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Conceptual and Legal Framework for Quality of Work and Employment in International Institutions – The European Union and the International Labour Organisation

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I. Introduction

The multifaceted concept of “job quality” has only recently appeared in the rhetoric of international organisations. At the start of this millennium, both the European Union (EU) and the International Labour Organisation (ILO) of the United Nations (UN) included among their policy objectives similar concerns about improving “job quality” or promoting “decent work”. This was followed by an intense institutional process for the conception and operation of its notions. The aim of this chapter is to explore the international concepts of “job quality” according to two complementary and intertwined perspectives: the policy and legal dimension.

As policy concepts, “job quality” and “decent work” reflect a (relative) consensus between Member States on their significance in a policy with commonly agreed objectives. In procedural terms, their complex nature and implementation by means of indicators includes a process to monitor and compare the progress in the agenda to improve job quality or promote decent work. From this viewpoint, both approaches have the characteristics of a “soft law” approach towards governance, such as the

Open Method of Co-ordination (OMC). In a broader policy perspective, the EU and ILO/UN concepts are both presented as strategies to accommodate the new constraints of globalisation in a socially fair manner. However, as policy concepts, “job quality” and “decent work” are also deeply anchored in a legal context underpinning the institutions originating these concepts. Thus, they also reflect a legal apprehension about the concepts incorporated in their policy definitions.

The first section of this chapter is dedicated to the policy dimension of “job quality”/ “decent work”. A systematic review and comparison of the sub-dimensions characterising the concept shows that both approaches are very convergent in terms of policy perspective. This comparative approach highlights a selection of the dimensions of “job quality”/“decent work” for which it is possible to establish a clear relationship with the legal framework at institutional level. The second section reviews the way these dimensions are defined from a legal perspective for both institutions and discusses some of the issues raised by this legal approach to the qualitative aspects of work.

II. Setting the Framework: Employment Quality Dimensions in International Institutions

A. European Union: “Job Quality”

The definition and measurement of “job quality” has been on the EU agenda since the qualitative dimension of policies became a pivotal element of the Lisbon Strategy at the beginning of the millennium, in the nascent cooperation between Member States on employment and social policies¹. This cooperation was fostered by the introduction of “soft law” methods of governance such as the “Open Method of Coordination” (OMC), developed by the EU in order to promote coordination in the policies of Member States (subsidiarity), such as employment and social policies.

¹ We lack space here to include in our review the work being undertaken by the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), regarding the definition of the quality of work and employment from an integrated perspective, but we should stress its importance. This work is closely related to the EU process to define “job quality” which began under the 2001 Belgian presidency of the EU. The conceptual framework developed by EUROFOUND has four main dimensions: (a) ensuring career and employment security; (b) maintaining and promoting the health and well-being of workers; (c) developing skills and experience; (d) reconciling working and non-working life (EUROFOUND 2002 and 2006).

1. “Job Quality” in the EU Policy Agenda

Under the original Lisbon Strategy, Europe was aiming notably to create both more and *better* jobs in the context of a globalised knowledge economy. It should be stressed here that the initial Lisbon Strategy encompassed a holistic approach to quality. The notion of quality was supposed to relate to all aspects of the economy and society, including the quality of social policy in its entirety but also training and industrial relations policies. This is why the Stockholm European Council, in 2001, established the qualitative dimension of employment as a general horizontal objective in the Employment Guidelines of the European Employment Strategy (EES), meaning that all the guidelines should be evaluated from a quality perspective, as was already the case for other horizontal issues such as gender equality or non-discrimination. A set of around 40 indicators was adopted at the Laeken European Council in December 2001 to monitor “job quality” in the framework of the EES. Also in 2001, the European Commission issued its first Communication setting out the conceptual framework for “job quality” (European Commission, 2001).

From a policy perspective this period could be depicted as the “golden age” of “job quality” in the European policy arena. Since 2005, after the mid-term “streamlining” of the Lisbon Strategy and its revamping as the narrowly focused Growth and Jobs Strategy, the issue of “job quality” has been relegated to the background of the EU social policy agenda. Nevertheless, due to a “lock-in effect”, whereby once a concept has appeared in the European policy field and has been approved by the European institutions it cannot easily disappear, so “job quality” still remains in the European debate. From 2005 to 2010, “job quality” was still one of the pillars of the EES and of the Growth and Jobs Strategy, but its understanding has substantially changed in policy terms. Good quality jobs are no longer presented as a crucial element to foster the well-being of European citizens and workers or as the European Social Model(s), but are increasingly interpreted in terms of job productivity to sustain economic growth and financial attractiveness for job creation to foster employment participation (Peña-Casas, 2010). The recent agreement on the content of the new mid-term strategy for the EU (Europe 2020) and the Employment Integrated Guidelines confirm this declining interest in “job quality” in the EU. The dimensions of the initial concept are still present but have been reduced in the framework of a general lesser priority for “inclusive growth”, aimed at improving social cohesion and also the effective functioning of labour markets (European Commission, 2010a), and are evoked as one of the components of a specific Employment Guideline aimed at developing a skilled workforce

in response to labour market needs, promoting job quality and lifelong learning (European Commission, 2010b).

In the framework of the Europe 2020 flagship initiative on New Skills for New Jobs, the Commission announced its intention to review the definition of QWE in 2011 (European Commission, 2010c). According to a note in the context of the conceptual review of QWE undertaken by the European Employment Committee, the Commission proposes a narrower definition based on four characteristics of what constitutes a good quality job; these are: to provide adequate earnings,; offer opportunities to upgrade skills, lifelong learning and career progression; to ensure safe and healthy working conditions; and to combine a high level of both security and flexibility, including flexible arrangements allowing for the reconciliation of work and private life (European Commission, 2010d). Note the proximity of these dimensions with the conceptual framework underpinning the flexicurity paradigm (see Chapter II by J. Deumer in this book).

2. Dimensions of Quality of Work and Quality of Employment

The conceptual framework for “job quality” in Europe was introduced by the abovementioned 2001 Communication. The Commission identified ten key dimensions associated with key policy objectives and standards (see Table 1). There is no space here to enter into a precise description of all these dimensions and associated indicators, but we need to stress certain elements that are of utmost importance to clarify the links between policy and the legal dimensions of the concept².

The first is the key distinction made in the Communication between aspects of “job quality” concerning the job characteristics themselves (objective and intrinsic characteristics, including: job satisfaction, remuneration, non-pay rewards, working time, skills, training and prospects for career advancement, job content, match between job and worker characteristics) and those related to the work and wider labour market context (gender equality, health and safety, flexibility and security, access to jobs, work-life balance, social dialogue and worker involvement, diversity and non-discrimination). This distinction is essential as it clearly separates two aspects that are interconnected but which nevertheless differ in terms of their concept and also legal perspective. If we have used up to now the expression “job quality”, it is important to distinguish aspects related to *quality of work (QW)* from those regarding *quality of employment (QE)*, with employment being understood here as the policy and legal dimensions of labour market functioning. Such a

² For a detailed comparative assessment of the EU conceptual frameworks and indicators, see Peña-Casas 2010.

distinction is also apparent in the conceptual frameworks of other international institutions, at least implicitly. This is why from now on reference will be made to the different concepts used by institutions under the term *quality of work and employment (QWE)*.

A second important distinction to be made is the difference between the conceptual dimensions of QWE and the indicators used in their monitoring. The choice of indicator does not necessarily nor adequately reflect the policy objectives of QWE, as it is constrained by data availability issues, as well as policy considerations. The monitoring indicators require common agreement on their use in a policy process, especially at EU level. This is for instance the case with wages or social dialogue indicators, on which there is a lack of consensus among the policy stakeholders regarding the validity of the available indicators. The comparative approach of this chapter focuses on the conceptual and policy dimensions of QWE, as it enables a better understanding of the legal framework.

The following table, taken from the 2001 Communication, very well illustrates the relationships between the ten dimensions of QWE, the key policy objectives of the EU/EES and the instruments that can be mobilised to achieve these objectives.

**Table 1. EU dimensions of QWE,
related policy objectives and main instruments**

DIMENSIONS	KEY POLICY OBJECTIVES AND STANDARDS	MAIN INSTRUMENTS
1. Intrinsic job quality	Jobs ought to be intrinsically satisfying, compatible with a person's skills and abilities, and provide appropriate levels of income.	EU and MS economic and social policies in general, BEPG, EES, Social Partners
2. Skills, lifelong learning, and career development	People ought to be able to develop their potential abilities to the full through appropriate support for life-long learning.	Education and life-long learning policies, legal framework, including mutual recognition of qualifications
3. Gender equality	Labour markets should offer equal opportunity for men and women in respect of equivalent value jobs, and in terms of lifetime careers.	EES, legislation, social partners, action programmes
4. Health and safety at work	It has to be ensured that working conditions are safe, healthy and supportive – in both physical and psychological terms – of sustainable participation and employment.	New health and safety strategy, including legislation backed by monitoring and benchmarking, social partners

5. Flexibility and security	An appropriate balance between flexibility and security is called for to encourage positive attitudes to change at the workplace and in the labour market. This requires appropriate support for those who lose their jobs or are seeking an alternative, as well as encouragement for the full use of abilities and flexible career choices through appropriate support for occupational and geographical mobility.	Open method of coordination, taxation, legislation, social partners, transferability of supplementary pension rights, information and agency support + EES
6. Inclusion and access to the labour market	Access to and inclusion in labour markets should be increased, including those entering the labour market for the first time or after a period of unemployment or inactivity, and to allow them to stay in the labour market.	EES, Public employment services at EU level, European Social Fund, corporate social responsibility, work on local development
7. Work organisation and work-life balance	Working arrangements, especially those concerning working time, together with support services should allow an appropriate balance between working life and life outside work.	EES, legislation, social partners
8. Social dialogue and worker involvement	All workers should be informed about and involved in the development of their companies and their working life.	Social partners cooperation, legislation
9. Diversity and non-discrimination	All workers should be treated equally without discrimination in terms of age, disability, ethnic origin, religion or sexual orientation.	EES, social partners, action programmes, ESF (EQUAL)
10. Overall work performance	High levels of labour productivity and high living standards across all regions of the Community	Economic policies and structural policies

Source: European Commission, 2001

The second column incorporates policy objectives, mainly those of the EES and more basic legal standards, such as gender equality, non-discrimination or workers' rights³. The third column shows the wide

³ It should be recalled here that the policy objectives of the EES in 2001 were already encompassing a "mainstream" perspective on gender and non-discrimination. Quality was supposed to be the third mainstream concern, as attested by the introduction of quality as a cross-cutting dimension in the Guidelines of the EES at that time. These objectives are in one form or another still present in the current EES, although widespread in a more limited number of guidelines or new concepts, such as "flexicurity" (see Chapter II by J. Deumer in this book).

spectrum of instruments available to foster QWE in Europe. It is a complex mix of hard and soft law. EU hard law consists of primary law such as treaties and secondary law such as directives as well as the rulings of the European Court of Justice that are binding on Member States. Hard law defines the EU competency for action, the fields where it can impose binding legislation and policy on its Member States. In contrast, soft law is a broader notion and consists of different policy documents, recommendations and declarations that rely on the power of persuasion, the spreading of good practices and softer instruments. Soft law can however be powerful in terms of setting trends as highlighted by Beveridge, who cautions against constructing too strong a dichotomy between hard and soft law (Beveridge, 2008).

B. International Labour Organisation: Decent Work

The Decent Work Agenda of the International Labour Organisation (ILO) was initiated in 1999, thus at the same time as the EU was introducing its QWE framework. Following the 1998 Declaration on Fundamental Principles and Rights at Work, the ILO introduced the concept of Decent Work (DW) as “the converging focus” of all the ILO’s four strategic objectives: the promotion of rights at work, of employment, social protection and social dialogue (ILO, 1999). DW is understood in terms of equal rights and opportunities for all, encompassing the “capability approach” promoted by the UN in its human development agenda. DW sums up the aspirations of people for their working lives – their aspirations for advancement and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality (on the capabilities perspective, see also Chapter XII by Bonvin *et al.* in this book).

1. Decent Work in the International Policy Agenda

DW has been gaining momentum in the UN policy agenda. The ILO DW agenda is increasingly being integrated into the UN Millennium Development Goals. Decent work is considered as a crucial means to reduce poverty and for achieving equitable, inclusive and sustainable development. At the UN World Summit in September 2005, more than 150 countries agreed to place full and productive employment and decent work at the heart of relevant national and international policies and to spell out the central role of decent work in development strategies and poverty reduction. The ILO Declaration on Social Justice for a Fair Globalisation endorses the Decent Work Agenda as a primary objective in the ILO’s work and recommends that Member States consider establishing appropriate indicators or statistics, if necessary with ILO assistance, to monitor and evaluate progress made (ILO, 2008a). The ILO

DW agenda was also discussed at the “High Level Segment” of the UN Economic and Social Council (ECOSOC) meeting in Geneva on 3-5 July 2010, underscoring once again the fundamental contribution of DW towards achieving the Millennium Development Goals. The UN has included the DW framework in the assessment structure for the Millennium Development Goals (ILO, 2009a).

2. Dimensions of Decent Work

Ever since its introduction in 1999, the definition of the conceptual dimensions of decent work and adequate monitoring indicators have been the subject of on-going work by specialised bodies within the ILO, such as the International Conference of Labour Statisticians. There has also been a good deal of international cooperation on this matter⁴. This has led to the proposal for a common framework for measuring and monitoring DW, accompanied by a detailed list of indicators (ILO, 2008b). This framework is currently being used by the ILO to conduct pilot studies on DW in several countries. As far as European countries are concerned, a study has already been conducted on Austria (ILO, 2009b). The conceptual framework of DW is composed of eleven dimensions based on the four fundamental objectives promoted by the ILO: (1) fundamental principles and rights at work and international labour standards; (2) employment and income opportunities; (3) social protection and social security; (4) social dialogue and tripartism. The eleven dimensions are as follows (the numbers between brackets referring to the four fundamental objectives):

1. Employment opportunities (1 + 2)
2. Adequate earnings and productive work (1 + 3)
3. Decent hours (1 + 3)
4. Combination of work, family and personal life (1 + 3)
5. Work that should be abolished (1 + 3)
6. Stability and security of work (1, 2 + 3)
7. Equal opportunity and treatment in employment (1, 2 + 3)

⁴ See notably the work undertaken by the taskforce for the measurement of quality of employment under the auspices of the UN Economic Commission for Europe (UNECE). In order to encourage the measurement and reporting of QWE in the group of countries under its competency (56 countries forming the UN “region” of Europe), this taskforce has gathered together several national and international statistical bodies since 2003. It stresses notably the high degree of convergence existing between EU and ILO conceptual frameworks. It proposes a “convergent” framework based on seven main dimensions of QWE: safety and ethics of employment; income and benefits from employment; working hours and balancing work and non-working life; security of employment and social protection; social dialogue; skills’ development and training; workplace relationships and work motivation (UNECE, 2010).

8. Safe work environment (1 + 3)
9. Social security (1 + 3)
10. Social dialogue, workers' and employers' representation (1 + 4)
11. Economic and social context for decent work

C. Comparison of EU and ILO Conceptual Frameworks

The comparative exercise of these different institutional frameworks of QWE demonstrates their high degree of convergence and overlap. Both institutions provide a conceptual framework mixing issues related to QW and QE, thus creating a wider perspective on QWE. In the following table the EU QWE framework is compared with the DW framework. As mentioned previously, here our comparative approach is limited to the main areas in both frameworks, since policy objectives and fundamental principles are expressed at this level, rather than through the chosen indicators which are subject to technical constraints.

**Table 2. Comparison and concordance
between different QW frameworks**

EU QWE DIMENSIONS	UN / ILO DECENT WORK DIMENSIONS
1. Intrinsic job quality (appropriate levels of income + adequate skills + satisfying job).	2. Adequate earnings and productive work
2. Skills, lifelong learning, and career development	2. Adequate earnings and productive work
3. Gender equality	7. Equal opportunities and fair treatment in employment
4. Health and safety at work	8. Safe work environment
5. Flexibility and security	6. Stability and security of work + 9. Social security
6. Inclusion and access to the labour market	1. Employment opportunities 7. Equal opportunities and fair treatment in employment
7. Work organisation and work-life balance	2. Decent hours 4. Combining work, family and personal life
8. Social dialogue and worker involvement	10. Social dialogue, workers' and employers' representation
9. Diversity and non-discrimination	7. Equal opportunities and fair treatment in employment
10. Overall work performance (High levels of labour productivity and high living standards across all regions of the Community)	1. Employment opportunities + 11. Economic and social context of decent work

Source: the author's compilation

There are some differences between the frameworks. The issues of child and forced labour are not incorporated in the EU framework, mainly because it is not a policy issue in the EU, since all EU member states have ratified the European Convention on Human Rights (Article 4). The question of social protection is explicitly mentioned in the ILO framework, but is not a specific dimension in the EU framework, although dimension 5 on flexibility and security includes the coverage and access to social protection as a condition of security. Another difference, which is more astonishing, is the absence in the ILO framework of an explicit reference to the fundamental matters of training and lifelong learning. However, skills' acquisition and development are implicit in "productive work" (dimension 2).

Apart from these differences, there is a high degree of convergence between the two frameworks. The first case of convergence lies in the common preoccupation with strengthening the social dimension of globalisation. The EU has put in its Renewed Social Agenda of 2008 and also in its meta-strategies the need to reinforce the cohesion of internal and external policies (mainly trade and development) to contribute to a fairer globalisation. A second factor of convergence lies in the series of principles in the EU and UN agendas. Both policy agendas encompass a framework for action in favour of more and better jobs, managing change, social cohesion and equal opportunities. The values promoted through the ILO and notably its DW agenda are also at the core of the so-called "European Social Model", characterised by a focus on the right to productive and freely chosen work, in which rights are protected, which generates an adequate income, with adequate social protection and in which there is an emphasis on equal opportunities. All this should happen in a democratic process guaranteed by tripartism and social dialogue.

Furthermore, the EU has also committed itself to promote the DW agenda *within* and *outside* the Union. The 2006 Communication on "Decent Work for all" highlights the role that the EU must play in the promotion of the DW agenda at international level: by supporting the setting of policy agendas and standards at multilateral level, developing bilateral relations and exchanges on these issues with partner countries and regions, as well as integrating decent work objectives into the EU's trade and development policies (European Commission, 2006). However, the promotion of DW has been more apparent outside the EU than within. The internal EU agenda on QWE appears totally disconnected from the external agenda on DW. It is striking that, at one and the same time, the EU supports the DW agenda in its external policies while internally it places QWE on the back burner of its meta-strategies. Needless to say, the credibility of the EU's role in promoting DW at a

global level depends largely on the EU's ability to achieve its own objective of delivering more quality jobs in Europe.

As mentioned previously, there is another point in common between the ILO and EU frameworks. Both are defined for use in the context of a policy exercise. The concepts and indicators developed by both international institutions are intended for use in a governance process, with the characteristics of what is defined in the EU as a “soft law” process. The agreement on common objectives and monitoring indicators in the context of a comparative reporting procedure, implying a form of peer review/pressure, are at the core of the ILO Decent Work Agenda and the EU holistic approach to “job quality” under the Lisbon Strategy and, more precisely, with the EES as an OMC.

III. Legal Aspects of Job Quality Dimensions

Table 1, as presented above, highlights the complexity of the multi-dimensional perspective on QWE, and consequently the diversity of the legal tools that are to be considered and mobilised to improve effectively QWE in Europe, as either “hard law” or “soft law” processes. In this section, we review some of the EU and the ILO dimensions of QWE from the viewpoint of their legal basis in their own institutional frameworks. As it is not possible to cover all aspects of QWE in this chapter, we are focusing on some dimensions related to essential QWE issues and incorporated in both EU and ILO frameworks. This section will be limited to the analysis of job quality under hard and soft law, described by Supiot (2006) as a divergence between *Dura Lex* and *Soft Law* on one hand and the matter of fundamental social rights on the other.

A. *Hard Law v Soft Law*

1. *At the EU Level*

a. The Legislative “acquis”

As a complement to Member States' action, the EU has overtime built up a solid legislative “*acquis*” in various domains regarding employment quality. The European Coal and Steel Community (ECSC) of 1951 and the Rome Treaty of 1957 already contained articles concerning such issues as health and safety, working conditions, worker representation and equal pay for men and women. In 1974, the Social Action Programme⁵ incorporated over thirty measures in the areas of health and safety at work, minimum wages, working hours, employee participation,

⁵ Council Resolution of 21 January 1974 concerning a Social Action Programme, OJ C 13, 13 December 1974, p. 1-4.

etc. The first reference in an EU framework to the issue of employment quality is found in the first main objective of the programme, aimed at the attainment of full and *better* employment in the Community⁶. During the same period, the EU created dedicated institutions to foster an exchange of knowledge and the debate on various topics related to job quality, starting with the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) and the European Centre for the Development of Vocational Training (CEDEFOP), both in 1975, and later the European Agency for Safety and Health at Work in 1996. Furthermore, since the Maastricht Treaty in 1992, there is also an institutionalised European social dialogue between various industries and sectors. The major part of the European “*acquis communautaire*” covering various important aspects of job quality such as working conditions, health and safety and, more widely, gender equality and non-discrimination, was established during this period.

It is not possible in the restricted space of this chapter to review the extensive scope of EU hard law covering all aspects of employment quality. Hence we will focus upon the three main spheres evoked previously: equality and non-discrimination, health and safety at work and employment security and social protection.

EU efforts regarding equal treatment and non-discrimination have led to the adoption of several directives. A large body of European legislative texts is dedicated to equality between women and men. This is mainly covered in various Treaty provisions and Directives concerning access to employment, equal pay, protection during maternity, parental leave, social security and occupational social security, the burden of proof in discrimination cases and self-employment⁷ (for a

⁶ The second main objective involves the improvement in living and working conditions, while the third is a precursor to the instigation, nearly twenty years later, of an European Social Dialogue, aiming at an increased involvement of management and labour in the economic and social decisions of the Community, Addison, J. (2009), *In the Beginning, there Was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008*, The Rimini Centre for Economic Analysis, PR 01-09.

⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975, L 45/19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ 1976 L39/40; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986, L224/40; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men

further analysis of the legal developments on gender equality and reconciling work and family life, see Laura Carlson's chapter in this book). These directives are far from perfect to ensure real quality of work. The Pregnant Workers' Directive applies exclusively to issues relating to dismissal and excludes pay-related matters. It does not include the right of a woman to return to her job or an equivalent job at the end of her maternity leave and it excludes employees on short-term and temporary contracts. Under the parental leave directive, the leave entitlement is limited to parents of children below the age of eight and ignores the needs of parents of older children and parents on leave are not granted financial compensation (Caracciolo *et al.*, 2010). Based on Article 13 of the EU Treaty, in 2000, the European Union enacted two directives protecting people in the EU from discrimination on grounds of race and ethnic origin (the Racial Equality Directive), and on grounds of religion or belief, disability, age or sexual orientation (the Employment Framework Directive)⁸. They define a set of principles that offers every individual in the EU a common minimum level of legal protection against discrimination and is specially relevant to issues of age (see Christine Canazza' chapter in this book on "Quality of Employment within the Active Ageing Strategy").

Secure employment and equal access to social protection are two major elements of quality of employment and are also at the heart of the EU debate on the implementation of flexicurity policies (see Chapter II by Deumer in this book). If the EU's main legislative action on social security relates to harmonisation issues to further the single market and freedom of circulation for European citizens and workers⁹, we should mention here the Directives promoting equal access to social protection schemes¹⁰, regardless of gender or individual characteristics as men-

and women in occupational social security schemes, OJ 1986, L224/40; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ 1992 L 348/1.

⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

⁹ European Parliament and Council, Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004 L 166, 30.4.2004, p. 1-123.

¹⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986, L224/40; Council Directive 86/378/EEC of 24 July

tioned above, but also for the type of work performed by individuals. In response to the increasing use of non standard employment contracts in the 1980s and 1990s, EU legislation has provided a legal framework for non standard employment contracts, recognising that workers under such contracts experience lower quality working conditions than permanent workers (Bercusson, 2009). The European sectoral social dialogue produced two framework agreements which became directives for part-time and fixed term work¹¹. The first one aims at eliminating discrimination against part-time workers and improving the quality of part-time work and at promoting the development of part-time work on a voluntary basis. This Directive is far from ideal as part-time work is generally not associated with high-quality jobs, and until this is the case, any improvement in the quality of part-time work will remain an illusion (Barnard, 2006). The Fixed-Term Work Directive aims at improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination and by establishing a framework to prevent abuse from the use of successive fixed-term employment contracts or relationships¹². The Directive on Temporary Agency Work endorses the principle of equal treatment between temporary agency workers and permanent workers by the employer undertaking, subject to certain limitations and exemptions (see Silvia Borelli's chapter on atypical work in this book). As for the gender equality directives, these directives are also not ideal. The part-time directive applies only to part-timers who have an employment contract or employment relationship as defined by the law, collective agreement or current practice. Some atypical workers are thus excluded from the application of non-discrimination rights because they do not have an employment contract and are qualified as self-employed. The fixed-term Directive excludes the self-employed and temporary workers. Only workers employed in the same establishment, under the same applicable collective agreement, the same national legislation, collective agreement or practice are able to claim favourable treatment whereas not all employment relationships can be easily traced back to any single arrangement.

1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986, L224/40.

¹¹ Council Directive 97/81/EC concerning the framework agreement on part time work concluded by UNICE, CEEP and ETUC, OJ 1997, L14/9; Council of the European Union (1999), Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work conducted by ETUC, UNICE and CEEP, OJ 1999, L 175/43; European Parliament and Council of the European Union (2008), Directive 2008/104/EC of the European Parliament and of Council of 19 November on temporary agency work, OJ (2008), L327/9.

¹² On 16 July 2002, the European Social Partners ETUC, UNICE, UEAPME and CEEP signed a framework agreement on telework which did not become a directive.

EU law provides also a certain protection for workers in relation to their employment situation. With regard to the rights and the protection of employees, a large number of EU directives have been adopted since the 1970s and then subsequently revised. These directives aim on one hand to protect employees from unfair or unjustified dismissal and, on the other, to provide a common framework for information and the participation of employees in their employment conditions. These two aspects are strongly interrelated. The Employer's Insolvency Directive¹³ protects workers' rights to immediate or future old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes in the event of insolvency while the Collective Redundancies Directive¹⁴ affords greater protection to workers in the event of collective redundancies. The Transfer of Undertakings Directive¹⁵, replacing the previous Directive 77/187/EEC, ensures, as far as possible, that the employment relationship remains unchanged for the transferee and that the workers are not placed in a less favourable position solely as a result of the transfer. The Information Consultation Directive¹⁶ establishes a general framework for informing and consulting employees. Employee information and consultation covers three areas relating to economic, financial and strategic developments, the structure and foreseeable development of employment and related measures and decisions likely to lead to substantial changes in work organisation or contractual relations (Bedrac, 2006).

A healthy and safe working environment is an essential feature of quality of employment. Health and Safety at work represents one of the most important advances in the social policy of the European Union. A solid corpus of legislation has been adopted to cover the maximum number of risks with the minimum number of regulations. The *Europe-*

¹³ Council of the European Communities (1980), Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of their employer's insolvency, OJ 1980, L 283/23.

¹⁴ Council of the European Union (1998), Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ 1998, L 225/16.

¹⁵ Council of the European Union (2001), Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses, OJ 2001, L 82/16.

¹⁶ Council and European Parliament (2002), Directive 2002/14/EC of the Council and the European Parliament of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002, L 80/29.

an *Framework Directive on Safety and Health at Work*¹⁷ adopted in 1989 guarantees minimum health and safety requirements throughout Europe and to ensure a higher degree of protection for workers at work, through the implementation of preventive measures to guard against accidents at work and occupational diseases. A series of individual directives focusing on specific aspects of health and safety at work were adopted on the basis of the Framework Directive (Hennion *et al.*, 2010, Nayer *et al.*, 2007). Among these individual directives, one should be specially mentioned, the so-called *Working time Directive*¹⁸, one of the main instruments for improving workers' conditions. This Directive lays down minimum health and safety requirements for the organisation of working time (minimum daily rest periods, weekly and annual leave, breaks or weekly maximum working time as well as for specific aspects of night work, shift work and work patterns).

b. The Soft law processes

However, legislation at EU level is not always adequate. Soft instruments such as policy coordination, the operation of good practices, implementation of guides, frameworks for action, codes of conduct and recommendations can help shape a consensus and create the right conditions for action at national or company level (European Commission, 2010c). This recourse to soft law to complement, and even sometimes to substitute, hard law has become increasingly prevalent at EU level since the end of the 1990s. Indeed, even in fields such as gender equality, non-discrimination or health and safety, for which a strong legal corpus already exists, implementation is often complemented by soft law tools. For instance, "The Community Strategy 2007-2012 on Health and Safety at Work" outlines the options for further action to make workplaces across Europe healthier and safer (European Commission, 2007). The Strategy for Equality between Men and Women 2010-2015 is another example of traditional soft law that sets out the policy priorities of the Commission on gender equality including the gender pay gap (European Commission, 2010e).

As explained previously, "job quality" appears in the EU picture through the Lisbon Strategy and more particularly through one of the new forms of soft law governance, such as the EES. Equal opportunity is one of the four pillars of the EES, alongside employability, entrepre-

¹⁷ Council of the European Communities (1989), Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the health and safety of workers at work, OJ 1989, L 183/1.

¹⁸ Council Directive 93/104/EC of 23 November 1993 concerning specific aspects of the organisation of working time, OJ L307/18, now Directive 2003/88/EC, OJ 2003, L 299/9.

neurship and adaptability. Equal opportunity included tackling the gender (pay) gap, facilitating reconciliation between work and family life and encouraging the return to work after absence. Under the EES, atypical jobs are perceived as opportunities for the creation of new employment in response to the employer's need for greater flexibility, as well as the employees' desire to reconcile work with their family life, while at the same time retaining employment security. This promotion of work "flexibilisation" by the EES was later reinforced and given a prominent position in the current EES (Keune and Jepsen, 2007). The question of flexicurity is discussed in more detail in Chapter II of this book, so we will just briefly recall here the complexity of harmonising the worker's need for protection and security with the employer's need for flexibility. Encouraging flexibility in employment with a high level of social security can only be carried out if employees are given a real chance to stay in the job market and to advance in their employment and if some specific obligations are imposed on employers (Fredman, 2004). Many Member States are questioning whether the approach to flexicurity in general is well-founded, particularly with reference to reconciliation (Huiskamp and Vos, 2007). The issue of the legal protection of workers is also covered by the debate on flexicurity.

Job quality¹⁹ is still among the objectives of the Europe 2020 Strategy to increase productivity and workers' participation in employment. Job quality is evoked in the context of the pillar dedicated to "inclusive growth", aimed at social cohesion and especially the effective functioning of labour markets "(...) *through investing in successful transitions, appropriate skills development, rising job quality and fighting segmentation, structural unemployment and inactivity while ensuring adequate, sustainable social protection and active inclusion to reduce poverty (...)*" (European Commission, 2010a).

Job quality is also mentioned in the seventh guideline for the Employment Policies of the Member States entitled "Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality". Accordingly, the quality of jobs and employment conditions should be addressed and Member States should undertake action to fight poverty wages, promote occupational health and safety and ensure adequate social security for those on fixed-term contracts and the self-employed (European Commission, 2010b).

One of the "flagship initiatives" of the Europe 2020 Strategy also deals more explicitly with employment aspects, and in particular job quality (European Commission, 2010c). To increase participation in

¹⁹ For an in-depth analysis see Marlier, E. and Natali, D. (eds.) with Van Dam, R. (2010), *Europe 2020: Towards a more social EU?*, Brussels, P.I.E. Peter Lang.

employment, the European Commission proposes to boost action across four main areas: reducing segmentation and supporting transitions (new momentum for flexicurity), equipping people with the right skills for employment, improving job quality and working conditions, and creating jobs. Several of the proposed measures are related to the ‘simplification’ and ‘adaptation’ of employment legislation and the ‘*acquis communautaire*’ in several areas of job quality, notably working conditions and health and safety at work. The Commission encourages the use of ‘soft’ instruments (comparative analysis, policy coordination, the operation of good practices, benchmarking, implementing guides, frameworks for action, codes of conduct and recommendations) to complement this approach. In the context of this flagship initiative, the Commission also announced its intention to review and streamline the policy concept on quality of work, in cooperation with the Member States and social partners. This report is expected to contribute to the debate by clarifying the multidimensional concept of job quality, not only from an academic perspective but also from close interaction between current European policy and legal frameworks.

c. Soft Versus Hard Law?

Soft law refers to EU measures that are not binding on those they address. It is essential to distinguish soft law’s lack of a legally binding effect from its potential impact in practice. As highlighted by Trubek *et al.* (2005), soft law may be “harder” than we think. It may impact on policy development and practice precisely because of its lack of legal effect. Soft law tends to be used in the EU context where Member States are unable to agree on the hard law measure which is legally binding or where the EU lacks the competence to adopt hard law measures. According to Sciarra *et al.* (2004), the Member States and EU institutions are thus able to adopt EU policy proposals, while leaving their implementation optional for those Member States who do not wish to be so bound. They are thus an obvious temptation for the Commission when faced with resistance from some Member States which threaten to block policy proposals. Soft law may be seen as a more flexible instrument to achieve policy objectives.

For example, the legal strategy of the EES has been questioned. Guidelines have been criticised on a number of grounds as pointed out by Zappala (2003). They are soft law instruments. Non-binding EU guidelines may not lead Member States to change their national employment policies. There is also a fear that non-binding guidelines are a tempting substitute model for EU social and labour regulation, allowing for more Member States’ autonomy compared to the binding “hard law” legislative application. However, the Employment Guidelines have had some effect on EU labour legislation. The Directive on race and ethnic

discrimination was an element of the overall EES aiming to create a labour market that promotes entry by minority groups. The Preamble to the Directive refers to the 2000 Employment Guidelines. Similarly, a relationship between equal opportunities as a pillar of the EES and EU Labour law is established. The former Directive on Parental leave 96/34, with its explicit aim to be a “means of reconciling work and family life and promoting equal opportunities and treatment between women and men” could be regarded as part of the equal opportunities pillar of the EES. As explained by Bercusson (2009), the relationship between the *acquis* and the EES is a two-way street. The *acquis* is a legally binding framework of labour regulation which limits the scope and nature of the policies adopted under the EES. At the same time, the EES expanded the scope of the *acquis* by inspiring new regulations aimed at achieving the objectives of the EES, but based on the social chapter of the Treaty, among other provisions.

Thus, the debate on the opposition or the complementarity between hard and soft law within the EU policy framework is still on-going, and probably will be for the long term. Currently, it seems that the introduction of new hard law relating to job quality dimensions has become complex given the increased number of EU Member States and the relative blocking of European Social Dialogue in recent years, at least at the inter-professional level. The Lisbon Treaty has given more legislative powers to the European Parliament, but this has not yet really been translated into effective action, and the tensions between European institutions (Parliament, Commission, Council) are at their greatest when it comes to discussing hard law issues. As mentioned, there is not much to be expected from the ECJ either, as it tends to interpret EU law mainly according to competition and single market perspectives.

2. At the ILO Level

The status accorded to ILO standards has been the subject of much attention since the launch of the Decent Work Agenda.

According to the ILO Director General report, “normative action is an indispensable tool to make decent work a reality” because it should help to clarify its meaning. Indeed, the ILO standards (Conventions and Recommendations)²⁰ “provide an authoritative answer to the question of what decent work implies in concrete terms as regards the preconditions (fundamental principles and rights), its content (work that meets certain criteria on quality and security) and the means for achieving it (social dialogue)”. Moreover, this legislative activity is also a decisive indicator

²⁰ Report of the Director-General: Reducing the decent work deficit – a global challenge, Report 1(A), 89th session, June 2001.

of progress towards the achievement of ILO objectives, through its system of monitoring the implementation of Conventions ratified and for encouraging compliance with Recommendations.

However, although essential, normative action is not considered sufficient to ensure the promotion of decent work. Indeed, “decent work is universal in concept and its components are interdependent”, while the ILO’s normative action is “voluntary and necessarily fragmented in practice, as it seeks to break down the general objectives of the Constitution into a certain number of specific problems to which it offers concrete solutions”²¹. Therefore, the standards do not ensure immediate and consistent progress, no more than they can secure their universal application in all countries and business sectors.

To overcome this difficulty, the promotion of the decent work agenda was initially based on developing a “decent work pilot program”, a pilot experiment of the ILO Policy involving eight members²². The objective of this program was to put into operation the concept of decent work in ILO Member States of the, through the establishment of practical methods to promote integrated approaches to this policy at national levels. The objective of this program is to test the relevance of an integrated approach, for achieving the goals and priorities in ILO constituent Member States (ILO, 2006).

In a second phase, based on the results of this pilot program, country programs (DWCPs) were developed. Their content varied from one country to another, depending on national circumstances, the commitments of the ILO global priorities as identified by the strategic framework, program and the budget of the Regional Agenda for Decent Work²³. Each DWCP is therefore an analysis of national problems, the determination of a limited number of priorities, the setting of program objectives per country, the definition of a plan for implementing and evaluating performance in order to adjust strategies to obtain better results by each country (ILO, 2008c).

The strategy to promote the decent work agenda is therefore based on three stages. Initially, it was defined as a world model of qualitative

²¹ Report of the Director-General: Reducing the decent work deficit – a global challenge, Report 1(A), 89th session, June 2001.

²² Bahrain, Bangladesh, Denmark, Ghana, Kazakhstan, Morocco, Panama and the Philippines.

²³ As of 31 January 2010 there were 44 active Decent Work Country Programmes. Eleven Decent Work Country Programmes ended before the end of 2009 and another 12 will end in 2010. Over 80 programmes are currently under development. Six country programmes have already been evaluated: Argentina, Indonesia, Jordan, Philippines, Ukraine and Zambia; http://www.ilo.org/wcmsp5/groups/publiced_norm/relconf/documents/meetingdocument/wcms_123396.pdf.

and quantitative indicators that can be used to measure progress in achieving decent work objectives in each country (Cf. II.2). Besides this series of key indicators common to all countries, the indicators of decent work must also take into account the circumstances and priorities of each country. The objective is to achieve a model that is applicable at the international level and adaptable according to differing national situations. The second stage is to perform a series of statistical data and qualitative information relating to specific indicators of decent work. The ILO Member States must collect this information using their own statistical methods or administrative data-collection processes, such as databases set up by the labour inspection services. Qualitative indicators, such as those produced by social dialogue, could be based on a textual analysis of authoritative reports, including reports submitted to and produced by the ILO supervisory system, local surveys or administrative data. Finally, the inclusion in country profiles of decent work indicators and statistics will provide specific information on each country as well as a global picture of the agenda's implementation (ILO, 2008b).

It would be difficult not to measure this procedure against the open EU's method of coordination to produce a definition of common objectives, common indicators and national plans using a common reporting system. But, unlike the European procedure, the last part of the ILO procedure is more delicate and problematic, involving injunctions or recommendations to the countries. Does the ILO have the legal means to force the Member States to make any progress?

The importance given to the right to measure the progress towards decent work reflects the ambivalence of the role of the legal standard. Absent from the legal model used for the promotion of decent work (reports, agendas, etc.), legal standards ultimately reappear as a tool to measure progress made by ILO Member States in the national implementation of this policy.

Two components must be distinguished in the ILO legal framework to implement the decent work agenda. The first component concerns the concrete implementation of the decent work agenda. This focuses upon the minimum workers' rights as stipulated in the international standards of work and a correlation was thus established by the ILO between the categories of indicators on decent work and information on the national legislations on work. How can the ILO make an appreciation and correlate this type of information? In international comparisons, the ratification by the countries of ILO conventions gives the best indication of the current legislation and the regulation of work. However, ratification may be an insufficient indicator of implementation and its effect on work standards. Information on the legal framework of work must relate to legislation and the scope of application, as well as to implementation of

the right in jurisprudence. Such information must be regularly updated (ILO, 2008b). In its report on “the measurement of decent work”, the *ad hoc* tripartite meeting of experts put forward a model for the organisation of information on labour laws and the decent work legal framework. Conventions were thus measured against this model, for which the ILO conventions appeared relevant. Curiously, whereas one might have expected a large number of conventions to figure within the categories of indicators listed, the tripartite meeting accepted only a small number of them (17), which were intended to measure the States’ efforts to implement the agenda in their legislation (Cf. *Infra*. IV.2.2 – Table 3). However, with a total of 188 ILO Conventions issued since the organisation was created, it would seem that many more than those mentioned in the report of the tripartite meeting of experts could be expected to be recalled during any analysis of the legal framework for quality of work.

One of the criticisms made against the classical ILO normative action was its disparate development in the form of separate and autonomous instruments for each of the organisation’s objectives, quite, independently of one another (Maupain, 2008). The aim of the Decent Work concept was initially to provide a concise overview of the objectives and programs of the ILO (Bonnechère, 2007) which has enabled some authors to speak of a “new integrated normative approach” (Maupain, 2008). The adoption of the “Declaration on Social Justice for a Fair Globalization” by the International Labour Conference, 10 June 2008, had the specific objective of strengthening the ILO’s capacity for action whilst providing a legal platform for the Decent Work Agenda (Drouin, Duplessis, 2010). Although there are many references to Decent Work in the body of the Declaration itself, it is surprising that this concept is lacking in the title of the Declaration. This suppression is due to the fact that for the employers’ organisations, the concept of Decent Work is not consensually defined, and it must also be defined at national level (Drouin, Duplessis, 2010).

Another criticism is also made because of recourse to a Declaration establishing a standard with a dubious obligatory nature. Recourse in the form of a declaration is not an innovation in ILO courses of action; the 1944 Philadelphia Declaration on the aims and purposes of the International Labour Organisation, the 1963 Declaration concerning the Policy of Apartheid in South Africa (abrogated in 1991), the 1998 Declaration on “Fundamental Principles and Rights at Work” (Cf. IV.2.2) and the 2008 Declaration on “Social Justice for a Fair Globalisation” are four such examples. It aims to renew the ILO’s message without modifying its constitutional texts (Maupain, 2008).

If not ratified (Wisskichen, 2005), a declaration should not be perceived as a normative instrument but as a “formal and solemn instru-

ment suitable for rare occasions when principles of lasting importance are being enunciated”²⁴: it is an “exceptional form which goes beyond the organisation and reaches the whole world (...), used by the ILO to “recognise, guarantee and protect rights and principles that are untouchable” (ILC Record proceedings in 1964 quoted by Maupain, 2008).

The interest of these declarations is based on a “new approach of the normative question”, management by objectives, (Supiot, 2006) whose effectiveness is not measured only by the ratification of conventions, but also by the procedures created as a follow-up. For the 1998 Declaration on Fundamental Principles and Rights at Work, in order to guarantee the effectiveness of the obligations included in the declaration, a follow-up procedure was set up; each Member State that has not ratified one or more of these Conventions is asked every year to report on the status of the relevant rights and principles within their borders, and stating any impediment to ratification.

This mechanism tries to solve the problem of the weak ratification of fundamental conventions (Servais, 2004) related to the “normative self-service” (Supiot, 2006) authorised by the system of ratification in the ILO constitution.

The perceptions of this use of soft law are divergent. Some authors (Maupain, 2008) see it as a tool to overcome the inefficiency of the ILO’s legal control mechanisms. Others (including Duplessis, in 2007) note that soft law is emerging as a social and legal response to the growing complexity of international orders, but suggest a risk of dissolution of labour law and the body of standards developed since the origins of the ILO. However, this strategy has also been considered as a confirmation of the abandonment of the ILO normative action in the form of hard law (Alston, 2004) even if, for other authors (e.g. Maupain, 2005), the recourse to a declaration, like that on “Fundamental Principles and Rights at Work”, in 2008, allowed a definite progression in the ratification of conventions since the Declaration was adopted.

B. Promoting Fundamental Social Rights

1. The European Charters

Fundamental rights in the EU legal order have been developed by the European Court of Justice as a result of the awareness by national constitutional courts in respect of fundamental rights protected by EU Member States’ national legislation. The need for general principles of EU law to include protection for fundamental rights is driven by the

²⁴ Memorandum of the United Nations Office of Legal Affairs, E/CN.4/L.610 (1962), 2 April 1962.

consequences in the doctrine of supremacy for EU Law and for national constitutions to protect such rights. As pointed out by Bercusson (in 2006), the evidence of these past struggles is to be found in Treaty provisions, rulings of the ECJ and in many resolutions and declarations issued by EU institutions.

The most important solemn declaration on the quality of employment was the Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 in a declaration by all Member States, with the exception of the United Kingdom. The Community Charter established the main principles on which the European labour law model was based and influenced the development of the European social model in the following decade. Under this Charter, the Community has to make provision for the fundamental social rights of workers as follows: Freedom of movement (Articles 1 to 3); Employment and remuneration (Articles 4 to 6); Improvement of living and working conditions (Articles 7 to 9); Social protection (Article 10); Freedom of association and collective bargaining (Articles 11 to 14); Vocational training (Article 15); Equal treatment for men and women (Article 16); Information and consultation and participation for workers (Articles 17 to 18); Health protection and safety at the workplace (Article 19); Protection of children and adolescents (Articles 20 to 23); Elderly persons (Articles 24 to 25); Disabled persons (Article 26). The Charter represents a commitment by the Member States to a set of social policy and labour law objectives (Hennion *et al.*, 2010).

The legal status of the Community Charter is that of a political declaration since, due to the opposition of the UK Government, the Charter could not be integrated in the EC Treaty in 1989 (Bercusson, 1990). However, it had three effects and legal consequences. Firstly, the 1989 Charter is mentioned in the preamble to the Treaty on European Union and in Article 136 of the EC Treaty²⁵. Secondly, as a form of soft law, the Charter may be used by the European Court of Justice as an interpretative guide in litigation concerning social and labour rights. Such litigation could take the form of legal action by way of preliminary references by national courts (Article 267 TFEU) challenging Member States' implementation of Union law, which arguably violates the fundamental social rights of workers in the Charter (Kravaritou, 2009).

²⁵ "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 19 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers. Article 151 of the Social Chapter of the TFEU explicitly refers to it: "*The Union and the Member States, having in mind fundamental social rights such as those set out ... in the 1989 Community Charter of the Fundamental Social Rights of Workers*".

Thirdly, following the declaration of the Community Charter, the European Commission adopted a Social Action Programme²⁶ to implement the Charter.

Despite its declaratory nature, the Charter was influential in the launching of initiatives in employment and industrial relations policy, which during the 1990s produced a number of directives relevant to employment quality²⁷. However, it should be mentioned that social rights at EU level, also developed in the context of the progressive institutional process of European integration. The consideration of fundamental rights relating to working conditions, and particularly to working time, is driven by the possibilities that these procedural institutional changes allow. The passage from unanimity to a qualified majority procedure of voting, introduced since the Single Act in 1986, has allowed the EU to introduce a wide range of directives, notably in the field of workers' health and safety. The establishment by the Maastricht Treaty of an institutionalised European Social Dialogue and social partner organisations able to conclude common agreements has also opened up a new pathway for the development of Directives in several other fields relating to employment quality (Addison, 2009). As noted by Bercusson (2000), the Directives on parental leave and part-time work are outcomes of the provisions of the Employment Title, which promote the adaptability of working time, one of the pillars of the future EES Guidelines, with the fundamental right to sex equality that involves reconciliation between work and family life. The Community Charter has also inspired the introduction of a qualitative perspective in the shaping of the original European Employment Strategy (EES), the first OMC soft law process introduced in 1997 and, more broadly, on the affirmed qualitative and rights-based perspective of the Lisbon Strategy, at least in its initial vision in the early 2000s.

²⁶ European Commission, Communication from the Commission concerning its Action Programme relating to the implementation of the Community Charter of Basic Social Rights for Workers, COM(89) 568 final, 29 November 1989.

²⁷ Among these we could highlight: the pregnant workers Directive (1992) providing maternity leave, dismissal protection, preservation of employment rights and provision of risk assessments; the 1993 Working Time Directive establishing the 48-hour week, rest periods, annual paid leave and regulation of night work; the directives based on the framework agreements on parental leave (1996), the part-time work Directive (1997), the fixed-term work Directive (1999), the 1994 European Works Council Directive, the directive on posted workers (1996) guaranteeing host country conditions to posted workers, on atypical workers (health and safety), a directive requiring agency workers and those on fixed term contracts to be informed of job risks and trained appropriately, the employers' duty to inform employees of the conditions applicable to any contract or employment relationship, and the protection of young people at work.

The Community Charter anticipated the potential of individual fundamental employment rights in the Charter of Fundamental Rights of the European Union, adopted in Nice in December 2000²⁸. The EU Charter includes a large number of fundamental trade union rights and social and labour standards. One of its stated objectives was to make fundamental rights more visible, relevant and important to EU citizens (Ellis, 2010). In the EU Charter, social and economic rights are recognised as having the same status as civil and political rights. The consequence is that fundamental rights upheld by the European Court may afford greater or more extensive protection (Kravaritou, 2009).

The EU Charter refers explicitly to a range of individual fundamental and collective rights related to employment quality in its multidimensional perspective²⁹. However, if these fundamental social rights are recognised they are poorly protected and implemented.

The first grey area lies in the limitations included in the EU Treaties and the Charter itself regarding the scope and implementation. Article 6(1) of TFEU provides that *“The Union recognises the rights, freedoms and principles set out in the Charter of fundamental rights of the European union of 7 December 2000, as adapted at Strasbourg on 12 December 2007 which shall have the same legal value as the Treaties”*. The impact of the Charter will be limited as the total legal effect of the Charter is itself extremely moderated by the provisions of Title VII governing its interpretation and application (Ellis, 2010). The third indent of Article 6(1) of the TFEU requires the Charter to be interpreted in accordance with this Title. There is no question of the Charter creat-

²⁸ Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000 and adopted by the Commission, the Council and the Member States, OJ C364/01 of 18 December 2000.

²⁹ The Title I on Dignity includes an article on the prohibition of slavery and forced labour (Art. 5). In Title II dedicated to freedoms, we would mention the freedom of thought, conscience and religion (Art. 10), freedom of assembly and association (Art. 12), freedom of access to vocational training (Art. 14), freedom to choose an occupation and to engage in work (Art. 15). Title III concerns equality rights, and particularly the fundamental principles of non-discrimination (Art. 21), equality between men and women (Art. 23) and also the right to an occupational integration for disabled persons (Art. 26). Title IV, dedicated to solidarity, evokes several rights important for employment quality: the right to information and consultation within the undertaking (Art. 27), right to collective bargaining and action (Art. 28), access to free placement services (Art. 29), protection against unjustified dismissal (Art. 30), right to fair and just working conditions which respect health, safety and dignity (Art. 31), the prohibition of child labour and the protection of young workers (Art. 32), protection from dismissal for maternity reasons and to paid maternity and parental leave (Art. 33), and the right to social security and social assistance in the event of industrial accidents and loss of employment (Art. 34).

ing new free-standing rights because Article 51(1) limits those it addressees:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The Charter thus provides assistance with interpretation of Union legislation and Member States' implementation measures, and may also provide an argument supporting any challenge to such acts, but this is the legal extent of its power (De Schutter, 2010). The second indent of Article 6(1) of the TFEU states firmly that the '*provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*'. Moreover, Article 51(2) reiterates that the Charter does not extend the field of application of EU law beyond the powers of the Union, establish any new power or task for the Union, nor modify powers and tasks as defined in the Treaties. This provision poses a central problem as there is no EU competence to promote many of the Charter's rights. To that extent the EU and related Member States' activities may fall outside the scope of the Charter (Groussot and Pech, 2010). One example very well illustrates well this lack of harmony. Article 153(5) TFEU (137(6) of the EC Treaty) explicitly excludes the right of association and the right to strike, but freedom of association and the right to take collective active action are explicitly guaranteed in Articles 12 and 28 of the Charter. The central problem is the clash between limited EU competence and the EU Charter's fundamental rights. If fundamental rights are subject to any competence, it seriously undermines the concept of fundamental human rights. Values elevated by the EU to the status of fundamental human rights are only protected within the limits of EU competence, and the EU must ignore fundamental human rights where they come up against the limitation of its competence (Bercusson, 2008). Article 52(2) emphasises that rights recognised by the Charter for which provision is made in the Treaties must be exercised within the limits set out in the Treaties (Garcia, 2002).

A second important grey area for implementation of the Charter is linked to the derogations negotiated by certain Member States. Poland and the UK secured a Protocol on the application of the Charter for their countries. Its most important stipulation concerns 'justiciability'; the Charter does not extend the capability of the European Court of Justice or of Polish or UK courts to find that the national laws of these two Member States are inconsistent with the Charter. The Protocol does not,

apparently, preclude such courts from giving an extensive interpretation of national laws in recognition of rights protected by the Charter. Poland therefore established Declaration 61, stating that the Charter “does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity”. As noted by Ellis (2010), all this makes it unlikely that the courts of the other Member States will interpret the Charter very rigorously since to do so would be to disadvantage themselves whilst creating an advantage for Poland and the UK.

Moreover, the Charters of the European Union, whilst guaranteeing special rights, cannot guarantee nor safeguard all fundamental rights equally. These texts do not offer the same guarantees as the national legal orders in several specific domains that are crucial for employment quality. This is the case with the right to work or to social security in respect of new categories of workers. The protection of these rights has not yet been adapted to cover flexible jobs, temporary work, part-time employment or low paid jobs, categories that are created by the climate of a globalised economy and cross-border labour relations which are not protected by law. This has negative consequences, not only on social rights arising from labour but also on other fundamental rights, including the right to social security. They are both linked as the rights of underemployed workers, part-time workers or those with flexible jobs are threatened and weakened. Although the charters recognise these rights *stricto sensu*, the real issue is their effective implementation in the EU legal framework. The narrow scope of EU policy on employment and economic growths, clearly set as the overriding objectives for the EU in the new Europe 2020 Strategy, has been underpinned by a narrow legal focus on economic freedoms to the detriment of the social dimension (Kravaritou, 2009). It has been argued that the ECJ, by reference to the Charter in its rulings, could be an important vector for the implementation of fundamental rights in the EU legal order. However, the recent evolution of ECJ rulings does not really support this perspective. Both *Viking* and *Laval* rulings³⁰, even before ratification of the Charter, referred to article 28 and not only did they subordinate the right to strike to economic freedoms but they also applied their own criteria to assess the legality of the strike, ignoring any reference to national rules, and even constitutional rules concerning these criteria (Ghailani, 2008; Dorssemont, 2009).

³⁰ Case 438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking line ABP*, 11 December 2007; Case c-341/05, *Laval und Partneri*, 18 December 2007.

The *Rüffert*³¹ judgment is also worrying. The case was about whether public authorities, when awarding contracts for work, have the right to demand that tendering companies commit themselves to pay wages to all workers including posted workers in line with rates in collective agreements applicable in the place where the work is being carried out. It does not recognise the rights of Member States and public authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers, as these would not be compatible with the Posting Directive. Nor does it recognise the rights of trade unions to demand that equal wages and working conditions and the observance of collective agreed standards be applied to migrant workers in line with workers from the place of work, regardless of nationality, beyond the minimum standards recognised by the Posting Directive (Ghailani, 2009). As pointed out by Aliprantis (2010), the ideology of economic liberalism and not that of the European economic treaties, is at the origin of this evolution which won the case in the Court of Justice. This ideology sees social rights as incompatible with economic freedoms, freedom of the market and competition. We would like to refer to Filip Dorssemont's chapter which deals with this issue in further detail.

In the negative perspective of the evolution of the hard law process, in terms of improving the legal dimensions of employment, could a soft law procedure come to the rescue for the implementation of fundamental rights? Social rights guaranteed by the Treaty could be used to put pressure on the Commission to make proposals for their implementation through the establishment of an action programme. The threat of the European Court invoking the doctrine of direct effect in the absence of such implementation measures would be an incentive to Community legislative action (Bercusson, 2009). It should be mentioned that in 2009 the European Economic and Social Committee adopted an opinion on "A new European Social Action Programme"³². The EESC stressed the need for a new European Social Programme so EU social developments could keep pace with economic and market developments. The programme should specifically address policy areas such as the quality of life, fundamental rights, employment and work of high quality, social solidarity (...). Guaranteeing fundamental rights was identified as a key priority: the principles and provisions of the Charter of Fundamental Rights should help guide and encourage EU social policy developments and actions. This opinion was unfortunately not taken up by the European Commission.

³¹ Case C-346/06, *Dirk Rüffert v land Niedersachsen*, 8 April 2008.

³² EESC (2008), Opinion of the European Economic and Social Committee on A new European Social Action Programme, SOC/295, 9 July 2008.

In addition to these legally binding declarations, the EU has also recently set up softer tools to reinforce implementation of fundamental rights. The Fundamental Rights Agency (FRA) was set up by Regulation 168/2007³³ to provide assistance and independent expertise relating to fundamental rights, in the domain of Community law. The FRA's activities serve to promote fundamental rights and to support the EU institutions and Member States in raising the level of protection for everyone in the European Union. To achieve this objective, the Agency collects data on fundamental rights, conducts research and analysis, provides independent advice to policy-makers, networks with human rights stakeholders, and finally it develops communication activities to communicate the results of its work and to raise awareness of fundamental rights. It publishes an annual report on fundamental rights issues covering all the areas in which the agency is active, and highlighting examples of good practices.

The European Commission also adopted in 2010 a "Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union" (European Commission, 2010f). In this Strategy, the Commission announced its intention to present an annual report monitoring progress on the enforcement of the Charter in areas where the EU has powers to act. The first report was issued on 30 March 2011 by the European Commission.

2. ILO Declaration on Fundamental Principles and Rights at Work

In order to respond to the evolution of economic globalisation (Maupain, 2005), in 1998, the ILO adopted, a Declaration on "Fundamental Principles and Rights at Work"³⁴. This Declaration commits all Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions, and makes it clear that these rights are universal. These categories and conventions are:

- freedom of association and the effective recognition of the right to collective bargaining: C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 and C98 Right to Organise and Collective Bargaining Convention, 1949;

³³ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1.

³⁴ Adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

- the elimination of forced or compulsory labour: C29 Forced Labour Convention, 1930 and C105 Abolition of Forced Labour Convention, 1957;
- the abolition of child labour: C138 Minimum Age Convention, 1973 and C182 Worst Forms of Child Labour Convention, 1999;
- the elimination of discrimination in respect of employment and occupation. C100 Equal Remuneration Convention, 1951 and C111 Discrimination (Employment and Occupation) Convention, 1958.

We will not deal again with the obligatory nature of this declaration and its follow-up procedure, and the doctrinal debates that it caused (Alston, 2004; Maupain, 2005; Drouin and Duplessis, 2010). At this stage, it would appear important, and by means of a legal analysis of the quality of employment, to compare the standards considered as “fundamental” by the 1998 declaration with those retained by the Tripartite Meeting of Experts on the Measurement of Decent Work, as legal indicators of the progress made by Members States in the promotion of decent work (Table 3).

Table 3

Substantive element of the Decent Work Agenda	Ratification of ILO Conventions	ILO’s Fundamental Conventions (1998 declaration)
<u>Employment opportunities</u> – Government commitment to full employment – Unemployment insurance	C.122 ³⁵ C.102 ³⁶	
<u>Adequate earnings and productive work</u> – Statutory minimum wage	C.131 ³⁷	
<u>Decent hours</u> – Maximum hours of work.	C.1 ³⁸	
<u>Combination of work, family and personal life</u> – Maternity leave	C.183 ³⁹	
<u>Work that should be abolished</u> – Child labour	C.138 ⁴⁰ -C.182 ⁴¹	C.138-C.182

³⁵ Employment Policy Convention, 1964.

³⁶ Convention concerning minimum standards of social security, 1952.

³⁷ Minimum Wage Fixing Convention, 1970.

³⁸ Hours of Work Convention, 1919.

³⁹ Maternity Protection Convention, 2000.

⁴⁰ Minimum Age Convention, 1973.

⁴¹ Worst Form of Child Labour Convention, 1999.

– Forced labour	C.29 ⁴² -C.105 ⁴³	C.29-C.105
<u>Stability and security of work</u>	(no legal indicator suggested)	
<u>Equal opportunity and treatment in employment</u> – Anti-discrimination law based on sex of worker – Anti-discrimination law based on race, ethnicity, religion or national origin	C.100 ⁴⁴ -C.111 ⁴⁵ C.100-C.111	C.100-C.111 C.100-C.111
<u>Safe work environment</u> – Occupational safety and health insurance – Labour inspection	C.155 ⁴⁶ – C.102 C.81 ⁴⁷ – C.129 ⁴⁸	
<u>Social security</u> – Pension. – Incapacity for work due to sickness – Incapacity for work due to invalidity	C.102 C.102 C.102	
<u>Social dialogue, workers' and employers' representation</u> – Freedom of association and right to organise – Collective bargaining right – Tripartite consultations	C.87 ⁴⁹ C.98 ⁵⁰ C.144 ⁵¹	C87 C98

(Source: ILO, "Measurement of decent work: Discussion paper for the Tripartite Meeting of Experts on the Measurement of Decent Work", Geneva, 8-10 September 2008)

Thus it may be noted that of the ten major elements of the Decent Work Agenda, only four appear in the Declaration of 1998. How can the variation in standards be justified? Is there in the proclamation of the fundamental character of the rights of the 1998 Declaration an implicit risk that the others will be considered as secondary rights and relegated to a normative accessory role (Supiot, 2006)? One explanation for the low number of conventions selected lies in the origin of this Declara-

⁴² Forced Labour Convention, 1930.

⁴³ Abolition of Forced Labour Convention, 1935.

⁴⁴ Equal Remuneration Convention, 1951.

⁴⁵ Discrimination in respect of Employment and Occupation Convention, 1958.

⁴⁶ Occupational Safety and Health Convention, 1981.

⁴⁷ Labour Inspection Convention, 1947.

⁴⁸ Labour Inspection in Agriculture Convention, 1969.

⁴⁹ Freedom of Association and Protection of the Right to Organise Convention, 1948.

⁵⁰ Right to Organise and Collective Bargaining Convention, 1949.

⁵¹ Tripartite consultations to promote the Implementation of International Labour Standards Convention, 1976.

tion. As an initiative by the employers' group in 1997, it acts primarily to establish a link between international trade and standards of work and to promote fundamental rights without the application of commercial sanctions against the States which do not respect them (Drouin, Duplessis, 2010). The 2008 Declaration which refers in Article 1-a to the principles and rights set out in the ILO Constitution and the Philadelphia Declaration, can be seen as the introduction of an international social public order (Supiot, 2006) and not just the diminution of the ILO's normative capacity (Alston, 2004).

If both the Decent Work Agenda and the 1998 Declaration on Fundamental Rights also mention collective bargaining and discrimination, the fact is that neither social security, nor the general protection for workers' health and safety appear in the 1998 Declaration. Why should Social security not be considered as a fundamental right? On this issue, the 1998 Declaration seems to have less authority than the requirements of the Decent Work Agenda. But is it conceivable that fundamental rights should have fewer requirements than decent work? This restrictive and rigorous interpretation should be moderated.

On the one hand, to include only eight conventions of the 1998 Declaration amounts to not taking account of the whole of the ILO constitutional context. In its Resolution and Conclusions on social security (ILO, 2001), the International Labour Conference recalled that social security is a basic human right. It may be considered that the 1998 Declaration covers only rights at work and the social security aspect is outside its framework, though its fundamental nature had already been affirmed by the 1944 Philadelphia Declaration (Supiot, 2006).

On the other hand, it can also be considered that the policy of the ILO is a progressive process which aims to enlarge the scope of conventions which any Member State must respect as a condition of its membership of the ILO, since the 1998 Declaration, continuing with the Decent Work Agenda then the 2008 Declaration. The Convention 102, which is the basic convention covering the minimum standards for social security, is the only one of the six ILO conventions on social security which defines the nine traditional branches of social security and establishes minimum standards for every one of these branches. The ratification of the Convention 102 seems to be the legal tool for measuring decent work in three major elements of the Decent Work Agenda: social security (pension, incapacity for work due to sickness, incapacity for work due to invalidity), employment opportunities (unemployment insurance) and a safe work environment (occupational safety and health insurance).

The 2008 "Declaration on Social Justice for a Fair Globalisation" is dedicated to social security as being one of the most important consider-

ations of the ILO. Although this Declaration does not explicitly proclaim fundamental rights, it recognises that the promotion of employment, social protection, social dialogue, and rights at work, are “inseparable, interrelated and mutually supportive” in the commitments and the efforts of the Member States and ILO action. More recently, in the “Global Jobs Pact”, adopted on 19 June 2009, the International Labour Conference asked Members countries to incorporate adequate social protection for everybody, in accordance with basic social protection including: access to health care, income security for the elderly and persons with disabilities, child benefits and income security, combined with public employment guarantee schemes for the unemployed and working poor.

Conclusive Remarks

The comparison of the conceptual frameworks of job quality developed in the EU and the ILO shows that beyond slight differences on particular aspects, such as e.g. children’s labour, there is a convergence in the approaches of both institutions. Although expressed from different policy perspectives and scopes, there is a common embedding in fundamental human and workers’ rights arising from both legal backgrounds. This could be expected as international, and particularly ILO, conventions are endorsed by the EU member states and often underpin the EU legal framework. The values promoted by the ILO through the decent work agenda and the preoccupation of strengthening the social dimension of globalisation are also supported by the EU in its external policy dimension, and within the EU through the values characterising the European Social Model. The policy agendas of the ILO and the EU encompass similar frameworks for action in favour of more and better jobs, managing change, social cohesion and equal opportunities. However, if the perspective of improving job quality, and more broadly social quality, is still present, to a certain extent, in the new EU meta-strategy for the next decade (Europe 2020), this is obviously not an overarching priority, as the focus is more than ever on economic and budgetary perspectives and the creation of more but not necessarily better jobs.

The EU conceptual framework of job quality needs to be redefined, as acknowledged by the EU Commission in its flagship initiative on New Skills for New Jobs framing the Europe 2020 Strategy. The complementarities with the ILO Decent Work approach could be highlighted and deepened in this perspective. It is necessary to mainstream the decent work approach in the EU policy framework, first as a key-dimension of its external policy, but also as a component of its internal policies, as a complementary and supporting approach towards the

improvement of quality of work and employment policies. The credibility of the EU at the international level in promoting DW depends largely on its ability to achieve its own objective of delivering more quality jobs in Europe. There is a need to (re)mainstream job quality in the EU internal policy agenda if Europe wants to sustainably cope with the succession of economic crises affecting the world. Beyond this, there is also pressing need for the EU to (re)introduce a social quality perspective in the European integration, focused on the improvement of well-being of European citizens (as stated in the Treaties). This is what European citizens are expecting from the EU, but out of sight in the obsessive focus on economic and monetary integration of Europe.

Over time, the EU has built up a solid legislative *acquis* in various domains regarding employment quality such as working conditions, health and safety and, more widely, gender equality and non-discrimination. However, legislation at EU level is not always adequate and soft instruments such as policy coordination can help shape a consensus and create the right conditions for action at national or company level. This recourse to soft law to complement, and sometimes to substitute, hard law has become increasingly prevalent at EU level since the end of the 1990, even in fields such as gender equality, non-discrimination or health and safety, for which a strong legal corpus already exists.

This intensive recourse to soft law raised a strong debate on the opposition or the complementarity between hard and soft law within the EU policy framework. As explained in this chapter, “job quality” appears in the EU landscape through the Lisbon Strategy and more particularly through one of the new forms of soft law governance, the EES. The relationship between the *acquis* and the EES is a two-way street. The *acquis* is a legally binding framework of labour regulation which limits the scope and nature of the policies adopted under the EES. At the same time, the EES expanded the scope of the *acquis* by inspiring new regulations aimed at achieving the objectives of the EES, which are based on the social chapter of the Treaty, among other provisions. This debate is still on-going, and probably will be for a long time. The introduction of new hard law relating to job quality dimensions has become complex given the increased number of EU Member States and the relative blocking of European Social Dialogue in recent years, at least at the inter-professional level. The Lisbon Treaty has given more legislative powers to the European Parliament, but this has not exactly yet been translated into effective action, and the tensions between European institutions are reaching a peak when it comes to discussing hard law issues.

Such tensions also appear in the action of the ILO on decent work, which is indeed based on ambivalence issues as well. Here, the focus is on to the normative action, which is essential for measuring progress of

Member States in achieving the goals set by the ILO through the number and the importance of the conventions ratified by each state. However, this same normative action is found to be insufficient. Due to a lack of interdependence between the various conventions developed by the ILO, disadvantages which are of voluntary and fragmented character become apparent/are disclosed.

The use of soft law has been rendered necessary to compensate for the insufficiency of the normative action in policy domains where legal competences are typically at national (or subnational) levels. However, the point where the comparison between the action of the ILO on decent work and the European policy on job quality finds an end, is precisely this lack of binding tools for global institutions as they do not possess the legal capacity to force member states to progress in the promotion of decent work. Although these new ILO instruments are viewed as being insufficient, it seems paradoxically that they actually do reappear in MS national policy making. The action of promoting decent work has enabled the ILO to launch a new normative approach, through the use of legal instruments such as solemn Declarations.

The discussions arising from the action of the European Union on job quality on whether hard and soft law are of opposing or complementing character, are also reflected at the ILO regarding issues of compensating the low number of ratifications and the risk of dissolution of labour law and the body of standards developed since the origins of the ILO.