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How has the crisis affected social legislation in Europe?

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Policy recommendations

If we analyse recent developments in social legislation in Europe, clear common trends appear, although these vary widely in the forms they take. Measures such as the reform of pension systems, the civil service and the labour markets, as well as the decentralisation of collective bargaining, are close to the 'solutions' advocated by the ECB, the European Commission and sometimes the IMF. Principles such as the need for 'decent work' or high quality employment are being questioned, leading to doubts as to the legitimacy of the large-scale deregulations of labour law. Such considerations, however, are bound to lead to more fundamental questions as to whether labour

market flexibilisation is an appropriate response to the crisis, since it has resulted in the explosive growth of inequalities and insecurity in most of the countries analysed. Laying down social legislation for the future requires clear-headedness, willpower and creativity. There will be a need for a minimum set of social standards, suited to the very complex realities of today's companies and the diversity of people in work. We will need rules to facilitate the changes underway and to guarantee a proper balance between competition, social protection and social cohesion.

Introduction

The future configuration of labour law and social protection in Europe has been a highly controversial issue for around ten years. Many have wondered whether labour law should be used as a tool to achieve employment policy goals. Some believed that the concept of fundamental rights offered a promising new way of addressing issues, whereas others felt that social rights should be redefined to take account of the changes which have taken place both in companies and production, as well as in the labour force and the types of employment available. In the years before the crisis, a sort of political, and sometimes social, consensus existed in favour of fewer, less onerous 'rules and regulations'. There were a number of reasons for this: the growing strength of liberal ideology, the effort required by the new Member States to take on board the Community *acquis*, and the ingenuity needed to think up new solutions requiring the breaking-down of many barriers (national versus transnational rules, inconsistencies between labour law, social protection and economic and commercial law,

etc.). It was a time when soft law became increasingly important, as did a new idea, that of flexicurity. The attempt to impose this met with various fates: reforms were needed before modernisation could take place, but a certain balance had to be maintained.

How has the global crisis ravaging Europe since 2008 affected these developments? A European project has been set up by the association ASTREES (Association Travail, Emploi, Europe, Société) and the research centre ERDS-CERCID to assess this impact. This policy brief summarises¹ the main findings of the project. What should we understand by the term 'crisis' when trying to analyse trends in social legislation? Has it acted as a catalyst for in-depth reforms or, rather, helped to reveal pre-existing problems? Are

¹ The various national reports, as well as the comparative analyses, will soon be available on the websites astrees.org and ietl.univ-lyon2.fr as well as in a study to be published in 2012 by Editions Larcier.

we now questioning certain past choices, and if so, why? What is the future of European social policy, particularly the so-called 'flexicurity' policies? Is the Union still an engine for social progress? Legal experts from eleven countries² have addressed these difficult questions. They have used their own analyses, combined with comments from many experts and the social partners, to try and provide some answers.

1. The crisis: greatly varying perceptions of its extent and time-frame within the EU

This study has not only revealed variations in the impact of the global crisis on economies and employment, but has also underlined the differing perceptions which exist of how the crisis is related to structural trends in social legislation.

In a first group of countries, made up of Austria, Poland and Sweden, developments in social legislation seem largely unaffected by the crisis. The crisis is essentially perceived and described as resulting from external factors, and in itself no reason, therefore, to call into question existing national social arrangements.

The study identified a second group of countries, where changes to social legislation are above all a consequence of a public debt crisis, which has fuelled and exacerbated a deeper social and political crisis. This is true for Greece, Hungary and the United Kingdom, obviously to varying degrees. In Greece, the debt crisis masks an institutional crisis which is particularly closely related to extreme deregulation of the labour market (with a great deal of undeclared work). This finding contradicts the analyses of certain international institutions which for a long time have accused Greece of having excessively rigid employment protection legislation.

For a third group of countries, the main effect of the global crisis has been to reveal long-standing structural issues relating to the national labour markets. The crisis has thus strikingly highlighted a serious fragmentation of labour markets, a factor in social polarisation. This would seem to be the case, again to varying degrees, for Germany, Spain, France and Italy. Spain is the most blatant example, with a highly fragmented labour market, partly as the result of the quantitative importance of 'atypical' forms of employment. Such a labour market is highly flexible and reacts quickly to cyclical developments, both upwards (until 2008), but also, sometimes dramatically, downwards!

Finally, there is one country which does not seem to fit into any of these categories: Belgium. In Belgium, developments in the area of social legislation seem to have been above all determined by the outcome of the political and institutional crisis which has affected the country since 2008, and which touches upon the very identity and integrity of the nation. Structural developments in social legislation thus seem to depend on the major political issue of how powers and resources in this area are divided between the

Federal State and the federated entities. Since the new government has been established, Belgium is no longer an isolated case, but seems to be in a similar situation to the countries in the third group.

Europe, then, is being affected by not one, but several crises. These differing perceptions have had multiple consequences on social security and labour law development, both nationally and at Community level.

2. Labour law and social protection: measures and reforms in a time of crisis

Despite major contextual differences between the countries examined, there are some trends which could be described as common. We can, for example, identify two main stages in the way in which social policy has reacted to the crisis.

First stage: managing the crisis in employment

During this initial stage of the crisis, most of the countries analysed tried to find quick ways to respond to the employment crisis - the most serious social consequence. Of the social measures adopted, partial unemployment is typical of this period. Most countries used this device, very often making the conditions surrounding it more flexible. Other common measures included ways to introduce greater flexibility into the organisation of working time (either part-time work or other means of organising working time within a company). Vocational training measures were also adopted, geared particularly to the unemployed and workers in partial unemployment. A wide range of arrangements were also used to subsidise income and purchasing power, by, for example, increasing redundancy or unemployment benefits, extending the duration of these payments or reducing VAT levels. Very few countries, however, adopted measures (suitable unemployment arrangements, specific training and retraining schemes, etc.) for workers in fixed-term jobs, who were in fact the first to be hit by the crisis.

The chief characteristic of these measures was their temporary nature. Few of them required large-scale reforms, but rather an adjustment to existing arrangements, as was the case for the partial unemployment schemes. The 2008 crisis should have resulted in a rethinking of social legislation. It showed, firstly, how flexible national labour markets had become. All of these, even those whose job protection legislation had been described as rigid, found it relatively easy to reduce company staff numbers, by laying off workers with precarious contracts and/or resorting to redundancies. These measures, moreover, had the initial effect of giving renewed credibility to certain social policy mechanisms and legal provisions which had previously been considered as mere hindrances to the economy. Thus the crisis enabled the adoption of protective measures which had formerly been accused of having negative effects on employment. In other words, the crisis may have provided an opportunity for a change of thinking, in that it highlighted the importance of the European social model and the effectiveness of its 'social shock-absorbers'. The second stage, which began in 2009, however, featured a worrying erosion of the social protection offered to wage-earners.

² Germany, Austria, Belgium, Spain, France, Greece, Hungary, Italy, Poland, the United Kingdom and Sweden.

Tabel 1: Crisis measures adopted in 2008/2009

| | Partial unemployment | Flexible organisation of working time | Measures to support purchasing power | Measures for those in insecure employment | Vocational training measures |
|---------|----------------------|---------------------------------------|--------------------------------------|---|------------------------------|
| Germany | + | | + | + | + |
| Austria | + | + | | | + |
| Belgium | + | + | + | | + |
| Spain | + | + | + | + | + |
| France | + | | + | | + |
| Greece | + | | | | |
| Hungary | + | + | + | | + |
| Italy | + | | + | | |
| Poland | + | + | | + | + |
| U.K. | | | + | | |
| Sweden | + | | + | | + |

Second stage: the public debt crisis

Once this rapid reaction stage was over, the situation in the various countries began to diverge, and developed very differently depending on the scale or perception of the crisis. Some practices or projects were nevertheless fairly widespread. There were frequent examples of civil service pay freezes or pay cuts, sometimes accompanied by job losses. Various methods were used to reduce the level or duration of certain social benefits, and VAT was sometimes increased. The crisis has sometimes had an accelerating effect, being used to justify reforms which had already been announced. Pension reform is the key example of this. In terms of labour law reform, three types of measure are very common and could have a major impact on national social rights (although not all countries are affected by these changes). The first of these are the sweeping reforms to the civil service, which call into question the specific nature of the rules applying to this type of employment. Secondly, at a time when it has become clear that the employment situation in EU countries is not dependent on job protection legislation, this very legislation is being challenged in various ways. Some measures have already been adopted, while others are in the pipeline. These include redundancy avoidance measures, avoiding recourse to the courts in the event of disputes, increasing the length of service required before redundancy rules apply, reducing the level of compensatory sanctions, calling into question the principle of reinstatement as a penalty for unfair dismissals, increasing the thresholds used to define specific obligations in the area of redundancy, etc. Finally, in some countries the crisis resulted in the adoption of new relationships between labour law rules, amounting to a decentralisation of collective bargaining. Company level collective

bargaining has gained ground and the normative function of branch level collective agreements has become less important.

3. Social legislation reforms: issues of legitimacy

National responses to the crisis have highlighted the way in which the drafting and hierarchy of social norms have been affected during the crisis period. The legitimacy or otherwise of these crisis measures must be examined from two angles. In European societies, the legitimacy of measures depends firstly on the lawfulness of the procedures used for their adoption, and on whether or not they respect our democratic traditions. Even when the adoption procedure has been totally above-board, however, the substance of certain measures can be questioned if these run counter to the fundamental rights and freedoms enshrined in higher-level norms. Clearly, the crisis measures taken may sometimes be seen as having questionable legitimacy from both of these angles.

Generally speaking, as far as the procedures used to adopt these rules are concerned, the consultation and negotiation procedures used have clearly been significantly curtailed, and some of these restrictions will probably out-live the crisis. No significant change has been seen in Sweden, admittedly, and the crisis seems to have strengthened the role and function of the social partners in Austria and even in Poland. Everywhere else, a temporary or long-term marginalisation of the social partners has been one element of the anti-crisis policies. This demotion has taken a number of forms. At times, the social partners have been involved merely to give legitimacy to the measures adopted;

Tabel 3: Measures adopted before and since 2008³

| | Pay freeze or cuts in the civil service, Reform | Decentralisation of collective bargaining | Reduction in social welfare benefits and allowances | Challenges to employment legislation protection | Pension reform |
|---------|---|---|---|---|----------------------|
| Germany | | + (tendencies) | + | + | + |
| Austria | | | | | |
| Belgium | | | | | + (under discussion) |
| Spain | + | + | + | + | + |
| France | | + | | + | + |
| Greece | + | + | + | + | + |
| Hungary | | | + | + | + |
| Italy | + | + | | + | + |
| Poland | + | | | | + |
| U.K. | | + (tendencies) | + | + (in the pipeline) | + (in the pipeline) |
| Sweden | | + (tendencies) | + | + (under discussion) | + |

in other situations they themselves have been unable to reach agreement on how to confront the crisis, and in some countries, such as Hungary, they have simply been ousted by the government from decision-making processes. In some cases, such as in Greece or Italy, the government has even by-passed parliament itself. In Greece, the exceptional procedure used was due to the severity of the crisis and the unprecedented pressure brought to bear by the European Commission and the IMF, which resulted in the government concluding an agreement with these institutions without consulting the Greek Parliament.

In parallel to this reduction in the role of the social partners, crisis legislation in many countries has altered the procedures for drafting social legislation, the hierarchy of norms and the criteria applying to trade union representation. All the countries studied, with the exception of Belgium and Hungary, have embarked on or strengthened the decentralisation of collective bargaining, by introducing new possibilities for companies to opt out *in peius*, to help them survive the crisis. These measures may be temporary or definitive. In certain cases, decentralisation was introduced via collective agreements. The actual substance of the opt-out varies from country to country, but often relates to flexible organisation within companies, particularly in terms of working time or, sometimes, pay. This trend can be seen even in countries where the social partners have shown their ability to ride out the storm. In these countries, it is seen as a sign that social dialogue is working well within a company, allowing it to implement crisis

measures. Such is the case, notably, in Germany, Austria and Sweden. In several countries, this decentralisation of collective bargaining has been accompanied by greater flexibility in the rules governing representation of the union side in negotiations (Germany, Italy and Poland).

These opt-out measures, together with the weakening of the criteria for representation, have weakened the position of certain categories of workers, and have often resulted in a loss of autonomy for the worker representatives involved in collective bargaining at company level. They are facilitating the dismantling of the whole system as well as the social order underpinning it.

Some of the crisis measures also strike a blow, directly or indirectly, at fundamental social rights recognised in national constitutions or international law. Thus a number of initiatives in the field of collective bargaining run counter to principles of trade union freedom and/or the autonomy of collective bargaining. This is the case in Spain and Greece, where the trade unions have appealed to the ILO and the Council of Europe. The other recurrent attacks on fundamental rights concern the right to equality and to non-discrimination, the right to property and freedom to work. One example is that of the United Kingdom, which, as a result of the crisis, has begun a revision of all its equality and non-discrimination law. The ILO has ruled that the ban on forced labour does not seem to apply to activation policies for the unemployed, but we could still question the legitimacy of certain measures making sweeping cuts to, or even withdrawing, job-seekers' benefit if they refuse to sign up to a public employment scheme. Finally there is the case of Hungary, where the very recent introduction

3 This table shows a certain degree of convergence between reforms, some of which pre-date (mid-2000s) the 2008 crisis.

of the 'most flexible labour code in the world' is part of a broad and worrying policy to undermine democratic and social rights.

There are other crisis measures, finally, which can indirectly infringe the fundamental rights of citizens⁴, who find themselves without a level of income sufficient to guarantee their human dignity, or workers whose work no longer seems to meet the definition, however vague, of 'quality employment' or 'decent work'. In the various countries concerned, to differing degrees, the income levels of citizens and workers will have been eroded, under the combined effect of an arsenal of measures listed in the national reports: activation policies geared to the work available, reductions in welfare allocations as well as pay freezes or reductions in both the public and private sectors.

4. European social policies and the crisis

The financial crisis which hit Europe in 2008 came on top of other crises, some latent, some less so, already affecting the European Union: first a political and institutional crisis, then a crisis of democracy and lastly a social policy crisis. The conceptual framework used for social policy by the European Commission in 2008 was largely centred on the notion of flexicurity. This approach has remained fundamentally unchanged, and the initial reaction of the institutions tended to be to do nothing and to take a 'wait and see' approach in the area of work and employment. Similar comments could be made about European social dialogue. Its main achievements, prior to the crisis, were related to three agreements on 'atypical' work, which formed the general context for a European concept of flexibility, and the final stage of which, concerning temporary work, resulted in a directive adopted at the end of 2008. Since then, under the influence of the general guidelines from the European Commission, only one framework agreement has been concluded, in March 2010, on inclusive labour markets.

The aspect, moreover, which has most impact on the reform of employment legislation and reforms governing national social protection systems, as well as on public employment policies, is the new European economic governance. At European level, attempts have been made to solve the crisis by improving economic governance. The initial responses to the crisis came from the Member States, and this return to an intergovernmental set-up revealed certain flaws in the European system of governance. Since 2010, the new form of economic governance has been based on three pillars: a reinforced economic programme subject to closer supervision of public finance imbalances, stability of the eurozone, and support for the financial sector and regulation thereof. The European Union has also adopted the so-called '2020 Strategy' to replace the Lisbon Strategy. It has concluded an agreement on the stability of public finances, the Euro+ pact. Finally, it has developed the idea of the 'European semester', whereby the first

six-month period of the year will be spent on the coordination of all these strategies, as well as the Euro+ pact, involving 23 Member States. Financial penalties can now be applied if budgetary rules are broken. The *six pack* adopted by the European Parliament in September gives very broad powers to DG ECFIN in the European Commission, responsible for economic and financial affairs. It can require countries to correct budgetary and/or macroeconomic imbalances, or be subject to sanctions. The Commission draws up a scoreboard for each Member State, thus making it possible to compare their performances.

All these measures may lead to and encourage social dumping. They are designed to reassure the markets and financial service sector by establishing the reduction of public debt as more or less a sole priority. This context of financial rigour has repercussions on national social policies as well as on the employment and social protection legislation in the Member States. The most recent acts adopted by the European institutions advocate specific action in the area of social policy, such as increasing the retirement age, wage moderation – i.e. a pay freeze or pay cuts especially in the civil service – restrictions on public expenditure, as well as, in certain countries, a decentralisation of collective bargaining to company level, at the expense of branch level discussions.

Conclusion

Our study shows that the initial 'financial' stage of the crisis did not produce major changes. With a few exceptions, the Member States and the EU itself 'made do' with existing measures. It seems, however, that the second stage – Euro crisis, public debt crisis – promises far more sweeping changes, many of which will represent a step backwards in terms of social policy. Social and political considerations are now more than ever taking a back seat compared to budgetary and financial aspects. Social dialogue, which was already seriously flawed, is now sometimes just swept aside in the search for solutions. What about low-income workers, often in insecure jobs, migrant workers, those who are economically dependent, whose interests are already poorly served by social legislation? What do the promised measures have to offer to them?

If we examine the measures taken – reforms of the pension system, the civil service and the labour markets, as well as decentralisation of the collective bargaining system – we can identify common trends. These take very different forms, but are closely related to the 'solutions' advocated by the ECB, the European Commission and sometimes the IMF. Principles such as the need for 'decent work' or high quality employment are being questioned, thus leading to doubts as to the legitimacy of the large-scale deregulations of labour law. Such considerations, however, are bound to lead to the more fundamental question as to whether labour market flexibilisation is an appropriate response to the crisis, since it has resulted in the explosive growth of inequalities and insecurity in most of the countries analysed. In fact, flexicurity policies, which were already controversial, seem to have vanished into thin air, to be replaced by a return to absolute flexibility. Such policies seem to have been unable to reopen a clearly vital discussion on household security, and their relevance must therefore be called into question.

4 Cf. discussions underway in the European Parliament on the influence of the economic crisis, and the possibility of allowing Community bodies to derogate in peius from fundamental rights and from the Community Treaty as a condition for obtaining credit or financial support (see Art. 122.2 TFEU).

At the time of writing, the new Union, supposedly a champion of 'stability and growth', seems to be making no moves towards a dynamic social dimension. If this situation continues, it will call into question not just the European social model, but also a key factor in our global performance. In previous decades, efforts were made, with varying degrees of success, to achieve progressive social legislation; the challenges soon to face the Europe of the future, however, in a situation of low growth, may be very different. There will be a need for a minimum set of social standards, suited to the very complex realities of today's companies and the diversity of people in work. We will need rules to facilitate the changes underway and to guarantee a proper balance between competition, social protection and social cohesion. These are formidable challenges. To meet them will require all those who still feel strongly about the importance of social legislation to use even greater reserves of willpower and creativity.

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