1. Introduction

Studying European social law can be a startling experience for someone who is well acquainted with social law on the national level. The EU does not have a coherent approach to questions of labour law and social security, but rather singles out “burning issues”, for which the diversity of domestic law in the MSs seems particularly problematic. A brief historical overview should give more insight into the EU’s social policy, which “turns much of the conventional understanding of social policy on its head.”

1.1. Development of European social law

The history of European social policy has been described as “more a story of failure than great success”. Originally, the treaties establishing the predecessors of what is now the European Union did not contain any explicit provisions in the area of social law. Quite obviously, these treaties (the 1951 Treaty Establishing the European Coal and Steel Community and the 1957 Treaty Establishing the European Economic Community) intended to facilitate economic cooperation, which consisted in the creation of an internal market without barriers between the individual member states. Accordingly, “workers” figured in these treaties only as beneficiaries of an economic freedom – the free movement of persons, which will be treated in more detail in section 4.1.

Against this backdrop, it was actually the European Court of Justice (ECJ) which firstly gave the EEC treaty a social meaning. For one thing, this concerned the mentioned provisions of the free movement of workers, which the Court eventually regarded as aiming not exclusively at the financially most efficient allocation of the workforce across Europe. For another thing, the Court started to apply a “social” form of reasoning for the interpretation of what is now art 157 of the Treaty on the Functioning of the European Union (TFEU): this somewhat atypical provision, which was present already in the original version of the TEEC, prescribed equal pay for men and women within the Community. In a landmark decision (Defrenne), the ECJ ruled that the said provision was not restricted to regulating questions of competition among the MSs. Much rather, according to the Court, it was

---

1 The term „social law” as used in the EU context is a broad concept, covering labour law as well as social security law. This compares to some national legal orders, which use the term largely as an equivalent to social security law. Cf Countouris, European Social Law as an Autonomous Legal Discipline, Yearbook of European Law 28/1 (2009), 95 et seq.
4 Initially, France had pressed for the inclusion of this clause in order to protect itself from competitive disadvantages: since none of the other MSs had a comparable rule on equal pay in its national law at that date, France had the reasonable fear that enterprises in the other MSs could work at lower costs by benefiting from cheap female labour. Cf Burri/Prechal, EU Gender Equality Law (2008) 4.
meant to give an individual right to equal treatment regarding pay to every citizen of a member state. The importance of this ruling can hardly be overestimated, since it gave individual women direct access to the European Court, and a possibility to enforce their rights even vis-à-vis their employer.

The Defrenne ruling was rendered at a time which today is sometimes referred to as the “golden era” of European social law. In this period, which is roughly equivalent with the 1970s, widely conceptualised projects of achieving a harmonisation of social law provisions emerged in the European context. Against the background of the severe consequences of the global oil crisis and concrete indications of an ever-increasing “race to the bottom” in the social field, the European Commission drafted its first Social Action Programme. This document, which was established in cooperation with the European social partners, was based on endeavours of gradually introducing a common set of minimum standards of social law, which would prevent economic competition from stimulating or even forcing the individual states to lower their original national standards. The legal bases used for legislative action were, on the one hand, the mentioned equal pay clause, on the other hand the provisions on approximation of laws with a view to the EC internal market (now art 115 of the TFEU).

In the end, only a marginal share of the proposals envisaged by the Programme were actually adopted. The harmonisation track thereby commenced soon came to a halt on grounds of the political realities of the 1980s. This period was characterised by a certain revival of market liberalism, a concept vehemently advocated by the Thatcher administration in the UK. In practice, this government vetoed any further pursuit of harmonisation in the social field, so that the only legal acts of a social law nature stemming from this period are located in the (largely uncontroversial) area of health and safety (see section 9.1).

This political deadlock basically continued also during the early 1990s, when however the increasingly pressing call for social measures by the EU led to a solution of “two-speed” integration – which essentially amounted to giving the UK the option of opting out of the harmonisation steps taken by the other member states. This process was initiated by the proclamation of the 1989 Charter of Fundamental Social Rights of Workers as a non-binding set of principles in the social sphere. This was followed by the 1992 Agreement on Social Policy, which was annexed as a protocol to the Maastricht Treaty. In essence, this agreement already contained the competence provisions that can now be found in the Social Chapter of the TFEU, ie it gave the Council of the EU – under exclusion of the UK – a legislative competence for a range of social law issues.

---

6 Cf Daly, Whither EU Social Policy? 3 et seq.
7 Cf Pochet, Social Europe 3.
After a change of government in the UK, the provisions of the protocol could finally be inserted into the TEC by the Treaty of Amsterdam in 1997. Since then, no notable extension of the powers of the EU in this area of legislation has taken place. However, primary law has developed significantly with a view to fundamental social rights, with the 2001 EU Charter of Fundamental Rights becoming binding with the entry into force of the Treaty of Lisbon in 2010. Moreover, the stated political programme of the EU has increasingly focused on presenting social aims on an equal footing with economic ones in recent years. A prominent example is the 2000 Lisbon Strategy with its aim of making the EU “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion”, and the follow-up Europe 2020 Strategy under the heading of “smart, sustainable, inclusive growth”.9

As of today, minimum standards agreed on the EU level extend to wide areas of national labour law. In many aspects, these standards are barely “felt” by MSs whose domestic systems already depart from more advanced or stricter rules. Having said that, notably EU standards of equal treatment have certainly necessitated substantial changes in the legal orders of all MSs10. What’s more, as will become evident in the chapters to follow, the activist approach of the Court of Justice has at times turned vague and seemingly weak provisions into demanding standards for the systems in place.

1.2. Overview of social policy provisions in current EU primary law

A glance at the EU founding treaties in their present form illustrates that current EU law is actually full of commitments to social development and social protection. The increasing prominence of such values in declaratory treaty provisions can be exemplified by a reference to art 3(3) of the TEU, which declares as a central aims of the Union to establish a “highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”, for which it will amongst others “combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. Although the importance of statements of this kind for the interpretation of the treaties (and, ultimately, EU law in its entirety) should not be underestimated, it is telling that the development of EU social issues in the course of primary law amendments since the Treaty of Maastricht was largely restricted to the continuous introduction of such declaratory norms.

9 For details see http://ec.europa.eu/europe2020/index_en.htm.
1. Introduction

In other words, their insertion was not accompanied by a corresponding enhancement of the concrete competences the Union has been bestowed with in the social law area. These competences are currently spread over four chapters of the TFEU: provisions on free movement can be found in art 18 et seq (for citizens in general) and 45 et seq (for workers). Their relevance in the area of social law will be dealt with in more detail in chapter 4. What’s more, the Employment Chapter (Art 145 et seq) provides for a certain degree of cooperation on questions of employment policy (see chapter 2), whereas the Social Chapter (Art 151 et seq) contains what could be called the heart of the social dimension of the EU, enlisting a number of competences as they will be referred to in the next section.

Finally, it needs to be recalled that EU primary law is by no means restricted to the founding treaties, but contains notably general principles (see art 6 of the TEU) and the EU Charter of Fundamental Rights (CFR) – both of which provide a basis for fundamental social rights to become a benchmark for the application and implementation of EU law (see chapter 3).

1.3. The EU’s competences in the social policy field

As a preliminary note, reference needs to be had to the general limits applicable to any legislative action by the European institutions. As a point of departure, the principle of conferral (Art 5(2) TEU) restricts such legislative action to those fields where competence is explicitly attributed to the Union by the TFEU. For the area of social policy, the EU is bestowed with a shared competence according to art 2(2) and art 4(2)a-c TFEU. This means that the MSs are free to regulate any issue of social policy as far as it has not yet been dealt with by binding provisions passed by the EU. Importantly, the possibilities of the EU legislator to regulate such issues of shared competence are – at least in principle – restrained by the principles of subsidiarity and proportionality (Art 5(3-4) TEU), which allow for regulation by the Union only as far as the same aims could not sufficiently be realised by individual measures of the member state. Never must the EU enact regulation that goes beyond what is necessary to reach the said aim.

A first look at art 153 TFEU evidences that, basically, wide areas of national social law are open to (partial) harmonisation by the EU lawmaker within the boundaries of subsidiarity and proportionality. However, it warrants attention that not all the items enlisted in art 153(1) are of “equal strength”, which has to do with the procedures required for passing legislation in the individual areas. These are determined by par 2 et seq of the same article. From that, it can be inferred that the ordinary legislative procedure is applicable only to issues of

- the improvement of the working environment, health and safety
- working conditions
- information and consultation of workers
1. Introduction

- the integration of persons excluded from the labour market and
- equality between men and women.

Apart from the involvement of the European Parliament as legislator on equal footing with the Council, the applicability of the ordinary legislative procedure notably means that the Council can decide by qualified majority. This makes action in these areas far more likely than in the following areas, which can be regulated only by unanimous decision in the Council:

- social security and social protection of workers
- termination of employment
- the representation of workers and employers, including co-determination, and
- conditions of employment for third-country nationals.

Needless to say, unanimity between 27 national governments becomes increasingly difficult to achieve. This practical difficulty is illustrated vividly eg in the area of collective representation of employees: whereas the information and consultation of works councils and similar bodies (art 153(1)e TFEU) is prescribed by a number of directive in different areas, rights to co-determination by such bodies (art 153(1)f) are virtually absent from EU legislation (see chapter 10).

Finally, the areas of combating social exclusion and modernising social protection systems are not open to the adoption of common minimum standards by means of a directive: art 153(2)a TFEU restricts legislative action to “measures designed to encourage cooperation” and expressly excludes any harmonisation of the MSs’ laws.

Curiously in the end, art 153(5) also contains a negative delimitation of the EU’s competences, by stating explicitly the fields in which legislation is impossible even by unanimous decision. This concerns questions of pay, the right of association, and industrial action – ie issues of central importance in the social law area. In order to prevent these restrictions from depriving the bases of competence referred to above of their effectiveness, the ECJ has adopted a narrow interpretation of these exceptions. The most remarkable example in this respect is the constant jurisdiction stating that a prohibition of discrimination of certain categories of employees may include the stipulation of equal pay for these employees. It should also be mentioned that it is contended at times that the broadly formulated legal basis of art 115 TFEU (approximation of laws – requiring unanimity in the Council) would actually allow for EU action in all the fields art 153(5) seeks to exclude.

Lastly, a particularity of art 153 TFEU is that the MSs can transpose EU legislation based on this article not only by national statutory law, but may leave it to the social partners to implement it by means of a collective agreement. Self-evidently, the responsibility for proper implementation remains with the MSs (art 153(3)).