

Opening a hole in the European regulatory floor? Brexit and employment relations

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Opening a hole in the regulatory floor?

- Little attention to repercussions of Brexit for labour market (employment) regulation elsewhere in EU/EEA
- Post-Brexit, if UK dilutes or departs from social acquis deriving from EU membership, then becomes a source of regime competition for EEA-30 → ‘Singapore effect’
- Effect would operate mainly through indirect effects associated with trade and foreign direct investment (FDI)
 - more flexible employment regulations and weaker standards source of competitive advantage in trade, and locational advantage in attracting FDI
- Any labour migration impact would stem from ‘displacement’ after ending of free movement

Opening a hole in the regulatory floor?

- Impact of Brexit on EU/EEA regulatory floor of employment standards not straightforward to assess
 - range of possible outcomes: ‘Bonfire of regulations or business as usual?’ (Coulter and Hancké)
- Argument: several considerations suggest that downwards pressure on employment standards will be qualified

Menu

- European (EU/EEA) regulatory floor of employment standards
- Four considerations qualifying downwards pressure
- Brexit and the future trajectory of the European regulatory floor

European regulatory floor of employment standards

- Mix of Directives, Agreements between social partners given binding effect, Rulings by European Court of Justice (ECJ)
- Five main substantive areas
 - Working conditions, including health and safety and working time
 - Non-discrimination in employment
 - Reconciling work and family commitments
 - Rights for migrant and posted workers
 - Collective rights to employee information and consultation
- Regulatory floor has some already existing holes ('porosity') compromising its effectiveness
 - UK's opt-out from the Working Time Directive
 - Possibilities under some Directives to derogate from standards via collective agreement
 - TAW Directive: possible to derogate from core principle of equal treatment; widespread (ab)use of 'Swedish' derogation in UK

European regulatory floor of employment standards

Changing role of the ECJ

- Until mid-2000s, ECJ rulings invariably strengthened the European regulatory floor in certain areas (equal treatment irrespective of contractual status, gender equality)
- ‘Laval quartet’ rulings upheld economic freedoms underpinning single European market at expense of national employment standards
- European regulatory floor as a source of corrosion as well as reinforcement

Four qualifying considerations

1. Domestic regulations which exceed the floor

- UK laws which pre-date EU regulation and established stronger rights e.g. health and safety representation rights
- EU directives transferred into UK law in ways which exceed minimum standards specified e.g. maternity leave, right to request flexible working arrangements
- Reflect domestic political choices which will not necessarily be reversed
- More generally, disentangling UK from EU law challenging → 40+ years of domestic case law which embed principles grounded in ECJ judgements

Four qualifying considerations

2. **Wider international trends in employment standards**

- Strengthening of individual employment rights under European regulations part of a wider development across industrialized countries
 - Australia, Canada, New Zealand, but not the USA
- UK's individual rights regime partly also a product of domestic politics, unlikely to be backtracked from

Four qualifying considerations

3. Domestic politics and preferences beyond Brexit

- Fundamental choice: staying close to or moving away from Europe's single market? And therefore European employment regulation?
- Three positions in UK debate
 - Alignment with the 'stock' of European regulation at the point of departure, but not committing to implement new or revised standards (T May)
 - 'Dynamic' alignment over time, incorporating new and revised standards (Labour)
 - Scope for lower regulatory standards from day one (B Johnson)
 - Employer and Trade union positions
- October 2019 compared with November 2018 EU Withdrawal Agreements
 - Commitment to protecting employment standards moved from binding text to non-binding political declaration; plus rephrased in weaker terms
 - Johnson government moving away from single market and embracing labour market deregulation → outcome of election crucial

Four qualifying considerations

4. Trade deals and conditionality

- Steady growth in the inclusion of social clauses, requiring adherence to internationally recognised employment rights and minimum standards, in international trade agreements
- Employment (and environmental) standards in free trade agreements (FTAs) concluded between EU and third countries have widened and deepened
- Initially focused on FTAs with industrialising & developing countries, but recently extended to industrialised countries e.g. EU - South Korea
- Implications for a future EU – UK FTA: UK access to Europe’s single market linked to shadowing European regulatory floor → the stronger the shadow, the better the access

Brexit and the future trajectory of the European regulatory floor

Three possibilities

- Opening the way to augmenting Europe's regulatory floor?
- Little change?
- Prompting a European deregulatory agenda?

Reinforcing the European regulatory floor?

- UK consistently opposed and tried to block measures; original EU Treaty social chapter secured when UK opted-out at Maastricht (1991)
- Without the UK, further progress in strengthening the floor more likely
- Renewed commitment to social policy measures by the European Commission under Juncker and von der Leyen (European pillar of social rights; minimum wage proposal)

Brexit and the future trajectory of the European regulatory floor

Little change?

- Commission shifted away from regulatory activism since 2000
- Under Barroso, Commission embraced some deregulatory initiatives e.g. REFIT
- Re-embrace of social policy under Juncker yielded few new regulatory initiatives
- Balance of forces in the EU Council shifted towards a more liberal, 'light touch' regulatory approach
- Other governments, which 'hid behind the UK', may assume a blocking role

Brexit and the future trajectory of the European regulatory floor

Prompting a European deregulatory agenda?

- Pressures created by regime competition in employment standards from the UK provide the opportunity for employers' organisations and some national governments to push for a deregulatory agenda at European level
- Commission already has a 'cookbook' of deregulatory labour market measures, used as a condition of the financial assistance packages made available (by the 'Troika') to several member states under the crisis

Conclusion: Brexit as likely to act as a brake on, as a facilitator of, the strengthening of the European regulatory floor of employment standards