

The Civil Society Brexit Project: *Information*

Keeping Up with the EU: Developments in EU social law and policy - September 2021

Introduction

A key concern of civil society around Brexit was that the UK, whether deliberately or inadvertently, may begin to fall behind its European neighbours on social rights protections. One of the challenges for civil society is that it can be difficult to understand, and to find out about, current and upcoming policy and law developments in the EU.

Therefore, this briefing provides a horizon scan of some of the current and possible upcoming developments around EU social law and policy:

1. Recent developments (since February 2021)
2. Recent case law
3. Development tracker

Other briefings in this series which provide information around current EU developments are available at www.civilsocietybrexit.scot

1. Recent developments (since February 2021)

European Pillar of Social Rights Action Plan

In March 2021, the European Commission launched its European Pillar of Social Rights [Action Plan](#). The plan sets out a number of concrete actions envisaged by the EU Commission to give effect to the rights in the [European Pillar of Social Rights](#). The plan formulates three targets, which the EU wishes to reach by 2030:

- At least 78% of people aged 20 to 64 should be in employment,
- At least 60% of all adults should participate in training every year,
- The number of people at risk of poverty or social exclusion should be reduced by at least 15 million, including at least 5 million children.

Each of these targets contains various sub-targets, such as the aim to halve the gender employment gap; to increase the provision of formal early childhood education and care; to decrease the rate of young people neither in employment nor in education or training; to ensure that at least 80% of those aged 16-74 have basic digital skills; and to reduce early school leaving.

One of the main challenges in achieving these aims is that the EU does not have the competence to pass legislation concerning all the measures necessary. This is why the EU's concrete plans for action – detailed below – consist of a mix of hard law measures (i.e. EU legislation) and soft law measures (recommendations to the Member States, sharing of best practices, etc, notably where the EU has no

competence to legislate). In many cases, therefore, the success of the Commission's Action Plan will depend on the cooperation of the Member States.

The action plan also relies on Member States to use the vast amounts of money available through the NextGenerationEU recovery instrument (adopted to help overcome the economic and social costs of the Covid pandemic). Hence the successful realisation of the action plan will very much depend on the cooperation of the Member States. Signals on their part have so far been positive. At the Porto Social Summit in May 2021, the Member States endorsed the Commission's action plan at the highest level.¹ Yet it is perhaps fair to say that full realisation will be a long process.

What follows is a list of social policy measures envisaged by the European Commission over the next few months, which may be of interest to readers of this briefing. So far as the Commission has taken concrete steps, these will be outlined briefly.

Hard law measures:

Legislative proposal on the working conditions of platform workers	Expected: Q4 2021
Revision of the Long-term Residents Directive and the Single Permit Directive – the aim seems to be to create a 'true EU long-term residence status', possibly giving long-term residents the right to move to other Member States and work there	Expected: Q4 2021
Legislative proposal on combatting gender-based violence against women , including work harassment on grounds of sex	Expected: Q4 2021

Soft law measures:

The EU Strategy on the Rights of the Child and the European Child Guarantee	Adopted in Q1 2021 (more detail below)
European Platform to Combat Homelessness	Launched Q2 2021 (more detail below)
Affordable Housing Initiative	Q2 2021
Response to European Parliament's call for legislation on a 'right to disconnect' - the ability of people to disconnect from work and work-related emails etc during non-work hours. The right to disconnect will also be considered at part of the Commission's implementation report on the Working Time Directive.	Timeframe: unclear
Action Plan on the Social Economy	Expected: Q4 2021
Council Recommendation on Minimum Income	Expected: 2022
Initiative on Long-Term Care	Expected: 2022
Initiative to support social dialogue at EU and national level	Expected: 2022

¹ The Porto Declaration can be found here:

<https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10004&furtherNews=yes>.

The EU Strategy on the Rights of the Child and the European Child Guarantee

The **EU Strategy on the Rights of the Child** aims to protect, promote and fulfil children's rights. It is sub-divided into six thematic areas:

1. Child participation in political and democratic life: aims at greater empowerment of children to be active citizens and members of democratic societies. The EU institutions want to involve children better in their decision-making processes.
2. Socio-economic inclusion, health and education: to ensure children's right to a good standard of living, to equal opportunities and support when needed.
3. Combating violence against children and ensuring child protection: so that children grow up free from violence.
4. Child-friendly justice: to support justice systems that uphold the rights and needs of children.²
5. Digital and Information Society: so that children can safely navigate the digital environment and harness its opportunities.³
6. Global dimension: EU actions supporting, protecting and empowering children globally, including during crisis and conflict.

Most of these goals cannot be achieved by EU action alone; in fact, the EU has very little competence to legislate on most of these issues (e.g. it only has a supporting competence – and thus plays a very limited role – in education). Hence most concrete action will have to come from the Member States. It remains to be seen how successful the EU's (mainly) soft-law initiatives will be.

The Rights of the Child Strategy sits alongside the **European Child Guarantee**. This guarantee aims at breaking the cycle of social disadvantage and exclusion, which so often leads to poor school performance, children dropping out of school, long-term unemployment, and poverty. The European Child Guarantee is part of a broader strategy of building an EU of equality (alongside the European Disability Strategy – see below). The Child Guarantee aims to encourage Member States to provide free and effective access to early childhood education and care; education and school-based activities; at least one healthy school meal per day; and healthcare, all free of charge. Again, it will be up to the Member States to put the European Child Guarantee into effect.

² Pre-existing legislation in this thematic area includes: Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime; Directive 2016/800 on procedural safeguards for children suspected or accused in criminal proceedings.

³ Existing legislation in this thematic area includes Directive 2011/93 on combating the sexual abuse and sexual exploitation of children and child pornography.

European Platform to Combat Homelessness

In June 2021, the EU institutions, governments and civil society launched the European Platform on Combatting Homelessness “to trigger dialogue, facilitate mutual learning, improve evidence and monitoring, and strengthen cooperation among all actors that aim to combat homelessness”.⁴ The aim is to eradicate homelessness by 2030. As the name ‘platform’ suggests, this is primarily a vehicle for promoting policies; exchanging best practices; harnessing funding opportunities; and reviewing progress towards the aim of eradicating homelessness.

Affordable Housing Initiative

The EU’s Affordable Housing Initiative cuts across a number of policy areas, notably environmental policy and social policy. The EU provides funding (action grants) to support renovation projects for affordable housing in 100 ‘lighthouse districts’ across the EU. These projects will be supported by a European Affordable Housing Consortiums, which will facilitate collaboration, networking, knowledge transfer and exchange of best practices.

Strategy for the Rights of Persons with Disabilities

In early March 2021, the EU Commission launched its new ten-year [strategy for the rights of persons with disabilities](#) as part of its efforts to build an EU of Equality.⁵ The strategy has three main themes:

- EU rights, i.e. facilitating EU free movement rights for persons with disabilities.
- Independent living and autonomy.
- Non-discrimination and equal opportunities.

The strategy builds on the previous European Disability Strategy and continues some of its initiatives, notably around accessibility and the EU Accessibility Act (see previous briefing). The EU Commission announced a mix of hard law and soft law measures in order to implement it. The ‘flagship’ measures announced are as follows:

- A new Disability Platform will replace the existing High Level Group on Disability: it will bring together national UNCRPD focal points, organisations of persons with disabilities and the Commission and will serve as a forum of exchange (2021).
- Launch of a European resource centre (AccessibleEU) to increase coherence in accessibility policies and facilitate access to relevant knowledge (2022).
- A package of guidelines and mutual learning support to improve labour market outcomes of persons with disabilities (2022).

⁴ More details can be found in the Lisbon Declaration on the European Platform, available here: <https://www.2021portugal.eu/en/news/lisbon-declaration-on-the-european-platform-on-combatting-homelessness/>.

⁵ Alongside the EU’s LGBTIQ Equality Strategy 2020-25; the Anti-racism Action Plan 2020-25; the Gender Equality Strategy 2020-25; and the EU Roma Strategic Framework.

- A European Disability Card which would be recognised by all Member States so that persons with a disability face fewer obstacles in having their disability status recognised when moving to another Member State (by end of 2023).
- New Commission Guidance recommending to Member States improvements on independent living and inclusion in the community (by 2023).
- A Framework for Social Services of Excellence for persons with disabilities (2024).
- A new Commission internal HR strategy to promote diversity and inclusion of persons with disabilities working in the European Commission.

2. Recent case law

There are a number of recent judgments from the Court of Justice of the EU that are relevant to the field of social policy broadly speaking.

Working time

Stand-by time as working time?

The Court of Justice handed down two judgments concerning the question whether a worker's time on stand-by counts as working time under the Working Time Directive and thus has to be remunerated.⁶ In the first case, a technician in a radio transmission centre located on a mountain top was required to work 12 hour shifts followed by a 6-hour stand-by period during which he had to be on call and – if called – would be required to return to the transmission centre within an hour. Due to the location of the centre – on a mountain top in the Alps – and the location of the worker's home, this meant he could not stray far from his place of work during his time off. In the second case, a senior firefighter was required to carry out regular stand-by service, which required him to reach the city in which he served as a firefighter within 20 minutes. This meant he could not venture far from the city's boundaries. In addition he had to bring his uniform and a specific service vehicle everywhere he went while on stand-by duty.

The Court of Justice's judgments adopted a nuanced – and compared to earlier cases on stand-by time stricter – approach. The main test for whether stand-by time should count as working is whether the “constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests”. In other words it depends on whether the stand-by time can be considered proper time off or not. However, the Court also said that ‘organisational difficulties’ that a period of stand-by may generate for the worker are not relevant, in particular the worker's residence and distance to their place of work. Hence if somebody has chosen to live far away from their place of work and thus their room for pursuing activities is more restricted during stand-by time, then that is their problem. Overall the decisions would appear to strengthen the employer's position rather than that of the employee.

⁶ Case C-344/19 *D.J.* ECLI:EU:C:2021:182 and Case C-580/19 *RJ* ECLI:EU:C:2021:183.

Working time and military personnel

In a further judgment handed down in June,⁷ the Court of Justice clarified two further aspects concerning working time. First, the Working Time Directive is not *per se* inapplicable to military personnel. And second, where an employee is on stand-by duties and where this stand-by time counts as working time – like a soldier who has to remain in the barracks while on stand-by, i.e. cannot return home – the Working Time Directive does not mandate that employees must be paid at the same rate as normal. It is up to the domestic laws of the Member States to determine the level of pay for employees while on stand-by.

These decisions have no immediate effect in the UK as they were all handed down after Brexit. This means they are not binding precedent for UK courts and need not be followed. They may still be considered by UK courts, however, and it will remain to be seen whether the UK courts will be minded to follow the Court of Justice's lead.

Can employers ban employees from wearing religious symbols?

The Court of Justice was (once again) called upon to decide whether an employer's objection to their employee's wearing of an Islamic headscarf during work was compatible with EU anti-discrimination law (Directive 2000/78).⁸ The Court of Justice reiterated its findings made in two earlier judgments⁹ that a strict policy of neutrality by an employer that prohibits employees from wearing any visible sign of political, philosophical or religious beliefs did not constitute direct discrimination on the basis of religion or belief. However, it could constitute indirect discrimination if a particular group – e.g. Muslims – was more affected by the policy than other groups. Indirect discrimination of this kind could be justified. Here the Court reiterated its previous case law, according to which the rights and wishes of the customers could be taken into account by the employer when formulating their policy on employee's clothing. However, it refined its earlier case law somewhat in that it required the employer to demonstrate a 'genuine need' for the policy. A mere desire to pursue a policy of neutrality is not enough. This means that it can only be adopted if strictly necessary in view of any adverse consequences – e.g. customers staying away – the employer is seeking to avoid.

The Court of Justice ruled further that a policy that is restricted to prohibiting only conspicuous, large-sized symbols – such as a headscarf, but not a small cross on a necklace – is not justifiable as it is 'liable to have greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering'.

While the Court of Justice upheld its relatively permissible stance regarding an employer's right to pursue a policy of strict neutrality, the decision provides some additional nuance in that it a) requires the employer to demonstrate a genuine need for that policy; and b) does not permit a prohibition of ostensible religious symbols only.

⁷ Case C-742/09 *BK* ECLI:EU:C:2021:597.

⁸ Joined Cases C-804/18 and 341/19 *WABE and Müller Handels GmbH* ECLI:EU:C:2021:594.

⁹ Cases C-157/15 *Achbita* ECLI:EU:C:2017:203 and C-188/15 *Bouagnaoui* ECLI:EU:C:2017:204.

3. Development tracker

Updates on developments discussed in previous briefings:

Directive on Work-Life Balance	End of transposition period: 2 August 2022 So far (partly) transposed by Belgium and Czechia
Directive on transparent and predictable working conditions	End of transposition period: 1 August 2022 So far (partly) transposed by Austria, Belgium and Czechia
EU Accessibility Act	End of transposition period: 28 June 2022 So far (partly) transposed by Belgium and Austria
European Health Union	As a reaction to Covid-19: plan to create a new European Health Emergency Preparedness and Response Authority (HERA)
Proposal: EU Directive on adequate minimum wages	Currently going through the legislative process.
Extending the scope of anti-discrimination legislation	After a two-year hiatus, the legislative proposal was again discussed in the Council. A progress report concluded that 'tangible progress' to address Member State concerns, but that further technical work and political discussion would be needed before the (required) unanimity in the Council could be reached.
Ratification of the ILO's violence and harassment convention	No new developments.

Tobias Lock, September 2021