

Evaluating the EU's Regulatory Burden and Its Discontents: The Labour Market, Free Movement and Social Europe

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Abstract Concerns about the 'regulatory burden' associated with the UK's membership of the EU are not just the preserve of Eurosceptic Conservative MPs, UKIP, or others in the political class. They are shared by some influential sections of the business community worried about matters like banking and financial services regulation and environmental impact assessment laws. Another area of concern, but with a much longer provenance, is employment and social policy. This has informed successive governments' domestic deregulation programmes as well as calls to rein in perceived EU 'over-regulation': the Conservatives' 'lifting the burden', New Labour's 'flexible labour market', and now the Coalition's on-going Fundamental Employment Law Review and promise to tackle EU law as part of the wider 'Red Tape Challenge'.

My paper considers this, factoring in the views of groups like the CBI, British Chambers of Commerce, Institute of Directors, and bodies like Business for New Europe. It also looks at *Cut EU Red Tape*, a recent report produced by a government-appointed business taskforce.

Whilst acknowledging the force in some aspects of the report's conclusions and recommendations, much of what is proposed is contentious. It would certainly be highly problematic if implemented. The idea that the EU 'over-regulates' is, in any case, contested in many specific aspects. It is also evident to most reasonable observers that the UK has long enjoyed considerable leeway in its implementation of EU requirements. Furthermore, membership of the EU has not prevented us having one of the most 'lightly regulated' labour markets in the world - an analysis with which the OECD has readily concurred.

Despite deregulatory and neo-liberal trends across much of Europe - driven by the post-2007 crisis, deflationary pressures, and faltering growth and recovery - a degree of regulation in the workings of the labour market, free movement, and Social Europe is necessary. An obvious paradox, I suggest, is that much of the EU's regulation is required if only to restrict excessive regulation and market distortions at the Member State level. Indeed, UK business leaders themselves recently called for this when asking the EU to fully implement the Services Directive. Plainly, without such top-down regulation across the European Economic Area, in areas like services and free movement of capital and labour, it will be difficult to establish a functioning labour market. Nor, without it, will a viable single market be possible. It is only the EU that is capable of providing the necessary trans-European legal framework.

Apart from such considerations, the UK, like the rest of Europe the UK, faces serious challenges: low productivity and growth, and continuing deflationary pressures impacting on growth, productivity, and employment conditions, as evidenced by the exponential leap in the number of workers on low pay since 2007. A minimum, floor of social protection, operating within an EU regulatory framework, is not just an essential element of 'Social Europe' it is an indivisible part of the wider European project.

The paper concludes with the suggestion that whilst the business community may well hope for (even expect) less unnecessary EU labour market interventions, and less 'Social Europe', any concerns they are likely to still have at the end of talks between the Prime Minister and other EU leaders are likely to be outweighed by a very much bigger concern - the negative outcomes that a UK exit would produce. This was a sentiment clearly expressed by the business organisations polled in last year's CBI/YouGov poll.

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Introduction

My thanks to the Institute of European Law for my invitation to speak and to Sir Stephen Wall for his excellent keynote paper.

It seems like yesterday, but just over forty years ago I recall being in this room listening to Professor Hood Phillips talking about Parliamentary sovereignty, A.V. Dicey, and Parliament's ability to make or unmake 'any law whatsoever'.

No doubt he would have revised his notes on sovereignty themes soon afterwards, because on 1st January 1973 we acceded to the European Community. A new hierarchy of law was born, with new ideas about Parliamentary sovereignty. Law-making in the labour law and social policy area changed overnight.

I suspect most of us were still pretty ill-informed about the precise workings of this seismic shift or its longer-term implications. What we did have ringing in our ears, though, were the memorable words of Lord Denning in *H.P. Bulmer Ltd v J. Bollinger SA*, when he compared the Rome Treaty and EC Law to 'an incoming tide...it flows into the estuaries and up the rivers. It cannot be held back...'

Despite some dissidents – I have in mind Tony Benn MP and sections of the Left - much of the political class and the business community were supportive of the EC. The public, too. In 1975 they gave the UK's membership a sizeable thumbs-up. In response to the question 'Do you think the UK should stay in the European Community (Common Market)' 68.2% said 'yes' and only 32.8% said 'no'. Broken down on a regional basis, every county in the UK said 'yes'. Only the Shetlands and Western Isles said 'no'.

Like Sir Michael¹ I do not subscribe to the suggestion - much vaunted by many on the Tory backbench and Mr Farage - that we were somehow duped into signing up to a limited trade organisation. Nor were our leaders or the public misled about the nature of the project we were signing up to, or on matters like an evolving *political* union. I am not sure when attitudes started to change, or when concerns about matters like EU over-regulation started to take off. Probably in the Jacques Delors years, when concerns around what an 'ever closer integration' might mean in practice started to emerge.

There are a lot of facets to any debate on regulation, and the business community's views. Before looking at some of these, and some aspects of labour market and social policy issues, it is worth commenting on the way Europe legislates and the UK's apparent inability to engage with Europe in *process* terms.

EU Law-Making: Process & Dialogue

Early support for the union – and a useful counter to loss of sovereignty discourse – was assisted by the idea of *pooled* sovereignty, particularly when legislating on matters like the social dimension. The initial principle was that no new laws could be made without all Member States being supportive.

Furthermore, it was understood, initially at least, that if the UK did not like a particular legislative proposal it could veto it – at least that was British ministers' understanding of the 'Luxembourg Compromise', as Sir Stephen has pointed out.

¹ Sir Michael's presentation can be viewed on YouTube: <https://www.youtube.com/watch?v=iG9vU2FMzXU>

That all changed, of course, after QMV and later developments. That development in itself was seen as threatening. It certainly dictated a need for the UK to box more cleverly, take more care to engage better in the law-making process, and maintain meaningful dialogue on points of difference.

Has this happened? I don't think so.

A valuable case study is currently being provided by UK/EU exchanges on the thorny subject of banking and financial services regulation.

Basically, the EU wants better, but also more *centralised* oversight. It sees the ECB as being best placed to perform this task as Europe's single banking and financial services regulator.

The UK, however, has a lot of very justifiable concerns. Apart from some concerns about the ECB, and its competence to manage such a task – especially given their track record during the Euro crisis – the change, as currently proposed, would be very centralising. As well as transferring most regulatory power away from Member States, it could also prompt banks and customers from outside the EU to repatriate their business to centres in the Eurozone.

Exchanges on the issue have become increasingly acrimonious, and megaphone diplomacy and the use of the media as an intermediary have become the norm, rather than constructive dialogue, has been the order of the day. Frankly, there has been little to commend *either* side's performance. Any experienced ACAS mediator or conciliator looking on would conclude something has gone *very* wrong.

The bad news for the UK and the finance industry, though, is that we seem to be losing the battle. Whose fault is that, especially given such strong points in our favour, meriting at least *some* compromise? An obvious point, but which seems to have been overlooked, is that any new regulatory system needs to factor in the needs of the single market as a whole – not just the Eurozone's. This should, of course, be relevant to other countries besides the UK.

As commentators like City UK have rightly pointed out, institutions like the Treasury and Bank of England need to be articulating their case much better if they are to influence the EU's evolving regulatory regime. It would help, too, if they stopped looking in the mirror and worrying about domestic political pressures – UKIP and the Tory back-bench in particular seems to transfix them – and started looking at the road ahead. Too much looking backwards, as experienced drivers will tell you, is likely to result in a crash.

The general point about the need for a better quality of dialogue is also very relevant to other dealings with Europe, including debates about labour market regulation and the social dimension.

Are there any lessons here for the change process in the labour law and social policy field?

Yes, definitely. In fact there are some obvious parallels with earlier disputes between the UK and EU over matters like working time which go back as far as 1993.

History is undoubtedly repeating itself!

Let's consider a major issue that is right at the heart of Social Europe and employment and social policy.

Working Time

In 1993 our differences with the Commission and other countries produced equally bruising encounters to the fiasco over banking regulation. By then the UK government and most of the business community were unequivocally opposed to legislation restricting working hours. In particular, it fought tooth and nail against proposals to limit weekly working hours to 48, and lay down minimum breaks, rest periods, and paid holiday. Interestingly, and is evident from the debates in the Council, the UK position enjoyed *some* support.

When a vote was taken, however, the UK lost by eleven votes to one. The government thereupon resorted to accusations of the Council 'smuggling the measure through' the changes 'by the back door', using majority voting. Court action to stop the directive was promised.²

Support for the UK's stance on some aspects of what was proposed, including a pervasive operation of a 48 hours weekly cap - was stronger than the UK had realised. This enabled concessions to be made, enabling Member States to introduce 'opt-outs' when implementing the measure in their domestic law.

Indeed, by 2004 some of the new Member States acceding to the EU that year supported the UK's position, and the policy reasons behind it, and introduced their own forms of opt-out.

2009 to Present

By 2009, a New Labour government - equally wedded to the idea of a flexible labour market and supportive of the opt-out facility - saw off all attempts at change, including the European Parliament's. The Business Secretary, Lord Mandelson, said he was 'relieved at being able to resist its removal'.³ As a case study on regulation at EU level, working time regulation continues to provide useful insights into the ebb and flow of regulation v deregulation debates. Despite it being one of the pillars of Social Europe, the scheme *continues* to come under pressure. Furthermore, whatever the merits or otherwise, countries have been adopting deregulatory programmes in an attempt to promote job creation and growth.

Facilitated by the EU Commission, negotiations on a more flexible regulatory regime have been continuing at all levels between the social partners and in State initiatives, as we are seeing in France.⁴

I will come back to this later, but it's clear that much of our own business community is still implacably opposed to the whole idea of working time regulation. This is evident from the BIS taskforce's *Cut EU Red Tape* report.

What about Today's 'Differences' on Labour Law and Social Policy?

Backed by some influential business leaders, the Coalition maintained New Labour's quest for a flexible, lightly regulated labour market, as well as a pretty combative approach to any further EU labour market interventions.

² 'Britain Plans Court Challenge over Limits on Working Week', *The Scotsman*, 2 June 1993. The Charter was the source of a lot of fear in the business community at the time, much of it irrational. Four years earlier I was asked to provide a commentary for the Daily Telegraph on the implications for the UK, and UK business, of the introduction of the Charter of Fundamental Social Rights, which I did in 'A Charter for Change', *Daily Telegraph*, 26 October 1989. Afterwards there was a lot of correspondence with readers, and it was clear that WT was just one of many concerns at that time.

³ 'UK Keeps EU Working Week Opt Out', BBC 28 April 2009.

⁴ Y. Panyerre 'Social Reforms to Cope with the Financial Crisis in France', Vol 35-3 *Comparative Labor Law & Policy Journal* 299-310.

Despite collectivism's decline - not helped by a weak statutory recognition regime and a legal framework that has done little to help trade unions recover from the damage inflicted in the Thatcher years - New Labour was pretty half-hearted when it came to implementing most EU directives in the employment and social policy sphere. This was generally done on a minimalist basis whenever possible. In key areas like part-time workers' rights, for example, it was left to the courts give any kind of meaningful effect to EU law.⁵ Furthermore, even if attempts were made to compensate for loss of collective rights by the introduction of new individual rights, New Labour's moves in 2002 to impose strict pre-tribunal dispute resolution procedures - a project that ended in failure by 2008 - made access to the tribunal system, and justice, progressively harder for most employees.⁶

The Coalition maintained that approach when setting out their stall in their *Programme for Government* in 2011. Like New Labour, they saw the introduction of procedural barriers to accessing tribunals as an attractive form of deregulation. Specifically, they have introduced new, mandatory pre-tribunal processes and hefty tribunal fees as a means of dissuading people from asserting any rights they might have: a change to which I will return, given its implications for EU areas of law-making and regulation.

Whilst 'protecting fairness' they promised to provide 'the competitive environment required for enterprise to thrive'⁷, observing later that year that 'Businesses have told us time and again that they feel they have no rights - the pendulum has swung too far in favour of employees'.

This signalled the start of a host of new initiatives, including the on-going Fundamental Employment Law Review and the promise of action to 'tackle employment law red tape'.

However, it is worth commenting that, despite such rhetoric, the UK *already* had in place, by then, what was judged by the OECD to be 'one of the most lightly regulated labour market amongst developed countries'.⁸ Only the US and Canada had lighter overall regulation - an assessment based on the OECD's employment protection 'indicators'.⁹

This did not, however, stop the Coalition embarking on further deregulation, with the EU as a source of any new measures firmly in its sights.

Initially, though, the priority was the domestic law regime.

Regulating Access to Justice: Tribunal Fees

For a government that is committed to deregulation while also 'protecting fairness', it is surprising that they have been active in regulating access to the employment tribunals. A better word may be restricting. Such regulation was introduced, ostensibly, to stop 'unfounded' claims reaching tribunals.

⁵ Notably the House of Lords in *Matthews & Others v Kent & Medway Towns Fire Authority & Others* [2006] UKHL 8 on implementation of Dir 97/81, the annexed Framework Agreement, and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551.

⁶ These were introduced by the Employment Act 2002. For a commentary, see B. Hepple and G. Morris 'The Employment Act 2002 and Crisis of Individual Rights', 31 *Industrial Law Journal* 245.

⁷ *The Coalition - Our Programme for Government*, London: Cabinet Office, May 2011, p.10.

⁸ *Flexible, Effective and Fair: Promoting Economic Growth through a Strong and Efficient Labour Market*, London: Department of Business, Innovation and Skills, October 2011. The paper was published on the same day that the BIS invited businesses to help them 'tackle employment law, bureaucracy and red tape' ('Tackling Employment Law Red Tape', BIS, 3 October 2011: part of the wider-ranging *Red Tape Challenge* (Cabinet Office, April 2011).

⁹ *Indicators of Employment Protection*, Paris: Organisation of Economic Cooperation and Development, 2008. The evaluation was based on estimated costs and procedures associated with dismissal and hiring as a measure of labour market indicators' at flexibility. For a more up to date analysis, see the OECD *Employment Outlook 2014*:

<http://www.oecd.org/employment/oecdemploymentoutlook.htm>

So a system of fees was introduced to inhibit claims, with fees being required of £390 for Type A cases, eg wages deductions, and £1200 for Type B, eg discrimination or unfair dismissal.

In the event, the results have been dramatic. Research by the Universities of Bristol and Strathclyde shows that claims have been falling significantly since the change. Specifically they have reduced by 81% compared to the same period last year. Furthermore, the research has concluded that by regulating in this way the process has resulted in seven out of ten potentially successful cases never reaching a tribunal.¹⁰

Does such regulation achieve any legitimate business or other aim? And how, exactly, does it maintain *fairness*? Surely it is the preserve of the tribunals and courts to adjudicate on cases, not the government?

Sectoral Wages & Conditions Regulation

Another target for deregulation has been anything seen as interfering with the management prerogative, even in areas like wages and conditions setting – an area of the UK's employment law landscape which has been a function of collective labour relations and bargaining.

One of the last vestiges of regulated collective bargaining was the Agricultural Wages Board for England and Wales (AWB).

The AWB was set up to enable both sides of the agricultural sector – employers and unions – to meet to discuss pay and conditions in the agricultural sector, and to negotiate claims. It survived the abolition of the wages council system, as it operated across other low pay sectors, on the basis that agriculture was a 'special case', with generally small enterprises and limited opportunities for the conditions for collective bargaining to flourish.

The process was, in fact, the epitome of light touch regulation. It left employers and unions alone to get on with the business of bargaining and then fixing sectoral terms and conditions. This was fair enough, especially as they were obviously the two groups in the sector best placed to see and understand prevailing conditions and the sector's needs, and the processes two main stakeholders. After negotiations, the board could put new conditions into legally binding legislative orders – a system that made perfect sense, enabling both sides to police the agreement in the interests of both 'sides'.

What are the attractions of such an approach? And why, therefore, should this *not* have been an area for meriting 'deregulation'?

Alan Bogg, Professor of Labour Law at Oxford University, has answered that pretty well, I think. He argued recently that there is a need for 'a reconfiguration of our understanding of labour law and the regulation of working life, one that locates it within a politics of the common good'. This would mean, among other things, a 'political commitment to the promotion of decent work, with decency characterised by the observance of fair labour standards and rising real wages', but also 'an understanding that productivity and competitiveness issues flow from a meaningful dialogue involving all the main actors - the State, trade unions, employers and workers'.

¹⁰ N. Busby et al, *Citizens Advice Bureaux and Employment Disputes* (Citizens Advice/Universities of Bristol & Strathclyde, 2014): <http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/>

He argued convincingly, I believe, that a 'centrepiece to this strategy must be a State commitment to collective bargaining... based on trust, co-operation and reasoned dialogue for the sake of the common good.'¹¹

Such arguments fell on deaf ears, though. The deregulation train rumbled on, and the AWB became an early target for abolition.

To coincide with BIS general deregulation initiatives, another department, the Department for Environment, Food and Rural Affairs (Defra) then set up a Farming Regulation Taskforce – also committed to 'reducing regulatory burdens'. It comprised government selected business leaders and consultees tasked with identifying specific areas of employment, environment, and other law where there was scope for reducing the regulatory burden.

Yet surprisingly, even before that taskforce reported in May 2011¹², the decision was taken by the government to abolish the AWB. This just left the taskforce with the job of rubber-stamping the decision, which they then proceeded to do.

They certainly did not address any of the anticipated likely negative effects that were expected in the aftermath of abolition, including the likely fiscal consequences of anticipated wage falls across the sector (including the transfer of costs away from employers and to the tax credits system, ie the community, as wages fell, as they were projected to do in the government's own forecasts) – or, indeed, any of the other issues identified in the impact assessment.¹³ The taskforce provided no rationale or further elaboration. It simply branded the scheme 'archaic and burdensome'.¹⁴

This begged the question what was the point of such assessments, or such 'task forces'? The point is relevant, as I shall explain, to the recent call by the authors of the *Cut EU Red Tape* report for impact assessments to precede any new EU legislation.

The decision to deregulate this cornerstone of the sector's wages and conditions setting arrangements, was plainly at odds with the wishes of most farmers and consultees in the AWB abolition process. Most of them, with good reason, favoured retention or else just a *modified* system. This was readily apparent from aspects of Defra's own consultation process and summary of responses (*Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England*, Defra December 2012: Revised February 2013).

Whilst the NMW now provides a basic floor of wage protection for new entrants, most farmers still valued the system of wage progression (and grades), and well thought out conditions provided by the board's scheme – often developed over a long period. These were designed with the particular needs of the agricultural sector in mind. The scheme was, above all, seen as providing stability for a sector dominated by small businesses with no HR systems or arrangements at enterprise level, and where there was weak collective organisation and representation. The unions representing the employees' side of the argument for retention were very critical – both as to the process and the likely consequences of abolition.¹⁵

¹¹ 'Why Labour Law will be at the Heart of the Next Election', *The Observer*, 18 September 2013.

¹² *Striking a Balance; Reducing Burdens; Increasing Responsibility; Earning Recognition: The Report of the Independent Farming Regulation Taskforce* (A Report on Better Regulation in Farming and Food Businesses) May 2011.

¹³ *Abolition of the Agricultural Wages Board*, Impact Assessment (IA) Defra1462, 19 December 2012.

¹⁴ *Striking a Balance*, note 8, chapter 4; and Chapter 11, para 11.02. The AWB was eventually abolished by the Enterprise and Regulatory Reform Act 2013, Part V, s.72, Schedule 20 ('Reduction of Legislative Burdens').

¹⁵ 'No debate, no vote, no democracy' as the Agricultural Wages Board is abolished today', Unite, 16 April 2013. <http://www.oecd.org/employment/oecdemploymentoutlook.htm>

Amazingly, the taskforce provided no rationale or further elaboration. It simply branded the scheme 'archaic and burdensome'.¹⁶

There was, however, an unexpected postscript. Having failed to convince most employers in the sector of the need to abolish the AWB system, the Coalition then failed to convince the government of the other three countries in the UK that abolition was a sensible move.

Accordingly, helped by a decision of the Supreme Court¹⁷ confirming Wales' ability under devolution legislation to set up its own new scheme, the system still continues in three countries of the UK.

The Implications for Collective Bargaining, Social Partnership & Dialogue

Measures like abolition of the AWB in England have certainly marked a further stage in the assault on collectivism, social partner dialogue and the system of voluntary collective bargaining – a system that is increasingly weak, particularly in most areas of the private sector.¹⁸ Not helped by continuation of a weak and largely ineffectual system of statutory recognition of unions and collective bargaining inherited from New Labour¹⁹, the changes have also distanced us even further from labour and HR practices operating in the rest of Europe. This is unfortunate given the importance of collective bargaining and regulation as key components in the any functioning floor of social protection – a theme on which I will be speaking at the forthcoming European Congress of Labour Law and Social Security in Ireland in September.²⁰

It is to European aspects of labour law and social policy that I would now like to turn.

The Red Tape Initiative, the EU & Leading Business Organisations

It was not long before perceived 'red tape', 'gold-plating' of EU legislation, and other manifestations of EU law were brought into the scope of the Coalition government's *Red Tape Challenge*.

A familiar theme, given the experience of past periods of deregulation, concerned any kind of regulation which 'put off' employers taking on new staff– an objective supported strongly by a number of influential business organisations including the British Chambers of Commerce (BCC).

One of the key recommendations ('Recommendation 1') emerging from the BCC's Workforce Survey in 2011²¹ was that the employment law regime should recognise, and be more responsive to, changes affecting the labour market since the onset of the crisis.

The BCC survey included, in particular, what it identified as the growing prevalence of newer forms of work, including zero hours, temporary, and fixed term contracts.

¹⁶ *Striking a Balance*, note 8, chapter 4; and Chapter 11, para 11.02. The AWB was eventually abolished by the Enterprise and Regulatory Reform Act 2013, Part V, s.72, Schedule 20 ('Reduction of Legislative Burdens').

¹⁷ *Agricultural Sector (Wales) Bill: Reference by the Attorney General for England and Wales* [2014] UKSC 43, Supreme Court.

<http://www.oecd.org/employment/oecdemploymentoutlook.htm>

¹⁸ See, in particular, *Living and Working in Europe Yearbook*, Luxembourg: Eurofound, July 2014; and Aumayr-Pintar et al *Pay in Europe the 21st Century*, Luxembourg: Eurofound, March 2014.

¹⁹ On this, see the commentaries in R. Dukes 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition' (2008) 37 *Industrial Law Journal* 236; and G. Gall 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41 *Industrial Law Journal* 407.

²⁰ K. Puttick 'States' Social Security & Support for the Wage-Work Bargain: Reconstructing Europe's Floor of Social Protection' (Keynote Paper, Theme III), XI ISLSSL European Regional Congress of Labour Law & Social Security 17-19 Sept 2014, Dublin, RoI.

²¹ *The Workforce Survey: Small Businesses*, London: BCC, October 2011.

According to the BCC this kind of employment now characterises, in differing degrees, as much as 31% of employment contracts – and particularly in firms employing more than ten workers.²² Referring to the growth in numbers of part-time workers seeking full-time work - put at 1.28 million at the time of the survey - the BCC asserted that 'New employment regulation needs to be more responsive to these changes by making law and guidance that is easily applied to these kinds of workers'.

BCC's 'EU Barometer', it said, showed that businesses was 'strongly committed to staying in the EU' - but that 'a growing number believe the EU needs to reform and support the UK renegotiating the terms of its membership'.²³

The Institute of Directors added its voice to this.

Their Director General, Simon Walker, said at their last annual convention that 'among all the issues that businesses face on a daily basis, the uncertainty of the Eurozone economy and of Britain's role within that union was one that we felt important to explore....For some, the free movement of goods and people within a single market is a triumph of our time.' 'For others', he added, 'the regulatory and financial burdens of membership raise questions about how well the system works - and for whom it is working...The IoD would be failing its members if we didn't engage in the debate around Britain's future relations with the EU.'

He said that a recent survey of IoD members found that 57 per cent support the Prime Minister's planned renegotiation, adding that if a referendum were to be held 49 per cent say they would vote for the UK to remain a member, with a third saying it would depend upon the renegotiation. Just 15 per cent would vote for a British exit. He noted that 79 per cent of IoD members had some form of business link with the EU, and 60 per cent agreed with the statement that 'continued access to the Single Market is important to my organisation'. He added, though, that there was a 'broad appetite for deep reform, and Employment law was high on the list of issues where members think 'powers should be repatriated...'

The CBI's Perspective

As is readily apparent from the views of key organisations like the BCC and IoD there is still support for maintaining EU membership - even among business leaders and organisations supportive of the UK remaining in Europe their quest is for a *reformed* EU. The CBI is a leading proponent of this stance. The CBI/YouGov Survey 2013 elicited these key findings:

- 71% said the UK membership of the EU had a 'positive' or 'very positive' impact on their businesses: 16% said it had 'no impact', with only 13% saying it produced a 'negative' impact
- 67% of the small and medium-size organisations (SMEs) polled thought the EU has had a positive impact: 16% said 'no impact': and only 16% produced 'negative' responses
- 86% believed that leaving the EU would have a negative impact on UK firms' access to EU markets, labour, etc

As important, though, for present purposes, the survey asked about the issues they wanted 'reformed'. When asked to rank their *priorities* for reform, 46% wanted an end to 'gold-plating' of EU legislation, including aspects like employment law, social rights, and migration-related regulation.²⁴

²² Ibid, p.5, 22.

²³ Q2 2014 BCC EU Barometer <http://www.britishchambers.org.uk/policy-maker/policy-reports-and-publications/q2-2014-business-eu-barometer.html> (accessed 2 June 2014).

²⁴ For further information about the CBI's position in relation to the EU, see the CBI's site 'Britain and the EU': <http://www.cbi.org.uk/business-issues/britain-and-the-eu/>

The Business Task Force & the COMPETE 'Common Sense Filter'

A valuable insight into the business perspective, and the case against perceived EU over-regulation, is provided by the report of the government Business Task-force *Cut EU Red Tape*.²⁵ This has set out no less than thirty 'priority recommendations and key principles' aimed at 'sweeping away barriers to growth'. One of the five key barriers identified in the report was 'the barrier' to starting a company and employing staff.²⁶

One of the taskforce's proposals focused on an earlier theme in this paper, namely process. It put forward a means of debating the need for further regulation at an early stage in any proposal, setting out a mechanism for limiting the amount of EU legislation with which businesses have to 'cope'.

Specifically, it called upon the EU Commission to adopt a new 'common sense filter' for all new proposals – the COMPETE Principles.

In summary, the COMPETE approach would establish a 'filter' to ensure that no new EU legislation could be brought forward without satisfying requirements based on these elements:

These are:

- Competitiveness test
- One-in, one-out
- Measure the impacts
- Proportionate rules
- Exemptions and lighter regimes
- Target for burden reduction
- Evaluate and enforce

The **competitiveness** test is described in these terms:

'All new proposals from the European Commission must pass a rigorous competitiveness test to demonstrate that they will boost European competitiveness. If they fail, they should be rejected and not allowed to proceed.'

Regulatory legislation, especially in the employment and social dimension areas, is surely not just about 'boosting' competitiveness. It performs a *range* of functions, including some which do not appear on the taskforce's list. They are often introduced to promote social policy objectives, and to protect the community interest and 'stake'. Working time regulation, for example, has a perfectly good rationale rooted in health, safety and welfare. Over worked and stressed employees go off sick and sometimes lose their jobs as a result, thereby becoming a cost to the community. Low-paid agency work means a higher fiscal cost to the community in the form of costly tax credits to top up that low pay. Employers in this context are net beneficiaries and stakeholders in a system that, in effect, is a wage subsidy. So why *should* the community, given its stake in the process, not have the ability to intervene – and why should such behaviour remain unregulated?

Having been introduced, employers should also reasonably be expected to adhere to the law, if only to avoid the operation of competitive disadvantages between States. This was just one of the many concerns in the EU Parliamentary debates in 2009 on working time opt-outs. Part of that regulation process entails individuals' ability to take complaints to an employment tribunal (now made considerably harder by the Coalition's domestic regulation agenda, and the introduction of pre-tribunal barriers and fees).

²⁵ *Cut EU Red Tape: Report from the Business Task-Force*, Prime Minister's Office and Department for Business Innovation & Skills, London: BIS, 15 October 2013 (updated 24 February 2014).

²⁶ *Ibid*, sections 4.2, B1-B8.

The *one-in, one-out principle* would also be difficult in practice.

Essentially what the task-force was trying to achieve, in this respect, was a reduction in the overall 'burden' by ensuring that no new measure could be introduced without, first, jettisoning as *existing* measure. The approach described as 'an offset for any new burdens on business by reducing burdens of an equivalent value elsewhere'.

An obvious corollary would be that without such an 'offset', and abandonment of existing measures, no new legislation could proceed, or even be debated. This is not, of course, a very workable proposition. What if there is obvious candidate for removal from existing law?

The *measure the impacts* proposal has more merit. In effect, this adopts a similar approach to what is now followed in the UK law-making process in relation to impact assessments. The system would operate in accordance with the proposal that the EU Commission would publish a provisional impact assessment when the measure goes out to consultation, setting out the impacts of the various options proposed. A single 'independent impact assessment board' would scrutinise assessments; and 'proposals which do not receive a positive opinion from the impact assessment board should not proceed'.

The proposal was very short on details, though. For example, assuming a negative report, would that mean *automatic* rejection at that point? The UK's approach assumes that new legislation should be accompanied by an impact assessment, and that's been a positive development. However, it is ultimately a matter for the legislator whether to proceed, or not.

In the UK context, unpopular and irrational laws are often made, despite adverse impact assessments. As I considered earlier in the case study provided by abolition of the AWB, a negative impact assessment is certainly no bar to new regulation being introduced – even when it lacks support from the business sector at which it is directed.

Abolition went ahead despite clear evidence of a range of negative consequences, including an expected fall in agricultural wages, and ensuing rise in take-up of in-work tax credits, housing benefits, etc. Essentially a sizeable transfer of costs away from employers and on to the community was the likely upshot.

In the event, the government not only proceeded, it did so by the shortest available route (simply by the addition of new provisions to the Enterprise and Regulatory Reform Act 2013, Part V – an approach that limited any meaningful debate or scrutiny of the merits of the changes).

Whilst controversial, under our constitution it is the legislator – Parliament, devolved legislative body, or in this case the EU – that has the final say, not interest groups, however important they may be in the law-making process.

The *proportionate rules* expectation was predicated on what the taskforce called a 'risk-based and proportionate approach when developing new proposals, drawing on objective scientific advice...The European Commission should bring forward clear guidance as soon as possible after legislation has been agreed, where this would help businesses comply with EU legislation in the least burdensome way'. However, who (or what) would decide if proposed new rules are 'proportionate' or not?

The sentiment makes sense – but unfortunately it is far from clear how this might actually *work* in practical terms.

As part of the taskforce's concerns about the impact of excessive regulation of small and young enterprises, the *exemptions and lighter regimes* element of COMPETE envisages a complete, blanket exemption 'whenever possible' – but, in any event, 'lighter regimes' for SMEs when developing proposals. This is likely to be very problematic in practice, particularly in the employment and social legislation sphere where the concept of a 'lighter regime' would be novel.

In any case, it is often in the case of smaller businesses that legislative interventions are most needed.

Nor is it clear what the evidence base is for assuming that legislation *per se* necessarily inhibits business development, growth, or job creation.

Evaluation of existing measures. Finally, the taskforce urged the Commission to ensure that no new proposals would be brought forward 'until the existing legislative framework has been evaluated', and ensuring that 'EU legislation is implemented and enforced consistently across the EU'.

That's fine, but the EU Commission already performs both functions within its remit under the Treaties.

Regulation to Inhibit Regulation? Some Paradoxes...

A particularly interesting recommendation made by the taskforce was that the EU Commission should ensure 'full implementation' of the Services Directive across the EU'.²⁷

The proposal is clearly a call for more EU regulation, not less. It was rooted in the concern that the Services Directive is still not fully implemented across the EU, and this has meant that Member States are able 'to maintain far too many restrictions in their services markets'. The taskforce's analysis added these interesting insights:

'It is also clear that more ought to be done to raise performance on services integration...However, it is apparent that some European states have been taking advantage of flexibilities granted in the Directive to maintain unjustifiable barriers to their services markets – notably by choosing to interpret concepts such as "proportionality" and "necessity" in the broadest manner. The introduction of a "proportionality test" against which these measures could be challenged would help to address this.'

For a number of reasons, UK governments, supported by business organisations, have tried hard to persuade the EU Commission to move more quickly in the much vaunted 'single market for services'. This is not surprising. It is an area in which UK companies compete effectively, and where future growth after the crisis can be expected. Indeed, it is a concern that if the UK were ever to leave the EU it would be much harder to make the case for further services liberalisation.

On the face of it this highlights a curious paradox. Looked at more closely, it makes sense, highlighting one of the EU's important roles, namely the attainment of an effective and functioning Single Market. As one commentator has rightly pointed out, the creation of a full Single Market requires dismantling the regulatory barriers to trade 'necessitates a considerable amount of EU-level regulation to event individual Member States from preserving non-tariff barriers and other trade reducing practices'.²⁸

Similar considerations inform the regulation of free movement. Without top-down EU regulation Member States can, and certainly, would regulate for their own domestic advantage – for example by relaxing equal treatment requirements.

²⁷ Ibid, Part 2: Proposals for reform to EU rules, regulations and practices – Barriers to Overall Competitiveness.

²⁸ J. Portes 'The Economic Implications for the UK of Leaving the European Union', National Institute Economic Review No. 226 (Nov 2013), p.6.

We have also seen this, at times, with UK governments' domestic agendas in the employment and social policy sphere. In the 1980s it was clear that many aspects of the Conservative government's deregulation programme also entailed *more* regulation, not less. This was evident in the 1980s and 1990s when the Conservatives embarked on a programme to take down collective labour law and unions.

In *Employment Rights* we commented that, at first sight, there appeared to be a contradiction between the neo-liberal philosophy of keeping the business of the State and government to a minimum and the highly interventionist policy adopted in relation to trade union reform. But we then suggested that there was, in fact, no contradiction. One of the functions of government is to protect the free market mechanism from 'interference', including trade unions, practices like the closed shop, etc. So one of the 'tasks' of deregulation is, in fact, to dismantle the legal and 'bureaucratic' controls which deter employers, especially small employers, from recruiting labour. Deregulation could take many forms...²⁹

European Employment Law: 'A Key Concern for Business'

The underlying message in the recommendations made by the taskforce in relation to labour market regulation and Social Europe is unmistakable. It is that 'European employment law issues are a key concern for business', and that UK businesses 'are struggling to cope with the unnecessary burdens placed on them by EU laws'.³⁰

A particular concern was expressed in the report in relation to micro-businesses. On this it was suggested that there should be a 'starting presumption' which was that all such enterprises should usually be exempt from regulation, or else subject to 'lighter burdens'.

It added that the same principle should apply to laws proposed by the 'social partners'. The report asserts that industry, including SMEs, should have the right to be consulted on social partner proposals, and they should in any case be 'subject to rigorous impact assessment'. This is now entirely consistent with Coalition policy in relation to domestic employment and social policy.

The blue-print, as outlined in *Flexible, Effective and Fair*, is stated to be 'underpinned by a vision for the labour market in which both employers and workers are informed and empowered, able to negotiate their relationship within a framework of fundamental protections, with minimal intervention by the Government. We believe that the best outcomes arise when employers are able to sit down and discuss issues *direct with their staff*, where process supports that conversation rather than stifling it. Plainly, this is never going to be a vision that can sit comfortably with the idea of social partnership, and the two 'sides of industry conversing and making new rules together.

This was certainly a key driver in the Coalition's moves to end the Agricultural Wages Board. The system may have survived the Thatcher and John Major Conservative eras, and then New Labour – but it is indicative of the scale of the Coalition's government's assault on UK employment law, and now the attacks on the EU's labour and social policy agenda, that it has not survived the post-2010 period.

The change is a timely reminder that collectivism itself is an idea increasingly under siege - in the UK, but also in some other parts of Europe where the underlying trend is towards collective bargaining systems is by all accounts becoming increasingly decentralised.³¹

²⁹ R. Painter and K. Puttick *Employment Rights*, London: Pluto, 2004 3rd ed, ch. 1, pp.8-11.

³⁰ *Cut EU Red Tape*, note 17, section 4.2 'Barriers to Starting a Company and Employing People – Overview'.

³¹ See, in particular, *Living and Working in Europe Yearbook*, Luxembourg: Eurofound, July 2014; and Aumayr-Pintar et al *Pay in Europe the 21st Century*, Luxembourg: Eurofound, March 2014.

Substantive Issues of Labour Market Regulation & Social Policy

Besides providing an opportunity for the BIS business taskforce to comment on EU processes, and make its position on the idea of social partner dialogue and law-making clear, the *Cut EU Red Tape* report set out a range of concerns with specific areas of current law-making priorities.

Among the areas marked out for concerns are the requirements in the Health and Safety at Work Framework Directive requiring businesses to keep written records of risk assessments carried out in their workplace. What the report asks for is the ability of Member States like the UK to exempt businesses from 'the burden of record-keeping'.

A key group that would benefit are smaller businesses.

A familiar (and recurring) theme is the removal of 'barriers to helping young people into work'. In this regard the authors of the report are clear that 'with youth unemployment at 22.8% in the EU in 2012' everything should be done to 'help young people take their first steps in the labour market'.

The objection, primarily, is to proposals by the Commission to do more to try to improve the conditions on which young people are taken on for traineeships and work experience, with a view to eliminating exploitative practices. The taskforce, though, sees this as a threatening move, particularly if it inhibits more informal types of scheme, including short-term work placements which are unpaid, arguing that employers value the ability to run such schemes with 'minimal bureaucracy'.

Flexibility, it says, is 'key'. It also argues that the participants should 'continue to receive social benefits during short-term placements, to avoid the bureaucracy of having to leave and rejoin the benefits system'.

However well intentioned, the problem with this is that given the scale of youth unemployment at present there are risks inherent in simply giving organisations a carte blanche to operate schemes with such informality. The public outcry when Tesco operated such unpaid schemes prompted the government to distance itself rapidly from such schemes, and introduce new work experience and traineeship arrangements, accompanied by substantial support in the form of subsidies. Tesco thereupon became one of the first companies to take advantage of this.

Another objection is to the idea that the State should, in effect, continue subsidising such placements through the social security system, rather than paying for such placements. The position might be different for smaller organisations, but the suggestion is unlikely to gain much public support if the employing business is a multinational that could well afford the costs of such short-term work experience? Perhaps, as the report suggests, a less regulated approach may also be more appropriate if the work experience is brief, and does not pose any administrative problems with social security agencies.

Other Concerns

Other key aspects of taskforce concerns focused on new rules on pregnant workers (with concern about proposals put forward in the European Parliament to amend the Pregnant Workers Directive, first adopted in 1992, and introduce up to 20 weeks' paid maternity leave on full pay: a move seen as 'hugely costly').

In the face of declining collective arrangements, and channels of communication and dialogue through traditional mechanisms like employer/union dialogue – a trend charted by recent studies in the UK like *The Workplace Employment Relations Study: First Findings* (in May last year), and reflected elsewhere in parts of Europe - it is no surprise that the EU Commission has been looking at alternative models, and ways to improve the existing framework provided by the Information and Consultation of Employees Directive, implemented in the UK – albeit not very well³² - by the Information and Consultation of Employees Regulations 2004, SI 3426/2004. Even this was criticised as 'burdensome' ('Further EU action in this area would be costly to business, without adding any real value...').

Needless to say, the report maintains the UK employers' long-standing objections to regulation of working time. It observes that 'Company after company told us that complying with the Working Time Directive is a huge headache. Keeping the ability to opt out from the 48-hour week limit is essential. But problems caused by European Court rulings on how 'on-call' time is treated need urgent action ... they have expanded the original scope of the legislation.

Interestingly, whilst this is an area in which the Coalition government's support remains firm, public opinion and concerns about areas like on-call and zero hours contracts – attractive as they are to businesses wanting 'flexibility' – has grown. As a result the Business Secretary, Vince Cable, is now committed to a degree of regulation in this area. Basically, a ban on aspects of abuse of zero hours contracts when they entail exclusivity requirements, and prevention of staff taking up employment opportunities for earning with other employers rather than waiting for the telephone to ring and an offer of employment being made.

The government has also been understandably cautious about some of the report's other demands, including proposed new 'flexibilities' in relation to the operation of the Agency Workers Directive. The underlying sentiment is that the 'The Agency Workers Directive has increased the burden of hiring agency workers, and reduced the flexibility that business has to hire people. This can reduce employment opportunities, and deter businesses from hiring for fear of breaking the law.' The problem with this is that EU policy makers, like those at State level, see unregulated use of agency workers as a threat to labour market stability, undermining prevailing wages and other conditions. As the CBI itself recognised during consultations, far from just being a source of short-term labour used as a temporary stop-gap measure - typically during short periods when 'cover' is needed - the use of agency work has been growing in leaps and bounds – almost a parallel labour market. In doing so it has considerable potential to undermine prevailing wages and other conditions. To counter this, the Agency Workers Directive in its final form, and after wide-ranging consultations over a lengthy period, introduced a new set of basic rights for agency workers. The agreed principle and policy objective was to ensure that whatever other 'flexibilities' accompany the agency work system, workers in it should at least be ensured the right to comparable rates of pay, holidays, rest periods, and working time to those they would have enjoyed had they been recruited directly by the hiring company. Normally this would begin from commencement.

The need for such a minimum floor of social protection has become pretty clear in recent years, with a wide range of well documented abuses taking place in the employment agency sector (highlighted, for example, by case studies in the TUC's Commission on Vulnerable Employment).³³ The same can be said about the gang-master system which still thrives, despite some well documented problems.

³² See, for example, P. Davies and C Kilpatrick, 'UK Worker Representation after Single Channel' (2004) 33 *Industrial Law Journal* 121 (criticising aspects of the UK worker representation system and mechanisms); and K. Ewing and G. Truter, 'The Information and Consultation of Employees' Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626, arguing that, as with other UK implementing legislation, the UK has not properly implemented the directive and this risks litigation in the future.

³³ Trade Union Congress Commission on Vulnerable Employment, London: 8 May 2008: <http://www.vulnerableworkers.org.uk/>

Easements in the Agency Directive's Implementation

Despite such regulatory interventions, the UK continues to enjoy a *lot* of flexibility in the way EU law operates. Indeed, as in other areas in which the UK enjoys considerable latitude in the way EU law and standards operate, such as working time, there is now scope for agency workers' rights to be postponed until after twelve weeks in the same job - the product of agreement between UK social partners, the TUC and CBI.

So it can hardly be said, can it, that social partner dialogue in this case has disadvantaged business here, any more than it has in the rest of Europe?

Plainly, though, the UK advantages the system already gives employers is still not seen as enough - at least the members of the taskforce. Besides questioning whether a Directive is even 'still actually necessary' it insists that employers should still be able to 'reach their own arrangements' with individual agency workers.

Needless to say, given the imbalance of bargaining power that inevitably exists between hiring organisations and such workers this would not just be unacceptable to EU policy makers, it would, in fact, drive a coach and horses through the entire scheme.

Free Movement and Linked Social Rights

This is an aspect of Social Europe which is, arguably, *the* most problematic area at present - not helped by UKIP's assaults of the EU, and key aspects like free movement.

From a *business* perspective it is undeniable that UK employers' ability to draw on a significantly enlarged labour pool has benefited them greatly and the community in general. This has generally been supported, by the evidence. EU nationals in the UK are more likely to be in work and contributing to the economy than UK nationals³⁴, and successive reports since 2006 have identified the advantages EU workers have brought to the UK economy.³⁵

Nevertheless, despite support for free movement by business organisations like Business for New Europe - which points to the positive reasons for continuing to be in the EU (including the added value resulting from nearly 3 million EU nationals working here)³⁶ - there have been a number of influential voices raised against free movement. These have contributed to divisions within the business community on the issue.

Most notably, soon after the admission of A8 nationals to the UK labour market, for example, the CBI's Director-General, Richard Lampert added his weight to opponents of free movement by calling for a 'pause'.

He even went as far as to say EU migrant workers and the system posed a 'threat to the UK's social fabric'.³⁷

³⁴ C. Dustmann et al (2010) 'Assessing the Fiscal Costs and Benefits of A8 Migration to the UK', *Fiscal Studies* 31, pp.1-41. Successive Ernst & Young/Item Club reports have also provided positive commentaries on the benefits the UK has enjoyed since 2004, noting positives like 'reduction in labour shortages' and the 'downward pressure on wages'.

³⁵ 'Employers' Use of Migrant Labour', London: Home Office/Institute of Employment Studies, March 2006, 5-7, and 29-36

³⁶ For example *An Essential Guide: Britain and the European Union*, BNE, March 2013; *Migration - Making it Work*, BNE, May 2013.

³⁷ 'Migrants Threaten Social Fabric, says CBI Chief', *The Guardian* 6 September 2006.

Bowing, no doubt, to popular pressure and his backbench MPs, the Prime Minister has been making it clear that as part of his 'renegotiations' the government wants curbs on EU migration into the UK.

How this might work is not at all clear – but it has aligned him, I suggest, to New Labour's position when Gordon Brown called for 'British Jobs for British Workers'.³⁸

To date, though, David Cameron has not enjoyed much success in persuading other EU leaders and the EU Commission of the need for changes, other than in relation to temporary, *transitional* controls on entry - notably when new EU States accede to the union and there is a risk of labour market 'disturbances'.

Arguably, such positioning is largely politically driven, without much backing from the business community. The main impetus appears to be coming from fears of UKIP and Eurosceptic backbench MPs who have been increasingly aligning themselves to UKIP's anti-EU, anti-immigration stance on this.

That said, it would be surprising if, as the political rhetoric hots up, the views among some business leaders did not start to change. Statistics this year showing that EU immigration by the end of 2013 reached 201,000 (*Migration Statistics Quarterly Report*, May 2014, Office of National Statistics) have certainly been a source of interest to the media, especially after the ONS reported a marked rise from 158,000, and calling this a 'statistically significant increase'.

This prompted *some* sections of the business community to call for restrictions, for example in the form of a possible 'points' system.

However, such a change could not be made at Member State level, only at EU level.

If adopted, it would mark a seismic shift away from one of the centrepieces of EU policy - embedded in the Treaties - which is the absolute right of EU nationals and their family members to move to, reside in, and seek work and be employed in other EU countries. The fall-back position for the Eurosceptics, is that if free movement is to continue then it should be treated no differently from other forms of migration.

It should be regulated more closely in relation to the *terms* on which EU workers are admitted, take up employment, and receive the same social benefits as host State nationals, should be changed.

This would undoubtedly accord with the UK's position, held for some time and generally supported in the courts here, that migrant workers should only be able to take advantage of the benefits of free movement – unrestricted entry, residence, jobseeking, employment, and access to benefits and social housing on the same terms as UK nationals – if they are either in remunerative employment and otherwise *reciprocating* for such support.

This has evolved as a form of economic integration test, superimposed on the EU scheme. Despite its adoption by our courts in cases like *Patmaliece* aspects of it are probably incompatible with EU law.

This would not just threaten a central tenet of free movement, equal treatment, it would mean the end of one of the centrepieces of Social Europe, namely EU citizenship itself.

³⁸ 'Brown Stands by British Jobs for British Workers Remark', *The Guardian*, 30 January 2009. The context was the unofficial walk-outs at the Grangemouth Refinery over recruitment by BP of EU workers. By referring to the way the immigration system as it operated in relation to non-EU migration was being modified to bring in a points-based scheme, many observers took the Prime Minister to mean that a similar approach might be adopted for EU nationals' entry, residence, and work.

EU Citizenship is accorded to all citizens of the Member States. It automatically brings with it, under the Treaty on the Functioning of the EU, the right to move and reside 'freely' within the EU.³⁹ It also affords protection from discrimination on the grounds of nationality.⁴⁰

Whilst the EU's scheme requires a degree of contribution and reciprocity from EU nationals residing and working in the UK, and failure to satisfy this can legitimately affect 'residence' (and linked social rights) it is doubtful whether the some aspects of the UK's implementation of the scheme is entirely compatible with EU Law. This is a theme I have discussed before, suggesting that there must be limits to the use of 'economic integration' requirements as a means of regulating residence. This is especially so in the context of a labour market increasingly characterised by short-term, low-paid jobs in which host States increasingly have to play a facilitating role - for example in support of migrant workers with short-term income replacement needs after they have had to leave such employment, or when they are pregnant.⁴¹

Should employers in Member States like the UK be permitted to treat EU workers any differently from our own nationals, simply to make migration 'work better' for us, or to appease an increasingly anti-EU *political* agenda?

Absolutely not!

I doubt that there would be much support for such a position among most reasonable business leaders, either. Apart from being inherently objectionable, one effect of abandoning the equal treatment principle - a centre-piece of free movement - would be the risk this would pose to the prevailing wages and other conditions currently enjoyed by UK nationals and other residents.

This is, in fact, what Sweden was primarily concerned about in May 2004 when setting its own, additional controls to coincide with admission of A8 nationals. The risk it perceived was that, without them, there would be the rapid emergence of a labour market of 'two teams'.

In taking those steps it acted on the recommendations of the Holmberg-Karlsson Communication to Sweden's Riksdag. In the event, the country adopted anti-discrimination guarantees, checks on tax and social security contributions, and ratification of ILO Convention 94 to prevent 'social dumping'.⁴² This was seen as an essential step to protect Swedish workers from 'displacement' - ie replacement of workers on higher wages and better conditions by workers from the A10 countries prepared to accept lower wages and worse conditions.

A further concern was that such a 'second team' would, in time, increasingly become a burden on Sweden's welfare system. The low pay, and less favourable conditions, of the second team would inevitably result in a transfer of costs from employers to State social security schemes, especially given that Swedish family benefits at the time generally exceeded a normal wage in some of the new Member States' labour markets.⁴³

³⁹ The key requirement in this regard that all Union citizens residing in the host State 'shall enjoy equal treatment with the nationals of that Member State...' (article 24(1)).

⁴⁰ Further guidance is provided by the Commission in its Citizenship Reports, including the *Citizenship Report 2013; EU Citizens*, Brussels: EU Commission, Justice, Fundamental Rights & Citizenship: <http://ec.europa.eu/justice/citizen/>

⁴¹ K. Puttick 'Paying their Way? Contesting "Residence", Self-sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', *Journal of Immigration, Asylum and Nationality Law* (2001) 25(3), 280-292.

⁴² *Employment Transitional Rules for All Concerned* (Holmberg-Karlsson Communication: 15 March 2004), discussed in K. Puttick (2006) 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian and Romanian Migrants', *Journal of Immigration, Asylum and Nationality Law* 20(4), 238-254.

⁴³ *Ibid*, 247.

Social Europe & Social Rights as 'Regulation'

The social rights resulting from EU regulatory interventions in areas like equalities, working time, TUPE and so forth, now seem to be at risk as Europe itself is seeing increasingly deregulatory, even neo-liberal agendas taking hold.

Indeed, a number of European personages, including the President of the European Central Bank, Mario Draghi, have gone as far as to say that Social Europe is not only at risk but was already 'gone', notably in some countries like Spain which have had to curtail social spending as a result of austerity measures.⁴⁴

Despite such pronouncements, there are powerful *counter*-arguments from sections of the business community (concerned, above all, at the prospects of much of the cost and on-cost of employment reverting back from the State to the employer – as well as from the Left.

Former General Secretary of the European Trade Union Confederation, John Monks, writing earlier this year, has said, for example, that whilst EU social policies launched three decades ago may have stalled, and neo-liberalism and deregulation have been in the ascendant, the impact of the crisis on many European citizens has made the social rights agenda 'more relevant than ever'.

He has also made the point that the EU, and the European project as a whole, needs that agenda, as it will 'only enjoy popular support if it has a social dimension'.⁴⁵

A more important source of support, however, has come from the EU Commission itself, and its President, Jose Manuel Barroso. Barroso was quick to point out that remarks of the kind made by Mario Draghi were made in the context of the special austerity measures affecting countries like Greece. He told the European Parliament shortly afterwards that Social Europe was 'not only not dead' but would continue to adopt measures aimed at 'creating jobs and achieving growth and higher employment levels'.

It was pointed out that this would build on the Annual Growth Survey and Europe 2020 strategy: an initiative that set out long-term clear commitments to Social Europe.

Interestingly, the EU Commission, led by Employment Commissioner Laszlo Andor, has called for more regulatory measures, not less - primarily to remove the remaining obstacles and restrictions on free movement, and in particular to free up labour market access by workers from Romania and Bulgaria (who are still subject to restrictions on working operating in nine of the twenty-eight Member States).

The proposed package also included recommendations on minimum wage regulation of the kind now being rolled out in Germany. This is hardly consistent with an end to Social Europe!

One area in which the EU has plainly not succeeded in regulating to ensure a floor of social protection for all workers is in the area of social rights that are dependent on the retention of 'worker' status.

I would like to finish by making some observations on that particular score.

⁴⁴ 'Europe's Banker Talks Tough: Draghi Says Continent's Social Model is 'Gone', *Wall Street Journal*, 24 February 2012. The same article noted, however, that Draghi and the ECB have been much criticised, with some commentators arguing that it is austerity measures directed at social measures that have contributed to the Eurozone crisis, and stagnation and contraction, threatening recovery. Interestingly, the USA has responded with exactly the opposite approach to the EU's, massively *expanding* State expenditure on benefits and in-work support (notably through the EITC, tax credits, wage subsidies, and other federal pump-priming in stimulus packages, including \$800 billion in the American Recovery and Reinvestment Act of 2009. As I will be saying in my paper at the European Congress of Labour Law in September, this was regarded as 'not enough' by commentators like Nobel prize-winning economist Paul Krugman; P. Krugman (2009): 'Too Little Stimulus in Stimulus Plan', Speech at the University of Pennsylvania, 19 February 2009.

⁴⁵ 'Social Europe is Far from Dead', *Social Europe*, 2014 Spring Issue, 24 February 2014.

Regulating to Maintain Europe's 'Social Protection Floor'

Whilst the Bachelet Report for the ILO in 2011⁴⁶ and subsequent ILO Recommendations in 2012 were primarily directed at the need for a minimum floor of social protection in developing countries, they had much to say about the *quality* of protection in Europe. As a result of the crisis, austerity, and failing labour market mechanisms for redistribution – a factor impacting on wages across Europe – Europe now has some significant gaps and holes in its floor of social protection. Since the onset of the crisis after 2007 those gaps have become sizeable holes in some parts of the floor's operation. The subject is one on which I am due to speak this September at the forthcoming European Congress of Labour Law and Social Security in Dublin.⁴⁷ One of my planned themes, as the keynote speaker introducing debates on Europe's social protection, will be that besides a general weakening of labour market institutions, including collective bargaining and minimum wages and conditions setting – factors in falling EU wage levels – austerity measures have taken their toll on a lot of programmes.

State provision has not necessarily been able to meet the increasing demands on State provision, especially given the severe impact of austerity measures on State spending. Furthermore, a hardening of attitudes towards workers seeking to assert social rights linked to free movement is also very discernible. For example, the provision of replacement income for workers in a variety of situations, including temporary cessation of work, illness, pregnancy, and so forth, has undoubtedly been harder to assert EU workers in other host States in the current climate.

St Prix & Member States' Support for Employment and Social Europe

In the case of EU workers it might have been expected that measures like Directive 2004/30 on free movement, which set out the equal treatment principle and afford specific protections, would cater adequately for women working in the UK from other Member States.

In particular, you might think, it would also address the need to ensure that host States' nationals' ability to access replacement income while they are on maternity leave and not earning, at least pending a return to work, would extend to workers from *other* EU States in the same position. Given the way that the scheme is formulated under the Treaties, and in Directive 2004/38, enabling former workers to show that they can retain 'worker' status (and therefore a 'residence' right), it might be thought groups like pregnant former workers, who have only left their employment for pregnancy reasons, would be adequately catered for.

In fact, far from it, as the case of *St Prix v Secretary of State for Work and Pensions* highlighted this year. Worse, once it became apparent in that case that there was no specific provision in the Directive's scheme explicitly facilitating retention, the UK government department handling the case, the Department of Work and Pensions, was quick to bar her out of State assistance.

The problem, in formal *legal* terms, is that article 7 appears to give a definitive meaning to 'worker'. Amazingly, it does not include pregnancy as a ground for retention. Accordingly the department dealing with the case (the DWP) was quick to assert that EU nationals in *Jessy St Prix's* position simply could not be helped if she was not still working (and earning, paying taxes, NI, etc) – the *economic integration* requirement – or she was not explicitly within the extended meaning of 'worker' in the Directive.

⁴⁶ *Social Protection Floor for a Fair and Inclusive Globalisation*: The Report of the Advisory Group Chaired by Michelle Bachelet, Convened by the International Labour Organisation in Collaboration with the WHO (Geneva: ILO, 2011).

⁴⁷ P. 8, note 20, above.

Fortunately, our Supreme Court, after hearing *St Prix's* appeal, ruled very sensibly that the matter was not *acte clair* as the list of groups able to retain worker status in article 7 of the Directive was unlikely to be definitive. So it referred the matter to the Court of Justice of the European Union.

Happily for *St Prix*, and other workers who could find themselves in a similar position in the future, the court adopted the reasoning of the Advocate-General, and was able to fill the lacuna in the scheme – despite resistance from the government.⁴⁸

In the bigger picture what did the *St Prix* episode, and earlier UK cases on free movement and linked social rights, say about the *politics* of free movement? Clearly, public concerns about immigration in general now extend to migration from within the EU as much as from outside it.

Plainly the Right has been in the ascendant, as opinion polls are showing across the continent. Much of the social dimension and Social Europe seems threatened as a result.

Concluding Points

Whilst much of the current antagonism towards the EU is essentially a *political* one, it is evident from the views of influential organisations like the CBI, British Chambers of Commerce, and the IoD – coupled with the BIS *Cut EU Red Tape* taskforce report findings and recommendations – that there are some genuine business concerns. The EU needs to listen to these.

The UK has enjoyed a pretty generous deal from the EU in terms of easements, opt-outs, and flexibility in the way it has been able to implement employment and social measures. This may have pleased governments and the business community, and even encouraged them to press for more concessions. However, the net result has also been to render a lot of key measures, including working time, part-time work, and agency work, more ineffectual – at least at the UK level. Furthermore, far from being over-regulated, the UK enjoys one of the most lightly regulated labour markets in the world, as the OECD has indicated: a fact which is hardly consistent with some of the views in the *Cut EU Red Tape* report.

Going forward, it should be obvious that a degree of top-down regulation will be needed to secure the attainment of a viable single market. The need for full implementation of key measures like the Services Directive, if only to bar out domestic regulation that is inconsistent with EU objectives, illustrates the point. Continuation of a range of essential measures in the employment and social policy field, including maintenance of the equal treatment principle underpinning free movement, will also be essential – whatever political attacks ensue in the months ahead. If Member States are able to unpick such schemes where will that end? Measures to achieve free movement of capital or the right of establishment of new business could be the next target. These points are, I believe, well understood by the UK business community. Whilst concerns about perceived over-regulation are likely to be a continuing feature of debates ahead of any referendum, such concerns are likely to be outweighed by a very much bigger concern, namely the negative outcomes that a UK exit would quickly produce. This was the clear message last year from the overwhelming majority of business organisations polled in last year's CBI/YouGov poll.

I look forward to the discussions that follow my paper. Thank you for your kind attention!

⁴⁸ [2011] 3 CMLR 48, Court of Appeal; [2012] UKSC 49; [2013] 1 CMLR 38, Supreme Court; Case C-507/12 *Saint Prix v. Secretary of State for Work and Pensions*, CJEU Judgment 19 June 2014.