fundamental right to an effective remedy as asserted in Article 47 of the Charter of Fundamental Rights of the EU.

<sup>17</sup> See e.g. Title III of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>18</sup> For a broader overview of EU rules enhancing enforcement, see Special Issue on 'The Incidental Proceduralisation of EU Law', *Review of European Administrative Law*, no. 1, 2015.

The new Directive shall thus cover a broad set of factors that enhance compliance with EU rules. For instance, member states shall be asked to designate specialised entities to provide assistance to victims of breaches of EU employment law.<sup>19</sup> A wide range of the functions of such specialised entities could be entrusted to labour inspectorates although the Directive shall require new structures and resources to be made available to these entities. The role of unions and non-governmental organisations in assisting victims should be a particular focus. Further reflections should be devoted to support to victims who decide to litigate, to time limits, interim relief, costs and out-of-court mechanisms.

### *Safeguarding the integrity of the social acquis as an EU floor for worker protection*

The role of the *acquis* has traditionally been clear and institutionally respected. It provides a floor of legislatively agreed rights at EU level upon which the member states can build. Yet in recent years there are increasing signs that this clear understanding of the *acquis* is in danger and accordingly requires EU institutional restatement. As this policy brief demonstrates, the social *acquis* needs to be thoroughly evaluated in order to improve and update it. However, EU legislation on worker protection, and national worker protection legislation, should not be questioned and undermined through unorthodox readings of EU sources or policy initiatives.

One concern is the use being made of the freedom to conduct a business in the EU Charter of Fundamental Rights. In *Alemo-Herron*, a chamber of the Court of Justice used this freedom to preclude a national solution to protecting the acquired rights of workers whose employment was outsourced to the private sector.<sup>20</sup> A further route recently used is to restrictively approach the social *acquis* by identifying functions such as to harmonise costs for undertakings or to strike a fair balance between employers and workers rather than interpreting the actual legislative text in light of its function as a worker protection floor.<sup>21</sup> Such

approaches have been endorsed and extended by the Grand Chamber of the CJEU on 21 December 2016.<sup>22</sup> A Greek law requirement for public authorisation of collective redundancies was found to breach EU law. It would breach the Directive's consultation and notification obligations if national rules prevented collective redundancies from occurring, as those obligations would have no practical effect.<sup>23</sup> Moreover, as the company was a subsidiary of a French multinational, the law requiring authorisation of collective redundancies, was 'liable to constitute a serious obstacle to the exercise of freedom of establishment in Greece'. Such legislation was also a breach of the Charter-protected freedom to conduct a business.<sup>24</sup> Such cases evidence a risk that the EU floor of social rights and national freedom to build on that floor is seen not as a central feature of a social market economy but as a broadly interpreted restriction on business freedom.

Evaluations of the extensive health and safety social *acquis*, the Information and Consultation Directive and the Written Statement Directive through the Better Regulation and REFIT initiatives have not found that they impose undue burdens on business. Nonetheless there is a risk that such soft law policy initiatives are deployed by certain actors to place EU legislative sources on worker protection under continual review even when the *acquis* fulfils clear social needs and sets only minimum standards.

To strengthen the foundations of the social *acquis* the EU Pillar of Social Rights should include a solemn High-Level Declaration, directed to all EU institutions, reaffirming and underlining respect for the integrity of the social *acquis* and member states' freedom to build on the floor it provides.

### **Conclusion**

The launch of a Pillar of Social Rights should be welcomed as timely and necessary. More than a (re-)statement of principles, it will hopefully trigger a

<sup>19</sup> Any reform to that effect shall include Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

<sup>20</sup> Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521. The Court, unlike the Advocate-General, made unwarranted assumptions about the employer's capacity in the UK to renegotiate the employment terms at issue. See also the use of freedom to conduct a business in EU discrimination law in the

Advocate-General Opinions in the pending judgments on religious headscarves at work: Case C-157/15, *Achbita*; C-188/15, *Bouagnaoui*.

<sup>21</sup> On harmonising costs of undertakings to narrowly interpret the Collective Redundancies Directive see Case C-80/14, *USDAW v Ethel Austin Ltd*, ECLI:EU:C:2015:291, paras 62-3; and on fair balance between employers and workers again *Alemo-Herron*, para. 25.

<sup>22</sup> C-201/15 *AGET-Iraklis* ECLI:EU:C:2016:972.

<sup>23</sup> *Ibid.*, para 44.

<sup>24</sup> *Ibid.*, para 69.

profound process of reflection on the social state of the EU and ways to improve it, as it will need a courageous and ambitious agenda for the adoption of the concrete changes that are needed. The fourfold proposal outlined in this policy brief is a mere starting point in that regard, but would already be an important step towards living up to citizens' expectations that the EU indeed aims at the 'well-being of its people'.

## Further Reading

Garben, S., "The constitutional (im)balance between 'the market' and 'the social' in the EU", *European Constitutional Law Review* (forthcoming 2017).

Kilpatrick, C., "Constitutions, social rights and euro-crisis law: a new area of constitutional inquiry", in T. Beukers, B. De Witte & C. Kilpatrick (eds) *Constitutional Change Through Euro-Crisis Law*, CUP (forthcoming 2017).

Muir, E., "Procedural rules in the service of the 'transformative function' of EU equality law: bringing the prohibition of nationality discrimination along", *Review of European Administrative Law*, no. 1, 2015, pp. 151-173.

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