



**REPATRIATION OF EU SOCIAL POLICY:
The right focus for a Conservative Government**

November 2009

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EXECUTIVE SUMMARY

Repatriating social and employment policy is the right battle for an incoming Conservative Government – for several reasons:

- EU social policy is the key driver of regulatory cost in the UK. A study by Open Europe, based on the Government's own Impact Assessments and published in February this year, estimated that regulations introduced in the UK between 1998 and 2008 have cost the British economy £148.2 billion. Of this, £36.7 billion – or 25% - stems from EU social policy alone.
- UK laws derived from EU social legislation will cost the UK economy more than £71 billion between 2010 and 2020. Therefore, in terms of relative impact on British society, tackling EU social legislation is exactly the right place to start for an incoming Conservative Government.
- Although the European Commission does not legislate as much in this area as it used to, EU social legislation is evolving all the time as it is interpreted by the EU courts. For example, the scope of the Working Time Directive has been extended no less than *eight times* by the European Court of Justice – the latest ruling was in September this year.
- As pointed out by the German Constitutional Court in its ruling on the Lisbon Treaty earlier this year, the EU has incrementally extended its powers in this area and overstepped its mark – below the radar of public scrutiny. The Court identified this area as “especially sensitive” for the ability of a country “to democratically shape itself”¹ and consequently ruled that the EU should have limited powers over social policy. There is therefore a democratic as well as economic case for the repatriation of powers over social policy.

What does repatriating social policy mean and how can it be achieved?

- Should a Cameron Government succeed in repatriating powers over social policy, the cost arising from these laws would not magically disappear over night. At least some of these regulations would also exist in the absence of EU interference, and a Conservative Government is likely to want to keep some of these laws in place – for example anti-discrimination laws. However, the key thing is that the UK brings both the regulations themselves and the costs stemming from them back under the control of Westminster, empowering MPs and in turn voters' to influence them.
- EU social policy stems from two types of source: the articles in the EU Treaties which directly stipulate how and where the EU can legislate in this area; and from a set of other articles, which are not directly related to social policy but which have also been used to push through social policy legislation.
- *Legally*, repatriating social policy could be achieved by completely opting out from the first set of articles, and by inserting language in the second set of articles which clarifies that these articles cannot be used as the basis for social legislation.

¹ German Federal Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, Paragraph 252, <http://www.bundesverfassungsgericht.de/en/press/bvq09-072.html>

- *Politically*, repatriating social powers can be achieved by adopting a four-pronged strategy:
 - Getting a clear and powerful mandate from British voters – preferably through a referendum;
 - Seeking allies in Europe – the UK Conservatives are not alone in their belief that social policy is best decided nationally;
 - Showing that you mean business – by using the UK’s contribution to the EU budget as leverage;
 - Showing EU partners that you are committed to keeping several of the social laws in place – but that you will strive to amend them to fit the UK’s individual circumstances.

1) EU SOCIAL AND EMPLOYMENT POLICY: WHAT IS IT?

Since the Maastricht Treaty, which came into force in November 1993, the EU has had a mandate to legislate in social and employment policy, using qualified majority voting (QMV). Under QMV, no individual member state has the right to veto a legislative proposal, meaning that any single EU government can be outvoted. The UK government, under the Conservatives, originally negotiated an opt-out from what was meant to be a “Social Chapter”, but which became a “Social Protocol” attached to the Maastricht Treaty, amid opposition from the UK Government.

However, the Labour government ended the opt-out in 1997, and two years later, with the Amsterdam Treaty, the Social Protocol was incorporated into the main body of the EU treaties.

This means that the “Social Chapter” or “Social Protocol” no longer exists in legal terms. Instead, the basis for the EU’s social and employment policy has taken the form of 11 articles in the Treaties – articles 151 to 161 (as amended by Lisbon, previously articles 136 to 145 TEC). These articles specify in which areas of social and employment policy the EU is allowed to take action, and dictates how decisions should be made. Proposals based on these articles are usually taken by QMV in the Council of Ministers with the European Parliament as co-legislator, meaning that MEPs and Ministers must both agree before a proposal can become law.

To our knowledge, there are 27 laws currently existing in the UK based on articles 151 to 161.

The most important article for social and employment policy is article 153 (article 137 TEC), which is the foundation for some of the most far-reaching regulations affecting UK employers and workers. The most significant of these is the Working Time Directive.² This article is also the basis for a range of health and safety laws, such as restrictions on noise and vibration levels at work.

To make things more complicated, the EU has in the past introduced social policy using other articles in the Treaties. For example, the UK’s Employment Equality Regulations stem from a Directive which in turn is based on the EU Treaty’s ‘anti-discrimination’ article (article 19 as amended by the Lisbon Treaty). Likewise, working time restrictions for transport workers are based, at least partially, on the section in the Treaties which regulate the Single Market in transport.³

Controversially, the EU has set a precedent using articles which give the European Commission the right to legislate in areas which enhance the “functioning of the common market”, to introduce legislation in a range of fields, including social policy. For example, when the Labour government ended the UK’s opt-out from the Social Protocol in 1997, the laws based on the protocol were made applicable in the UK

² The Working Time Directive was adopted in 1993 under the health and safety provisions of the EU Treaties, rather than under the Social Protocol annexed to the Treaties. The WTD was therefore decided by QMV and applied to the UK, even during the time of the UK’s opt-out from the Social Protocol. For more on the history of the Working Time Directive, see *Open Europe*, “Time’s Up: The case against the EU’s 48-hour working week”, 16 March 2009, see <http://www.openeurope.org.uk/research/wtdoptout2.pdf>

³ In particular, the Road Transport (Working Time) Regulations 2005, which is based on Directive 2002/15/EC Working Time in Mobile Road Transport Directive

using what is now Article 115 (then article 100 of the Treaty of Rome, later article 94 TEC) – despite the fact that this article says nothing at all about social policy.⁴

Likewise, rules setting out how employees' terms and conditions should be maintained when a business is transferred to a new employer were also introduced under article 115.⁵ In addition, article 352 (308 TEC) has been used to impose social policy legislation. This is the so-called 'flexibility clause', which grants the EU the power to "adopt measures to attain Treaty objectives in areas which the Treaties have not provided the necessary powers."

2) IS EU SOCIAL POLICY THE RIGHT BATTLE FOR THE CONSERVATIVES?

An increasingly common argument is that employment and social policy is the "wrong battle" for an incoming Conservative government. The European Commission, the argument goes, no longer legislates in this area and no new major initiatives are planned. When the Commission does engage with social policy nowadays, it is in pursuit of 'soft measures' such as encouraging best practice and work-life balance – not of EU-wide rules which prescribe working time or grand plans such as an EU-wide minimum wage. The paradigm on EU social policy has therefore shifted in the UK's favour, and it would be unwise for a Conservative Government to mess with it.

This is true to a certain extent. Compared to his predecessors Jacques Delors and Romani Prodi, the current Commission President Jose Manuel Barroso has put limited focus on social policy, and more emphasis on competitiveness. In fact, most of the EU's current employment regulations stem from Delors' or Prodi's time at the helm of the Commission. In parallel, enlargement of the EU has stilled the appetite for burdensome employment laws in the EU, as most new member states have seen such initiatives as a threat to their flexible economies.

But EU social policy *is* nevertheless the right battle – for several reasons:

i) EU social policy accounts for 25% of the total cost of regulation in the UK

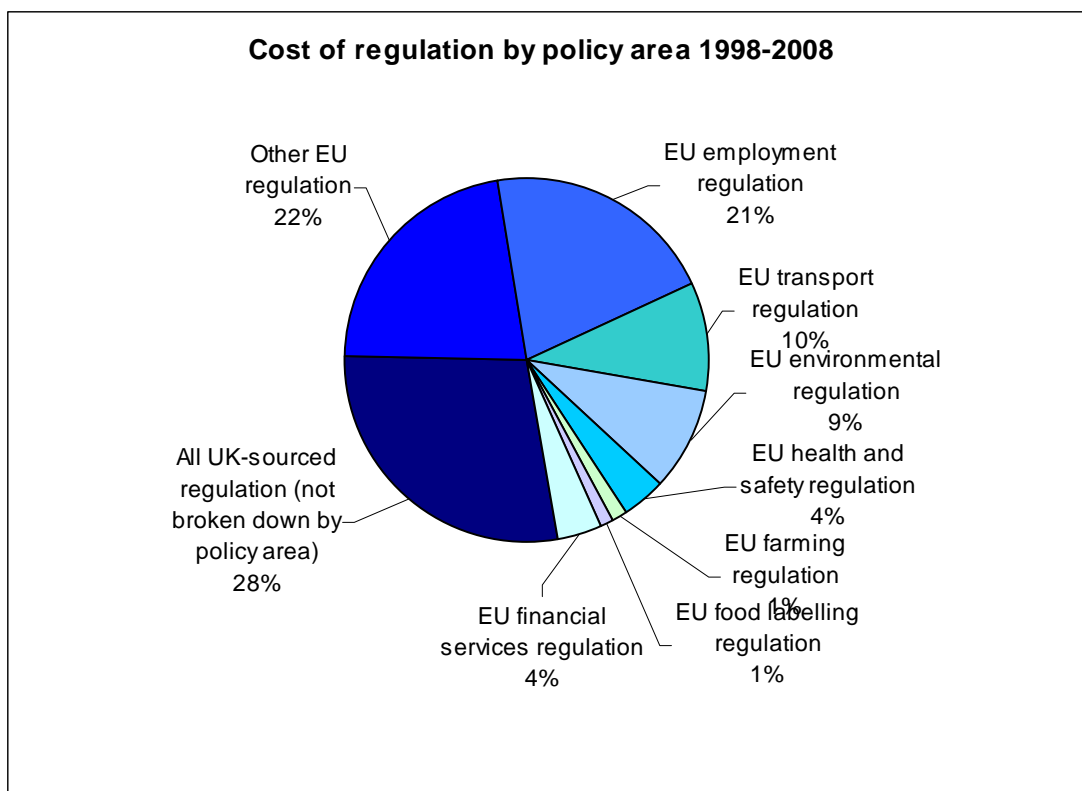
First, EU social and employment laws have had a massive impact on the UK economy – regardless of whether new laws are being passed or not. In fact, as things stand it is the most significant driver of regulatory cost in the UK.

A study by Open Europe, published in February this year, estimated that regulations introduced in the UK between 1998 and 2008 have cost the British economy £148.2 billion. Of this, £36.7 billion, or 25 percent, stems from EU employment, social or health and safety laws alone.⁶

⁴ For instance, see Gennard, John, "Labour Government: change in employment law", *Employee Relations*: 20, 1, 1997.

⁵ The Transfer of Undertakings (Protection of Employment) Regulations 2006, which is based on Directive 2001/23/EC business transfers.

⁶ *Open Europe*, "Out of Control? Measuring a decade of EU regulation", 1 February 2009, in particular Chapter 2, <http://www.openeurope.org.uk/research/outofcontrol.pdf>



Source: Open Europe's regulation database

The study was based on over 2,000 of the British Government's own Impact Assessment – which evaluate the benefits and costs of a regulatory proposal – making these figures absolutely instructive. And these are ongoing costs. Even if, hypothetically, the EU did not pass a single additional employment law in future, these existing regulations would continue to have a huge impact on the UK's economy.

These figures are *not*, it should be noted, a measure of the EU-derived proportion of the total number of laws introduced in Britain. Legislation relating to public spending, policing, schools and so on were excluded from our count. Regulations giving rise to so-called transfer payments – transfers of money from one group in society to another group – are also excluded. But the figures give a clear indication of which EU regulations matter the most in terms of *relative impact*.

If a Conservative government is serious about repatriating powers and laws that are currently having a real impact on the British society, the evidence shows that social policy is exactly the right place to start.

ii) EU social policy will cost the UK economy £71 billion between 2010 and 2020

That EU social policy is the right focus is further illustrated by looking at the future cost of regulation. By using the UK Government's own Impact Assessments we can identify how much EU social legislation will cost the UK economy over the next ten years (see table below). It is fair to assume that this cost will continue to represent about 20-25% of the total regulatory cost in the UK.

Regulations based on articles 151 to 161 will cost the UK economy about £68 billion between 2010 and 2020. This cost is heavily driven by the Working Time Directive,

and other regulations based on article 153. Another £3 billion will be added by EU social polices based on other articles in the Lisbon Treaty.

Cost and legal base of EU social policy (£millions)

UK implementing measure	EU regulation	Lisbon Treaty legal base	Recurring cost (2010 prices)	Cost by 2020 (PV)
The Working Time Regulations 1999 and The Working Time (Amendment) Regulations 2003	Directives 93/104/EC, 2000/34/EC	Article 153	3656.1	34062.0
Not yet implemented (Temporary Agency Workers)	Directive 2008/104/EC	Article 153	1856.0	17291.6
The Working Time (Amendment) Regulations 2002	Directive 94/33/EC	Article 153	550.7	5130.7
The Control of Vibration at Work Regulations 2005	Directive 2002/44/EC	Article 153	381.0	3549.5
Fixed-Term Employees' (Prevention of less favourable treatment) Regulations 2002	Directive 99/70/EC	Article 155	330.9	3083.1
The Sex Discrimination Act 1975 (Amendment) Regulations 2008	Directive 2002/73/EC	Article 157	168.5	1569.5
The Control of Noise at Work Regulations 2005	Directive 2003/10/EC	Article 153	65.6	611.4
The Maternity and Parental Leave etc. Regulations 1999	Directive 96/34/EC	Article 155	55.0	512.2
The Work at Height Regulations 2005	Directive 2001/45/EC	Article 153	51.0	474.9
The Control of Asbestos Regulations 2006	Directive 2003/18/EC	Article 153	43.6	406.5
The Information and Consultation of Employees Regulations 2004	Directive 2002/14/EC	Article 153	38.2	356.2
The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000	Directive 97/81/EC	Article 155	34.9	325.0
The Road Transport (Working Time) Regulations 2005	Directive 2002/15/EC	Articles 153, 91	25.1	234.2
The Transnational Information and Consultation of Employees Regulations 1999	Directives 94/45/EC	Article 153	19.8	184.1
Dangerous Substances and Explosives Atmospheres Regulations 2002	Directives 99/92/EC, 98/24/EC	Article 153	18.4	171.1
Not yet implemented	Directive 2009/38/EC	Article 153	4.8	44.7
Not yet implemented	Directive 2006/25/EC	Article 153	1.1	10.0
The Control of Substances Hazardous to Health (Amendment) Regulations 2003	Directive 99/38/EC	Article 153	1.1	9.8
Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001	Directive 97/80/EC	Article 153	0.7	6.9
The Civil Aviation (Working Time) Regulations 2004	Directive 2000/79/EC	Article 155	N/Q	0.0
The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004	Directive 2000/34/EC	Article 153	N/Q	0.0
The Merchant Shipping (Hours of Work) Regulations 2002	Directive 99/63/EC	Article 155	N/A	N/A
The Control of Substances Hazardous to Health Regulations 2002	Directive 2000/54/EC	Article 153	N/A	N/A
Not yet implemented	Directive 2004/40/EC	Article 153	N/A	N/A
Not yet implemented	Directive 2007/30/EC	Article 153	N/A	N/A
Employment Relations Act 1999	Directive 2002/74/EC	Article 153	N/A	N/A
Amending existing legislation	Directive 2006/54/EC	Article 157	N/A	N/A
Amending existing legislation	Directive 97/42/EC	Article 153	N/A	N/A
			Total	68033.3

UK implementing measure	EU regulation	Lisbon Treaty legal base	Recurring cost (2010 prices)	Cost by 2020 (PV)
The Employment Equality (Age) Regulations 2006	Directive 2000/78/EC	Article 19	300.2	2797.2
The Transfer of Undertakings (Protection of Employment) Regulations 2006	Directive 2001/23/EC	Article 115	32.4	301.4
The Disability Discrimination Act 1995 (Amendment) Regulations 2003	Directive 2000/78/EC	Article 19	3.4	31.3
Sex Discrimination Act 1975 (Amendment) Regulations 2007	Directive 2004/113/EC	Article 19	0.3	2.5
The European Public Limited-Liability Company Regulations 2004	Directive 2001/86/EC	Article 352	N/Q	0.0
Employment Relations Act 1999	Directive 96/71/EC	Articles 64, 74	N/A	N/A
The Employment Equality (Sexual Orientation) Regulations 2003	Directive 2000/78/EC	Article 19	N/A	N/A
The Race Relations Act 1976 (Amendment) Regulations 2003	Directive 2000/43/EC	Article 19	N/A	N/A
			Total	3132.5

Source: Open Europe's regulation database⁷

If a Conservative Government succeeded in 'repatriating' social policy, the costs arising from the regulations in the table above would not magically disappear overnight. At least some of these regulations would also exist in the absence of EU interference, and a Conservative Government is likely to want to keep some of these laws intact. Indeed, there are benefits to some of them. However, it would be bringing both the regulations themselves and the cost stemming from these regulations back under the control of Westminster empowering MPs and in turn voters' powers to influence them.

iii) EU laws are living creatures

These ongoing costs amply illustrate how EU Directives are living creatures which evolve as they're interpreted by the EU courts. For instance, the scope of the Working Time Directive has been extended no less than *eight times* by the European Court of Justice – in eight separate cases.⁸ The latest ruling came in September this year, when the ECJ ruled that an employee who is sick during his or her planned holidays has the right under the WTD to take that leave at a later date – an interpretation no-one anticipated.⁹

In each of these rulings, the cost of the regulation has gone up, and national autonomy over working time has been further eroded. The two most infamous cases were the Simap and Jaeger rulings – in 2000 and 2003 respectively. These rulings defined the rules for on-call time and compensatory rest in a way that made the Directive outright unworkable in several member states, and messed with rota systems across Europe. At the time, the then Health Minister John Hutton said that "it

⁷ The costs are based on the UK Government's own Impact Assessments produced for each individual proposal, identified and compiled by Open Europe. All costs have been adjusted to reflect 2010 price levels. The 2020 cumulative figures are Present Value (PV) of costs, calculated using the discount rate of 3.5%, as recommended in the Treasury's Green Book. For the Temporary Agency Workers Directive, we have not isolated transfer payments. To see how the cost estimate for the WTD was reached, see Open Europe, "Times Up: the case against the EU's 48 hour working week", 16 March 2009. We have used the lower-end estimate for the WTD cost, as we assume that the cost of the Simap and Jaeger rulings will go down gradually, as the NHS absorbs the initial policy and administrative cost of changes to working time, on-call time and compensatory rest rules. See, <http://www.openeurope.org.uk/research/wtdoptout2.pdf>

⁸ This is not including the 1996 ECJ ruling, in which the Court upheld the Commission's decision to introduce the WTD on health and safety grounds – against the will of the UK Government.

⁹ See *Pereda v Madrid Movilidad SA*, 10 September 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0277:EN:HTML>

*was certainly not within the intentions of the United Kingdom Government when we signed up for the Directive that time spent asleep would somehow magically count as time spent at work.*¹⁰

In other words: EU social policy is alive and well in the courts.

Looking ahead, it would be naïve in the extreme to assume that the ECJ will not continue to interpret the WTD and other existing employment laws in a manner which could unpredictably extend their scope. For example, the Temporary Agency Workers Directive – to be implemented in the UK within the next couple of years – is a typical example of a law which the ECJ could run with, should the UK government transpose it in a way deemed unacceptable.

In addition, the UK's opt-out from the maximum 48 hour working week, entailed in the Working Time Directive, is subject to QMV in the Council and co-decision with the European Parliament, meaning the UK could be outvoted at any point in time. The UK Government came dangerously close to losing the opt-out earlier this year, when the European Parliament voted to scrap it. In the end the Council managed to block the EP's proposal, but it is well known that several member states and a host of MEPs have as their objective to end the UK's derogation once and for all. Ironically, the negotiations were first opened up in a bid to make the on-call and compensatory rest rules less burdensome.

The way to truly secure the opt-out for the future is to derogate from article 153, on which the WTD is based.

iv) This is an area in which the EU has overstepped its mark

As illustrated by the ECJ's interpretations of the WTD, social policy has become an area where the EU is continuously overstepping its mark and extending its own competencies. This is not surprising, as there is an inherent ambiguity in the relationship between member states and the EU on social policy. This makes social policy particularly susceptible for the type of incremental extension of EU powers – taking place below the radar of public scrutiny – which locks in the EU's infamous "democratic deficit".

This was the point made by the German Constitutional Court in its dynamite ruling on the Lisbon Treaty earlier this year. The Court identified social policy as "especially sensitive for the ability of a constitutional state to democratically shape itself"¹¹ and consequently ruled that the EU should have limited powers in this area. It even went so far as saying that the German Court should be allowed to overturn rulings by the EJC on social policy if the latter overstepped its mark. In fact, the Court is currently considering whether the ECJ went too far in the so-called Mangold case – in which the ECJ ruled against Germany on age discrimination – and whether the decision should therefore be overturned. Should the German Court go for the "nuclear option" and overturn the ECJ's ruling, a UK Conservative Government would have a very powerful point of reference for its own efforts.¹²

¹⁰ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/67/6706.htm>

¹¹ German Federal Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, Paragraph 252, <http://www.bundesverfassungsgericht.de/en/press/bvg09-072.html>

¹² The German judges are due to announce their decision by the end of the year. For more, see Marlene Schmidt, "The Mangold Case before the European Court of Justice", *The German Law Journal*, <http://www.germanlawjournal.com/article.php?id=728>

Crucially, the Lisbon Treaty will exacerbate the present ambiguity, as social policy is becoming a so-called “mixed competence”, meaning that member states can only take action in this area if the EU has decided not to. This will further blur the line between where the EU’s powers begin and end.

Therefore, repatriating powers over social and employment policy would remove one of the unhealthiest ambiguities inherent in the EU project, while at the same time contributing to closing the gap between citizens and the EU.

v) Social policy is best decided nationally

It is clear that the EU’s experiment with social policy has not turned out well. Policies so closely linked with the “social contract” between governments and citizens are better decided locally, regionally or nationally. There are several different labour market models existing in parallel in the EU – from the corporatist model in old continental Europe, to the Scandinavian arrangement of voluntary collective agreements, to the diverse set of rather flexible models prevalent in the newer member states. The UK’s ‘Anglo-Saxon’ model is yet another breed. To regulate such diverse set of labour markets centrally is asking for trouble, as seen by the awkward arrangements and tensions that EU social policy often creates in member states. Diversity and institutional competition between countries have historically driven Europe’s social and economic development. Voluntary imitation and best practice, rather than forced harmonisation, remain the best way forward.

Although this is consistent with Conservative ideology, and ought to draw sympathy from centre-right governments across Europe, it should serve to focus minds amongst Europe’s Left as well. A series of court cases from the ECJ – arguably the most famous being the Laval case over Latvian workers’ pay in Sweden – have proven that EU interference in this area can backfire.¹³ Likewise, the idea of micromanaging working time and conditions does not sit squarely with the Nordic model, for example, since this leads to legislation in an area that has been governed by voluntary agreements between the social partners in the labour market. The battle over ‘Social Europe’ and ‘wage dumping’ will no doubt rage on, but the pragmatic arguments for keeping social policy on the national level is on the Conservatives’ side.

3) HOW CAN THIS BE ACHIEVED LEGALLY?

Fully repatriating powers over social and employment from the EU would effectively mean turning off all the taps from which laws in this field flow. This means i) disapplying articles 151 to 161 (as amended by Lisbon), so that they are no longer applicable in the UK; and ii) addressing the other articles which currently serve as a basis for EU social policy, and which could give rise to social legislation in future.

i) Opting out of ‘social articles’

¹³ In the Laval Case (18 December 2007), the ECJ ruled that the Swedish unions had been wrong in demanding that a Latvian construction company, which had been contracted to refurbish a school outside Stockholm, Sweden, needed to sign a collective agreement with the Swedish unions, stipulating that the Latvian company was required to pay its workers the local going rate, rather than the wage agreed in a national collective agreement. While the Court ruling itself made sense, crucially, the ECJ simultaneously extended its powers by effectively defining when unions in member states have the right to take strike action in cross-border disputes, see the ECJ’s decision, <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070098en.pdf>

Disapplication of – or an opt-out from – articles 151 to 161 would require Treaty change. Such a change must be agreed by all 27 member states, probably at a so-called Intergovernmental Conference of EU leaders. Any change that has been agreed must then be ratified individually by each member state, normally through national parliaments. A UK opt-out from articles 151 to 161 would probably take the form of a legally-binding protocol attached to the Treaty, stating that the articles in question do not apply in the UK. This would be similar to, for example, the protocol which currently excludes the UK from all articles in the EU Treaties that relate to the European Monetary Union (EMU).¹⁴

If such a Treaty change could be agreed, no EU Directives adopted on the basis of these articles will be applicable in the UK - new or existing. However, since every EU Directive gives rise to at least one corresponding UK law, all laws adopted prior to such a Treaty change would still be in force in the UK – although no longer ‘locked in’ at the EU level.

A Conservative government must then decide which of these laws it wants to keep and which ones it wants to repeal. This ‘second wave’ of what to lose and what to keep will no doubt be subject to substantial domestic political debate. But the key is that Westminster would again be free to choose which social laws to keep, which laws to amend and which ones to scrap altogether.

ii) Addressing the ‘non-social’ articles

Addressing the articles which are not explicitly part of the Treaties’ social provisions, but which have nevertheless given rise to social legislation, will be a more complicated task. Completely opting out of these articles would effectively mean opting out of part of the Single Market. We do not see this as a realistic alternative.

Instead, the Conservatives could seek a second set of amendments, in which it inserts an ‘exclusion provision’ into these articles. Such a provision would state that the articles in question cannot be used to introduce social legislation. There is a precedent for this: Margaret Thatcher won a clarification on article 114 (previously article 95) – which also deals with the enhancement of the Single market. The clarification stated that this article could not be used to push through social legislation.¹⁵

The articles this would need to happen for is: 19 (discrimination), 91 (transport) 115 (single market), 352 (‘flexibility clause’). However, the two latter articles provide only for unanimous decisions in the Council, meaning that the UK Government has a veto on any proposal based on these articles. Further research is needed on whether there are any other articles that have been used – or could conceivably be used – to push through social legislation.

4) HOW CAN THIS BE ACHIEVED POLITICALLY?

It is clear that repatriating powers over social policy will be difficult. It is also clear that if the Conservatives choose to go for this reform, they might have to give up something else in return. Horse trading is, after all, an inevitable facet of EU politics.

¹⁴ See Protocol (No 25) of the TEC, “on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992)”, <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

¹⁵ Article 95.2 states: “Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.”

But this does not mean that repatriating powers is an impossible task. The EU often works by consensus, and if a member state – a bigger one in particular – sets its mind on a certain task, most other member states usually try to find a way to compromise.

So how should the Conservatives do it?

First, get a clear mandate from British voters. Social policy is highly ideological, and a clear democratic mandate is absolutely imperative to counter inevitable ideological objections. By far the most powerful mandate any government can get is a decisive referendum result. Repatriating powers over social policy should form part of a wider European Reform Package which should be put to British voters. The second best option is to clearly spell out in a manifesto what repatriating powers over social policy will mean in practice.

In any case, a clear mandate from home will hugely strengthen the Conservatives' cards in Brussels. The Conservatives will be able to say "It isn't us that wants reform, it is X% of the British public."

Secondly, find allies. If focusing on the economic, practical and democratic case for bringing social powers closer to voters, the UK Government could find allies from a number of European countries. It is clear that EU social policy is a source of frustration in several member states. The experience with the Working Time Directive and the recent ruling on the Lisbon Treaty by the German Constitutional Court, would in theory make the Germans more willing to look at the issue.

The main Swedish governing party – *Moderaterna* – meanwhile, has clearly stated that "Labour market policy must, can and should be a national matter which builds on the different traditions and models which have evolved during decades [in the different member states]."¹⁶

Similarly, just as enlargement of the EU has made it more difficult to impose major new social legislation – such as an EU-wide minimum wage – it has radically improved the prospects for striking a "new deal" on social policy in the Union, stressing job and business creation, and the need to bounce back from the global recession. Several of the newer member states could conceivably support the UK Government on this. Poland¹⁷ and the Czech Republic are two obvious contenders, but Hungary, the Baltics and Bulgaria could also be allies, for example.

Thirdly, show that you mean business. Quite irrespective of the merits of the move, David Cameron has showed that he says what he means and means what he says, by forming a new political group in the European Parliament. This is a good starting position. By also linking the reforms to the UK's contribution to the EU budget – showing that it is ready to withhold the UK's contribution in the absence of a new deal – the Cameron Government would put itself in a strong negotiation position.

¹⁶ *Moderaterna*, "Mer Sverige i Europa", September 2008, p. 15, see <http://www.moderaternailerum.se/files/Mer%20Sverige%20i%20Europa.pdf>

¹⁷ See for instance, the note from the Polish Ministry for the Economy, to the Council of European Union in 2008, http://www.kpr.gov.pl/NR/rdonlyres/8FCE9B3D-5A3B-4D44-8D79-5758911DA422/43515/StanowiskoRzaduCOM_2007_803.pdf

Fourthly, promise EU partners that you will try to keep some legislation in place.¹⁸ Since opting out of EU social legislation means that Westminster regains the right to abolish this type of legislation if it later decides to, a Cameron government should make a commitment to keep some of the previously EU-derived social laws.

The Government should make clear that the main objective behind repatriating powers is to close the democratic deficit; preventing the EU courts from extending the scope of the legislation; and changing the laws so that they better fit with the UK's labour market model and its current economic climate, by significantly cutting costs for business and the public sector.

For example, there is a clear case for capping the working hours for junior doctors, but there is no clear reason why this should be at 48 hours as set out by the WTD – and accompanied by a number of other rules which don't make sense from the point of view of how the NHS is run. A similar approach could be taken for anti-discrimination policy, for example. This kind of thinking will surely draw sympathy from several other member states.

¹⁸ As argued, for instance, by former Conservative MEP, Philip Bushill-Matthews, communication with Open Europe on 3 November 2009.

ANNEX: THE SOCIAL ARTICLES AS AMENDED BY THE LISBON TREATY

The explicitly “social” articles which have been used to enact legislation

Article 151 (ex Article 136 TEC): States that the EU should have as its objective “the promotion of employment, improved living and working conditions, so as to make possible their harmonisation”.

Article 152 (new): A new article stating the EU recognises and promotes role of social partners at its level.

Article 153 (ex Article 137 TEC): Gives the Council and the European Parliament the power to pass laws in a number of different areas, including workers’ health and safety, working conditions, social security and social protection of workers (unanimous in the Council), information and consultation of workers, representation and collective defence of the interests of workers and employers (unanimous in the Council), conditions for employment for third country nationals (unanimous in the Council), the integration of persons excluded from the labour market, equality between men and women with regards to labour market opportunities. Three new areas are identified, including: protection of where their employment contract is terminated (unanimous in the Council), the combating of social exclusion, the modernisation of social protection systems.

Article 154 (ex Article 138 TEC): Instructs the Commission to consult “management and labour” (employers and employees) before initiating legislation in social policy, and sets out how such consultation should take place.

Article 155 (ex Article 139 TEC): States that “should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.”

Article 156 (ex Article 140 TEC): Instructs the Commission to encourage and facilitate the coordination of member states’ actions in “all social policy fields”.

Article 157 (ex Article 141 TEC): Instructs member states to ensure equal pay between men and women.

Article 158 (ex Article 142 TEC): Instructs member states to maintain the “existing equivalence between paid holiday schemes”.

Article 159 (ex Article 143 TEC): Obliges the Commission to write an annual report on the progress in harmonisation of EU employment and social policy.

Article 160 (ex Article 144 TEC): Creates a “Social Protection Committee” under the Council, to promote cooperation between member states on social protection policies.

Article 161 (ex Article 145 TEC): Obliges the Commission to include a chapter on social policy in its annual report to the European Parliament.

Other articles which have been used to enact social legislation

Article 19 (ex Article 13 TEC): Gives the Council and European Parliament the power to take action to combat discrimination.

Article 91 (ex Article 71 TEC): Lays down measures to achieve a Common Transport Policy across the EU.

Article 114 (Ex Article 95 TEC): Lays down Institutional arrangements on how to achieve a single market.

Article 115 (ex Article 94 TEC): States that the Council is to issue directives affecting the establishment or functioning of the internal market, on the basis of a unanimous decision and after consulting the European Parliament.

Article 352 (ex Article 308 TEC): Enables the Council to adopt measures to attain Treaty objectives in areas which the Treaties have not provided the necessary powers, except in areas relating to common foreign and security policy.