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## **Child labour and EU law and policy: A regional solution for a global issue<sup>1</sup>**

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### **Abstract**

This chapter will explore the role of the EU in creating and developing labour policies that address or indirectly affect children. The analysis will be framed within the context of the global debates around child labour, and will highlight the role that the EU may play in a global context. The chapter will start by sketching the main lines of the ‘child labour’ debate, the qualitative and quantitative significance of children in the EU labour market, and the relevant EU competences. It will then touch upon a range of EU labour law instruments that affect children, both as direct addressees – especially the Young Workers Directive – and collateral beneficiaries – including a range of tools that address sex discrimination. Finally, the chapter will assess the compatibility between the instruments and policies considered and, amongst others, the CRC, the relevant ILO instruments, and the CFR. The conclusion will determine the scope for improvement of the current state of affairs, and present policy recommendations.

### **1. Child labour: a global solution for a global issue?**

Whether children – here understood as anyone below the age of 18, in accordance with the CRC – should be allowed to participate in the labour market or in any way engage with the world of work (and to what extent) is an old and contentious debate. The CRC tries to offer some guidance on this matter, by establishing ‘the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’ (Article 32). This has, however, been insufficient to make clarity on what precisely are the limits to children’s participation in the labour market. For these purposes, the notion of ‘child labour’ has been developed, by usually referring to those forms of work that

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somehow are detrimental to children's physical and mental development and, therefore, should be prohibited. Even understanding 'child labour' in these narrow terms, the ILO estimates that there are nowadays across the world around 215 million children who carry out work that can be classified as 'child labour' (ILO 2013).

Although child labour debates focus mostly on practices that occur outside of the EU, the phenomenon is all but absent within the EU. Despite the lack of reliable data – a problem exacerbated by the innumerable, often young children working in the informal economy, in domestic environments, in family businesses, and more generally without declaring –, the number of children in the EU-27 working for pay, profit or family gain could reach 7.5 million (Rodríguez et al. 2007: 4). Leaving aside the insurmountable definitional and logistic difficulties in measuring the extent to which children work (Buck et al. 2011: 175ff), trade unions and media reports have made it clear that the economic crisis and weakening of the social welfare state have rendered 'child labour' in Europe a common phenomenon, affecting particularly migrant and ethnic minority children: children dropping out of school too early and acting as sibling-carers, sex workers, farm aids, shop assistants for heavy work and, worst of all, members of local mafias (as beggars, prostitutes or drug dealers), are dangerously becoming normalised patterns (ITUC 2011; Allegra 2012; Nadeau 2012). Other less discussed risks concern cross-border young workers engaged in construction work and services, and au-pair workers engaged under sui generis agreements often outside the scope of labour law (Rodríguez et al. 2007: 107).

Independently of the figures and types of work involved, the attractiveness of involving children with the world of labour will always exist (at least from the perspective of the recipient of the outcome of that work), due to the low costs and abundance of workers involved (Van Bueren 1995: 263). It is therefore crucial that policy and decision-makers have a clear idea of the values and objectives that should guide them in their discourse and action. Any measured answer needs to consider health, developmental, educational, social, economic, political and ethical issues. Global debates have raised innumerable arguments, in favour of either a welfare approach or an autonomy approach. On the one hand, one may argue that children's psychological and physical development may be jeopardised if they are allowed to carry out working activities, especially those entailing particular risks, and that their time should be dedicated to social interactions, education, and a range of activities that may enhance their well-being and nurture their potential. Also, letting children work perpetuates economic, educational and social disadvantages and inequalities, besides generally worsening labour and social standards (Buck et al. 2011: 169). Eliminating 'child labour' and offering universal education have indeed been reputed as being capable of bringing about vast economic benefits (ILO 2003). On the other hand, arguments in favour of a more flexible approach to working children relate to children's desire to become independent (namely economically), be helpful in their families, feel part of their social environments, and exercise their 'right to work' to fulfil their needs and construct their identity (Ochaíta et al. 2000: 25; Van Bueren 1995: 264; Hanson and Vandaele 2003; Hanson and Nieuwenhuys 2013).

This contribution will situate itself within a welfare approach. It is submitted that children's and carers' autonomy on this matter is legitimately curtailed on grounds of the children's best interests and the public interest in protecting children from detrimental effects to their physical, mental and moral development, as well as

on the grounds of the state obligation to safeguard the rights of children to physical and mental integrity, health and education. Children's autonomy, right to participation and privacy need to be paid heed in this context in order to achieve a balanced overall policy, but may not outbalance the importance of protecting children from harmful activities. Indeed, it is not sensible to use children's rights to autonomy, participation and privacy as a shield to defend exploitative practices that barely carry any benefit to the children in question and are, in fact, unethical means to create profit for someone else. Also, whilst the 'child labour' debate at a global scale may be accused of ethnocentrism (Boyden 1997), and a 'regulative approach' (as opposed to an 'abolitionist approach') may deserve attention in developing countries (Hanson and Vandaele 2003), in a European context the peril of ethnocentrism is practically inexistent in respect of 'child labour'. Most important, the socio-economic standards existent in the EU do not allow for the type of concessions admitted in debates regarding child labour in developing countries; on the contrary, much more demanding policies in this regard need to be implemented in order to reflect the (relative) degree of development across the EU. That may explain why, independently of regional socio-economic-cultural nuances (Rodríguez et al. 2007: 97-99), a social and economic 'abolitionist' outlook on this subject-matter is generally favoured in the prevailing legal and official discourses (including in the most recent EU Member States: Calvo/Rodríguez 2007: 13-21). Globalisation is making child labour a problem all the more pressing (Buck et al. 2011:187), and being permissive or flexible on this subject cannot be the answer to achieve the EU's or any of its Member States' objectives. Hence, children are, in principle, better placed in educational, family and sport/leisure social settings rather than in work places. Any deviation from this should be treated as an exception and thus thoroughly scrutinised. This approach will be discussed in greater detail and borne in mind throughout this chapter.

It is therefore important to devise a tight and well implemented legal framework to tackle issues related to children's involvement with the world of labour. This is all the more so in the light of the increasingly enthusiastic (even if perhaps sometimes only rhetorical) commitment to children's rights and well-being by the EU institutions (European Commission 2011), reflected in the Treaties as well (Articles 3(3) and (5) TEU). This commitment to children's rights has been expressed in much more reluctant terms with regard to EU's external policy, although both the Commission and the Council have shown some interest in offering children a special place in EU's external policies, particularly with regard to the fight against child labour (European Commission 2008; Council of Ministers of the European Union 2010). This chapter will analyse whether the EU has achieved a satisfactory degree of protection of children's rights and interests in the field of labour, and, if not, what else can be done to improve the current state-of-affairs. With this purpose, section 2 sets the scene by succinctly discussing the development of an EU labour policy, particularly from a competence perspective. Section 3 then explores the range of EU labour law tools that have, in different ways, affected children, and section 4 assesses the level of protection offered by these tools to working children and, in particular, their compatibility with other, more highly ranked instruments. Section 5 finally determines the scope for improvement and offers key policy recommendations. This analysis will show how the EU should position itself globally, in other words, what role it should try to play in relation to child labour in its relationship with non-EU countries.

## 2. EU labour policy – Competences and evolution

Until 1987, when the SEA came into force, the Treaty establishing the EEC Treaty contained extremely weak labour and social law provisions. There was, in fact, a complete lack of competence to legislate with regard to labour standards, as Articles 117 and 118 EEC only contained a ‘political programme’ (Hartwig 2008: 245), comprised of references to common goals and values, and the commitment to promoting collaboration between Member States. With the SEA, Articles 118a and 118b were introduced into the EEC and the Community became, for the first time, competent to regulate on health and safety related matters in the field of labour. Only minimum standards could be set by directives produced on the basis of this competence, precluding full harmonisation in this field. Article 118a EEC remained unchanged by the 1992 Treaty of Maastricht and it was on its basis that the Community produced the Young Workers Directive (Directive 94/33/EC of 22 June 1994 on the protection of young people at work, hereafter ‘YWD’, analysed below).

Soon after the introduction of these competences, the 1989 Community Charter of Fundamental Social Rights for Workers (Community Charter) was adopted by 11 out of the then 12 Member States (the UK only adopting it when the Charter was (partly) incorporated into the Treaties by the 1997 Treaty of Amsterdam). This Charter enshrines a range of labour-related rights, and it was approved as a ‘declaration’, hence being considered merely as a (moral) commitment rather than imposing legal obligations as such (Article 28). Still, on the basis of this Charter, the Commission launched the 1992 Social Action Programme including 47 proposals implementing the Charter, including several land-mark directives such as those on pregnant workers, working time and, crucially, the YWD.

Subsequent treaties have not significantly amended the relevant provisions, such that the EU competence to regulate labour matters has remained largely unchanged since 1997. The Treaties have, however, increasingly endowed the EU with competences in the field of justice and home affairs, as well as some limited supporting and coordinating competences in the fields of social inclusion (Articles 9 and 151-153 TFEU) and education (Articles 6, 9 and 165-166 TFEU), enabling the EU institutions to legislate in labour-connected fields, as will be seen below. Most significantly, it has been the CJEU that, on some occasions (even if not always with consensually positive results), have pushed forward a social and human rights-driven agenda (namely in relation to gender equality, as it will be seen in 3.1. below). Also, the production and later inclusion of the CFR into the Treaties also increased the number of labour-related provisions from which the EU institutions, Member States and individuals may draw to potentially enhance their positions (further explored in 4.3. below). A substantial proportion of the EU’s work on labour and children related matters are nowadays dealt with within the context of soft law instruments and the OMC (which will be discussed at greater length in 3.3. below). EU’s labour and social policy may therefore be characterised as significant, albeit still considerably limited by the reduced number of competences the EU possesses in this field and the non-binding nature of many of its outcomes. Bearing this in mind, the next section will

consider how the EU devised a range of tools more or less connected with the labour world, which to a greater or lesser extent have had an impact on children.

### **3. Children in the EU's (internal) labour policy**

#### **3.1. Children as incidental beneficiaries**

By placing a strong emphasis on the role of the labour force in the creation of an integrated market, the Community inevitably affected families and children. Consequently, although it took several decades for the EU institutions to see children as potential direct and specific beneficiaries of EU law, several of its policies and instruments in the context of labour had more or less indirect effects on children ever since the inception of the European Communities. Policies on free movement of workers allowed workers' children to move with them, thus letting them enjoy a potentially better standard of life. The 1960s and 1970s were particularly prolific in creating indirect benefits to workers' children, namely by reinforcing the residence rights of workers' family members<sup>2</sup>, as well as of service providers' family members<sup>3</sup>. Although dependent on their parents' right to move and reside as workers, children also acquired specific rights, including the right to study and train in the host Member State in the same conditions as nationals of that State<sup>4</sup>, and the right to remain in that State once the employment relationship or service provision activity of their parents finished<sup>5</sup>. This obviously allowed children later on to become workers in their own right in the host Member State, thus entitling children to EU labour-related rights, albeit via their parents' exercise of EU law rights. This line of policy was strengthened by instruments that specifically allowed dependent children of workers, service providers, students and others, to work as dependent workers or self-employed.<sup>6</sup> The rationale for all these provisions benefiting children, however, lies in the fact that they were seen as 'obstacles' to their parents' free movement and, therefore, needed to be 'addressed' for the sake of securing the economic benefits of labour free movement – hence children were not autonomous right-holders, but simply possessed 'parasitic' entitlements (McGlynn 2002: 388).

The sex (later, gender) equality agenda has also been at the core of the Community's social policy since its inception. The original Article 119 EEC (now 157 TFEU) on gender equality in pay was relatively early on complemented by

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<sup>2</sup> Article 10 Regulation (EEC) No 1612/68, Council Directive 68/360/EEC, Regulation (EEC) No 1251/70.

<sup>3</sup> Council Directive 73/148/EEC.

<sup>4</sup> Article 12 Regulation (EEC) No 1612/68, now replaced by Article 10 Regulation (EU) No 492/2011 without any amendment.

<sup>5</sup> Regulation (EEC) No 1251/70 and Council Directive 75/34/EEC, now repealed and replaced by Directive 2004/38/EC, in particular Article 12.

<sup>6</sup> Council Directives 90/364/EEC, 90/365/EEC and 93/96/EEC on the right of residence, all replaced by Directive 2004/38/EC.

secondary legislation and supported by a rich line of European case-law. The Community pursued gender equality in the field of employment into the 1980s and 1990s, often following the lead of the Courts, in relation to pregnant workers, social security, self-employment, and childcare. Along with many other hard and soft-law instruments, as well as measures beyond the realm of employment, the EU has undoubtedly contributed to greater gender equality, which has improved women's work lives and, consequently, family lives and quality of childcare parents may provide to their children.

What is relevant to highlight here is the indirect relevance of these instruments for children. This range of labour-related instruments indirectly benefited children by ensuring, for example, that the adults caring for them would have to only work for a limited number of hours, possess some flexibility in their working arrangements, enjoy time off work in case of pregnancy/adoption/maternity/paternity, and consequently receive more income and/or time to dedicate to the children in their lives. Still, throughout this long period the interests and perspectives of children were 'either being sidelined, or addressed only in terms of their future status as "productive" workers' (Ruxton 2005: 137). This was about to change in the 1990s.

### **3.2. Children as direct beneficiaries**

Although only the 1990s brought an EU instrument addressing directly working children, one could already consider children (at least potentially) as direct beneficiaries of EU labour law and policy in the light of those instruments and policies relating to free movement of workers. Indeed, such instruments did benefit children directly, despite not addressing them specifically. From the moment that children may legally constitute workers, then they may also exercise their right to free movement – now not as indirect beneficiaries of the free movement of their parents, but as direct beneficiaries of their own right to movement as workers. The extent to which children have exercised such right is, however, unclear (due to lack of data), and most likely minimal, so children remain marginal, even if potentially direct, beneficiaries. At any rate, the availability of free movement of persons, in particular workers, to children and implicit recognition of children as potential addressees is significant, as well as nowadays clearly recognised (European Commission 2010: 13-15).

The first time, however, that the EU contemplated children as a discrete group in the context of labour only came about in 1967, by the hand of the Commission, in the form of a recommendation.<sup>7</sup> It took another 20 years until the EU institutions took any further steps in this regard: in 1987 the European Parliament called on the Commission to put forward a harmonising instrument on child labour and on Member States to ratify the ILO instruments on the subject-matter if they had not already done so.<sup>8</sup> The Parliament's initiative eventually bore its fruits, and the Commission

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<sup>7</sup> Recommendation 67/125/EEC of 31 January 1967, OJ 13 February 1967, pp. 405-408.

<sup>8</sup> European Parliament, Resolution on Child Labour, Doc. A2-67/87, OJ C 190/44, 16 June 1987.

presented its proposal for a Council directive on the protection of young people at work in 1992.<sup>9</sup> The Commission used a range of instruments as sources of inspiration, including the 1959 UN Declaration on the Rights of the Child and CRC. In its proposal, the Commission highlighted the wealth of evidence to the effect that young workers were more likely than adults to suffer detrimental effects, both physically and psychologically, from occupational risks and working conditions.

The relatively unambitious aims of the proposal were clear from the start. The minimum age for admission to employment was already 15 or 16 in most Member States, so the minimum age proposed by the Commission (15) was not exactly a challenging target. Also, minimum requirements regarding working time and rest periods were already in the process of being established by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (Working Time Directive, WTD), which meant that the proposal did not go much beyond what was already going to be available through the WTD. Moreover, the proposal excluded from its scope the provision of services and self-employment. Such lack of ambition may have been a strategy to achieve the required political consensus, couched on the assumption that the ILO standards were satisfactory and for the most part respected by Member States.

Also, despite the reference to the CRC in the explanatory memorandum to the Commission's proposal, the proposal did not make any reference to the CRC or adopt its terminology, namely 'children' as those under the age of 18. Instead, and giving preference to the World Health Organization's and ILO's classifications at the time, the proposal distinguished between 'children' (under the age of 15) and 'adolescents' (between 15 and 18 years of age), all constituting 'young people' (a distinction retained in Article 3 YWD). This distinction, although potentially empowering older children and promoting their autonomy in the light of their increased capacities, risks impregnating the legal consciousness of an understanding that reduces the rights of older children and deprives them of their due protection. In the light of the more recent strengthening of the EU's children's rights agenda and reliance on the CRC in that context, it would nowadays make sense to refer to all of these 'young people' as children.

Negotiations between and amongst Community institutions and Member States further watered down the Commission's proposal. For example, the harmonisation of the minimum number of days of *paid* annual leave was removed (leaving only a provision on *some* annual *rest* behind, thus allowing for minimal, unpaid annual leave). A few aspects of the proposal, however, were improved. For example, light work was defined as work that is not likely to be harmful to the safety, health or development of children, and is not such as to be harmful to their attendance at school, their participation in vocational guidance or training programmes approved by the competent authority or their capacity to benefit from the instruction received (Article 3(d) YWD), rather than the original, much more permissive notion of 'all work which does not cause any abnormal fatigue'. Also, the required age to benefit from the exception afforded to combined work/training schemes and light work was raised to 14 (Article 4(2)(b) and (c) YWD); derogations to the prohibition of light

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<sup>9</sup> Commission of the European Communities, Proposal for a Council Directive on the protection of young people at work, COM(91) 543 final – SYN 383, Brussels, 17 March 1992, point 3.

work below a certain age based on national practice and traditions (Article 3(3) of the Commission's proposal) were eliminated, as they were clearly excessive; and the maximum duration of work for children carrying out light work went down from 15 to 12 hours/term-time week and from 3 to 2 hours/school day (Article 8(1)(b) YWD), thus securing time for homework and leisure. Also, the cultural or similar activities derogation was subjected to further conditions during the process of negotiations, including not being likely to be harmful to children's safety, health, development or education (Article 5(2) YWD). Moreover, the final wording of the provisions on the general obligations of employers and vulnerability of young people (Articles 6 and 7 YWD respectively) was strengthened throughout the legislative procedure.

Several contentious or, at any rate, key issues remained unaddressed. Firstly, occasional or short-term work involving domestic service in a private household or non-harmful work for a family undertaking can be excluded by Member States from the Directive's scope of protection (Article 2(2) YWD), despite research indicating that exploitation of the work of children occurs very often in domestic and family settings (Van Bueren 1995: 266) and that 'occasional' and 'short-term' are quite vague terms. As Kenner highlights, partially drawing from Barnard's work, it may be tempting to justify such exception with 'visions of grape picking and crop harvesting', but 'less comfortable Dickensian imagery of domestic exploitation of children' also come quickly to mind (Kenner 2003: 183). The use of the 'private sphere' notion and public/private distinction to justify such derogations have rendered invisible/acceptable many types of work carried out by children in some Member States, such as domestic work, small errands, baby-sitting, newspaper delivery, gardening and caring for relatives (Larkins 2011). This exception has prioritised the deregulation agenda at the price of children's health and development, and the legislature should have to justify (and possibly restrict) such ground for derogation (Bond 1995). Also, 'the ideological, economic and pragmatic justifications for the immunity of some forms of this employment all depend upon a questionable belief in an impenetrable demarcation between the realm of the family on the one hand, and the market on the other' (Bond 1996: 291). Although any interference with the family and private realms obviously requires a great degree of justification and is associated with complex issues of parental autonomy and privacy, a more precise and limiting enunciation should have been adopted for the exception applicable to domestic service in a private household or non-harmful work for a family undertaking exception.

Secondly, allowing to derogate from the working time limits of 8 hours/day and 40 hours/week on the basis of 'objective grounds' (Article 8(5) YWD) offers excessive flexibility to Member States (hence the EESC having proposed the deletion of such exception)<sup>10</sup> – either no such exception should have been included, or it should have been tempered by the inclusion of the consideration of the best interests of the child, as well as of the legitimacy of the grounds in question and proportionality of the derogation sought. Thirdly, the prohibition of night work between midnight and 4a.m. – absolute in the initial proposal by the Commission – ended up being weakened by allowing work during that period under certain circumstances and in certain fields (Article 9(2) YWD). Fourthly, the reference to sanctions in the

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<sup>10</sup> Opinion on the proposal for a Council Decision on the Protection of Young People at Work (92/C 313/19), 23 September 1992, OJ No C 313/92 P 70, 30 November 1992.

Commission's initial proposal was deleted, and the already weak provision was renamed 'measures' and its wording was amended from requiring penalties to be 'effective, proportionate and dissuasive' to simply 'effective and proportionate' (Article 14 YWD). Even though the YWD is a directive, a more specific and detailed provision could be devised, as it will be discussed below (section 5).

In sum, and anticipating the discussion below, the Directive merely aligns EU law with ILO standards, practically ignoring the CRC and hardly going beyond what most Member States already did. The Directive's aims are worded generally and in positively protective terms: Article 1(3), second paragraph, for example, requires Member States to protect children from economic exploitation and any work that may have a negative impact on children's development or education. Also, the YWD contains a non-reducing clause (Article 16), preventing Member States from using the Directive to reduce the domestic levels of protection offered to working children. Such provisions have helped the YWD become an important piece of labour legislation at EU level, as conventional textbook coverage reflects. Nonetheless, the Directive dangerously allows Member States to fully exclude its application in relation to occasional and short-term work involving domestic service in a private household and non-harmful work in the context of family undertakings (Article 2(2)). A range of other loopholes have been permitted into the final version of the Directive (Articles 4 and 5 YWD), including allowing children of any age to carry out cultural or similar activities, allowing children above the age of 14 to work under combined work/training schemes and perform light work, and allowing children above the age of 13 years old to perform light work specified by national legislation – the latter being approved against the will of the Parliament.<sup>11</sup> Finally, Article 13 YWD also allows for a general *force majeure* derogation ground from working time, night work, rest periods and, at least in relation to children between the ages of 15 and 18, breaks. Whilst this derogation ground may be appropriate for adult workers, it is not sensible to apply it to working children without any further restrictions (e.g. the best interests of the child, or an explicit legitimacy and proportionality test). Even allowing for concessions due to the fact that the legal basis used concerns a shared competence and only aims to set minimum standards, as well as the fact that social/cultural/economic differences relevant to this debate can be identified across the EU, it is submitted that EU Member States could have aimed higher.

The last step in this second phase of 'children as direct beneficiaries' concerns Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, generally referred to as the Framework Directive. Although working children were already able to potentially benefit from the existing EU equality instruments prohibiting discrimination on grounds of sex (discussed above) and race/ethnic background<sup>12</sup>, it was with the Framework Directive that children have become explicit and core beneficiaries of EU equality law. This is, indeed, a fundamental instrument for children, who have seen enshrined in EU law the right to claim equality at work (interpreted in a broad sense, Article 3) and a significant degree of protection from discriminatory practices against them in this realm of life, above all on grounds of age (but also on grounds of sexual orientation, religious belief and disability). This is not to be used as an argument to

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<sup>11</sup> Decision of 9 March 1994, OJ No C 91/94 P 89, 28 March 1994.

<sup>12</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

allow children to enter the labour market earlier than established by the YWD or any domestic statute (as that would clearly go against the welfare approach adopted in this analysis), but simply to protect from discrimination those children who do have the required age to start working. Still, Article 6 dramatically reduces what at first could seem as a significant legal hurdle to discriminatory practices. Due to pressure from Member States and the particular (largely perceived) impact of age in the field of work (in particular with regard to older workers), Article 6 allows discrimination on grounds of age if occurring on the basis of an objectively and reasonably justified legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means to achieve that aim are appropriate and necessary. The fact that discrimination on grounds of age can be justified on the basis of this ‘extra’ reason clearly contributes towards pushing age towards the bottom of the ‘hierarchy of grounds’ of EU anti-discrimination law.

Case-law has confirmed the latitude afforded to Member States in determining public policy objectives which justify derogating from age equality.<sup>13</sup> Nevertheless, a more recent case saw the CJEU holding a national rule in relation to pilots’ compulsory retirement to be in violation of the prohibition of age discrimination.<sup>14</sup> Also, the CJEU has already had the opportunity to use the Framework Directive to protect the interests of young (but not child) workers, as in *Hütter*<sup>15</sup> with regard to determination of pay, *Küçükdeveci*<sup>16</sup> with regard to calculating the notice period for dismissal, and in *Hennigs and Mai*<sup>17</sup> with regard to a national collective agreement providing for differences in basic pay according to age. Other contexts in which the Framework Directive may be used to fight discrimination against working children and youth include the offer of more precarious employment arrangements (e.g., allowing more successive fixed-term contracts for younger workers than for older ones, as advocated for in the Netherlands and Spain) and lower salaries (e.g., paying younger workers a fraction of the minimum salary payable to older workers merely on grounds of age, as it occurs in Greece and the UK) (Sargeant 2010: 474; Simms 2011: 20-21). Domestic case-law also reveals the potential to use age anti-discrimination provisions to protect young workers, as in relation to dismissal in the UK decision in *Wilkinson v Springwell Engineering Ltd*<sup>18</sup>. Integration into the labour market should clearly not come at the cost of arbitrary discriminatory practices. In any case, discrimination is only a minor proportion of the range of detrimental treatment that working children may suffer, so not even a generous use of the Framework Directive is able to ensure a high degree of protection of working children.

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<sup>13</sup> For example, C-144/04, *Werner Mangold v Rüdiger Helm*, Judgment of 22 November 2005; C-411/05, *Félix Palacios de la Villa v Cortefiel*, Judgment of 16 October 2007; and C-388/07, *Age Concern England v SSBERR*, Judgment of 5 March 2009.

<sup>14</sup> C-447/09, *Prigge and others v Deutsche Lufthansa AG*, Judgment of 13 September 2011.

<sup>15</sup> C-88/08, *David Hütter v Technische Universität Graz*, Judgment of 18 June 2009.

<sup>16</sup> C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, Judgment of 19 January 2010.

<sup>17</sup> C-297/10 and C-298/10, *Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai*, Judgment of 8 September 2011.

<sup>18</sup> ET/2507420/07.

### 3.3. Post-2000: A bi-cephalous era?

For the last decade or so, the EU's discourse with regard to the interconnection between children and the labour market has slowly, but clearly, changed. Symptomatic of this are the instruments related to the Lisbon Agenda, Europe 2020 Strategy, and OMC processes. Since its 2001 White Paper 'A New Impetus for European Youth' (European Commission 2001) through to the current EU Youth Strategy, EU institutions have since the beginning of the 2000s looked at children (and youth, understood as those aged between 15 and an age up to 30, which depends on the specific instrument) as one of two things: a problem to be solved (high unemployment rate, lack of qualifications matching the market needs, insufficient entrepreneurship, etc.) and/or as a means to achieve certain results (such as a more green and sustainable economy, or a more ICT-skilled work force). Although the 2001 White Paper did place some emphasis on participation, autonomy and values, in more recent documents the protective, participatory, autonomy and nurturing dimensions all seem to be missing for the most part from the EU's discourse. Considering the impact on personal development (including financial autonomy and family life) and social cohesion (including democratic engagement and involvement with civil society) (Simms 2011: 2), the relationship between children and the labour market surely deserves a more empathic and humane analysis.

Admittedly, the EU has been prolific in initiatives regarding youth and their role in society. Its overall objectives are noble, as these include enhancing cooperation between Member States<sup>19</sup>, achieving smart, sustainable and inclusive (in reference to women and ethnic and migrant minorities) growth (European Commission 2010), reducing early school leaving<sup>20</sup>, recognition of non-formal and informal learning<sup>21</sup>, and more generally reducing unemployment and precariousness. All these measures contribute to the holistic approach advocated for below (section 5), thus enhancing, even if indirectly, the EU policies from which children and youth may benefit. Still, the subtext of such instruments and documents is that policies designed for children and youth are means to achieve greater aims – generally improving the labour market and workers' mobility –, not to promote young people's well-being, quality of life or protection as such. In sum, a more humane perspective is missing. This trend became particularly clear with the 2005 European Youth Pact<sup>22</sup>, designed to use youth to advance the Lisbon Agenda. Another good example of this is the assertion that the 'Europe 2020 flagship initiative Youth on the Move puts young people at the centre of the EU's agenda to create an economy based on knowledge, research and innovation, high levels of education and skills *in line with labour market needs*, adaptability and creativity, inclusive labour markets and active participation in society' (emphasis

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<sup>19</sup> Council Resolution of 27 November 2009 on a renewed framework for European cooperation in the youth field (2010-2018).

<sup>20</sup> Council Recommendation of 28 June 2011 on policies to reduce early school leaving.

<sup>21</sup> Council Recommendation of 20 December 2012 on the validation of non-formal and informal learning.

<sup>22</sup> Annex 1 of Presidency Conclusions of the European Council, Brussels, 22-23 March 2005 (7619/05).

added) (European Commission 2010: 22). This is not an incidental formulation, since it is reiterated again and again, for example in the implicit cost-benefit analysis carried out by the Commission in its proposal for a Council Recommendation on Establishing a Youth Guarantee (European Commission 2012b) and speeches by the European Commissioner for Employment, Social Affairs and Inclusion (Andor 2013). Even potentially child-friendly and socially-aware moves, such as the enthusiastic agenda of the Commission on improving education, are marred by a blunt servicing of market needs (European Commission 2012a): the result is the vision of an educational framework at the service of a more economically competitive society, rather than a better society in all respects. The message could not be clearer: youth are perceived primarily as an *instrument and resource* to achieve the goals of EU's policies – in particular economic recovery – and answer businesses' needs for certain skills, not as beneficiaries or addressees of the EU's concerns and priorities. Opposite elements of such instruments, for example relating to social protection (European Commission 2010: 17) or training (Andor 2013), do little to combat the utilitarian sub-text, especially if one recalls the diminutive competences of the EU in these fields in comparison to the broader competences in relation to market integration and labour movement. This restricts such issues crucial to children to the remit of exchange of best practices, peer-reviews and mutual learning activities within the context of the OMC, whilst persisting on overlooking key issues such as pay and precariousness (as highlighted by the Parliament with regard to the Youth Guarantee)<sup>23</sup>. This scenario begs the question: should the EU's governance of children's rights really be concentrating on children as 'human capital for economic production' (Larkins 2011: 473) or as interested parties whose rights and needs should guide the EU children's agenda?

Although in the examples given above the EU seems to regard children as a means to an end (utilitarian approach), the EU often also sees children as ends in themselves (humanitarian approach). At the humanitarian end of the utilitarian-humanitarian spectrum of the post-2000 EU policy affecting children in the context of labour, are instruments designed to combat sexual exploitation and human trafficking, produced on the basis of Articles 79(2)(d) and 83(1) TFEU. Sexual abuse becomes sexual exploitation when it possesses a commercial connotation, i.e., when it is connected to, for example, the use of children in prostitution, pornographic publications, and/or trafficking for sexual purposes. Hence the usual link between sexual abuse and sexual exploitation, and the necessary link between sexual exploitation and labour policy. Both child pornography and child prostitution are significant and increasing in Europe (UN 2003; UNICEF 2009: 36).

The EU adopted a hard-law measure in relation to child sexual exploitation for the first time with the Council Framework Decision 2004/68 of 22 December 2003 on combating the sexual exploitation of children and child pornography, in the meantime replaced by Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. Sexual exploitation and forced labour go hand-in-hand with trafficking. The use of children as slaves or forced labourers, as well as in a range of illicit activities (especially as 'drug mules'), have been under the radar of the UN and

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<sup>23</sup> Resolution of 16 January on a Youth Guarantee (2012/2901(RSP)). Strasbourg, 16 January 2013.

the Council of Europe for a few decades now.<sup>24</sup> The EU first addressed this matter through a hard-law measure with the Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, which has been replaced by the currently in-force Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. The Preamble to the Directive is extremely rich in references to children, going as far as recommending a child-rights approach to Member States' anti-trafficking policies. The Preamble makes reference to children as a particularly vulnerable group and to children's best interests as protected by the CFR and the CRC. This Directive has exponentially improved the legal treatment of child trafficking at the EU level, thus constructively building on previous work carried out in conjunction with the ILO (International Labour Office 2009).

Directives 2011/93/EU and 2011/36/EU are mutually supportive, as they address phenomena that often occur in a connected way, e.g., in the case of trafficking of children for sexual exploitation. The Commission's 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-16'<sup>25</sup> reflects such interconnectedness, albeit not to a sufficient extent, in particular with regard to children, as pointed out by the Opinions of the Committee of the Regions<sup>26</sup> and the European Economic and Social Committee<sup>27</sup>. At any rate these two Directives enhance greatly the protection offered to children who are exploited in a labour context, upon being trafficked and/or in connection to sexual activities. This illustrates a 'best practice' at a global level of how children victim of trafficking and/or sexual exploitation should be protected and their welfare ensured. Also, in the light of the cross-border and global nature of these phenomena, these EU instruments constitute important elements for a framework of cooperation between the EU and non-EU countries in the fight against trafficking and sexual exploitation of children in a labour context, both by using (criminal) law enforcement tools and legal harmonisation.

### **3.4. Where are we now and where to next?**

It is therefore possible to identify three distinct, even if chronologically overlapping, phases in the development of EU labour law relating to, or at least affecting, children: a first phase where children were primarily incidental beneficiaries (1957-1990s), a second phase where children became full-fledged direct beneficiaries (1990s-2000s), and a third (current) phase of bi-cephalous nature (2000s-present). The Lisbon Agenda, Europe 2020 Strategy and OMC processes are characterised by a considerable degree of instrumentalisation and utilitarianism in the way they deal with

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<sup>24</sup> Council of Europe Parliamentary Assembly Recommendation No. 989 on the Fight against Drug Abuse and Trafficking (1984); UN General Assembly Resolution on Use of Children in the Illicit Traffic in Narcotic Drugs and Rehabilitation of Drug-addicted Minors, A/RES/43/121, adopted on 8 December 1988.

<sup>25</sup> COM(2012) 286 final.

<sup>26</sup> OJ C 062, 2 March 2013, pp. 22-25.

<sup>27</sup> OJ C 044, 15 February 2013, pp. 115-118.

children's interests and well-being. More recent (hard-law) labour-related initiatives, such as the Commission's proposal on seasonal workers<sup>28</sup>, confirm this conclusion, as the rationale expounded again relates to pursuing a certain vision of economic development and no attention (or even mention) is offered to the well-being of child or young workers. The analysis above is yet another sign that there are 'conflicting messages about the currency of children's rights at EU level and their vulnerability being diluted or overlooked in the face of competing political and economic objectives' (Stalford and Drywood 2011).

The vast economic benefits for society in general of keeping children in education for longer rather than letting them engage with the world of labour prematurely (ILO 2003) should be borne in mind, but still considered secondary in relation to the paramount interest of children's own well-being. The EU should therefore re-focus its children/youth agenda and any policies affecting them towards the interests of children/youth themselves, rather than using discourses that more or less implicitly reveal the priority offered to market and economic objectives. This is essential if the EU is to have political legitimacy to offer partners around the world assistance and examples of good practices in this field. The bottom line is, even if there were not any market or economic benefits, fighting 'child labour', delaying children's entrance into the labour market, and improving the working conditions of those children engaging legally with the world of labour should still be a political and legal priority. Before looking into ways of doing this, it is important to assess the degree of compatibility between the level of protection currently offered by the EU (in particular via the YWD), on the one hand, and supranational and international instruments, on the other hand.

#### **4. Compatibility with supra-national and international instruments**

##### **4.1. The United Nations framework**

The ILO, as a UN agency specialised in labour, has been a key international actor in the fight against 'child labour'. ILO's crucial instruments in this fight are Conventions No. 138 concerning Minimum Age for Admission to Employment (C138), adopted in 1973, and No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C182), adopted in 1999. These instruments are supported by the ILO's International Programme on the Elimination of Child Labour (IPEC), created in 1992. C138 aims to progressively eliminate child labour and increase the minimum age to be admitted to work as to ensure children's 'fullest physical and mental development' (Article 1); C182, instead, focusses on the worst forms of child labour, namely those connected with slavery, pornography, illicit

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<sup>28</sup> Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM/2010/0379 final.

activities and (other) work harmful to children's health, safety or morals (Article 3). All EU Member States have ratified both Conventions, so the EU is indirectly bound by them to the extent that they contain human rights standards below which the EU cannot legislate (Article 53 CFR), but not beyond that (Hartwig 2008: 250ff).

The YWD acknowledges the importance of the ILO principles in relation to the protection of young people at work (Preamble Consideration No. 4). Also, as suggested above (section 3.2.), the YWD seems to align itself to the ILO instruments in all key aspects (minimum ages, scope for derogation, etc.). The wording adopted by the second paragraph of Article 1(1) YWD is evidence of this, by setting 15 as the general minimum age and linking this minimum age to compulsory full-time schooling (precisely what Article 2(3) ILO C138 already stated since 1973). Also, EU policies more generally combat the worst forms of child labour, by addressing trafficking and sexual exploitation (section 3.3 above).

Still, in relation to a couple of aspects, the YWD may lag behind ILO C138 (the ILO has also held that the YWD lagged behind the ILO instruments, but the Commission has denied this: European Commission 1994). Whilst Article 7(3) YWD allows Member States to derogate from the prohibition of work entailing specific risks in relation to 'adolescents' (ages 15-18) for training reasons, Article 3(3) ILO C138 only allows such type of derogation above the age of 16 (although not limited to training reasons). One may argue that the YWD and ILO provisions in question are not entirely similar (as the YWD provision is linked to training and the ILO C138 provision is not), hence not being possible to draw a strict parallel. Still, one should conclude that, in order to ensure Article 7 YWD's compatibility with Article 3 ILO C138, the derogation in Article 7 YWD should only be allowed in relation to children above the age of 16. Also, Article 2 ILO C182, being a more recent instrument, has chosen to align its terminology with the CRC and uses the term 'child' for anyone under the age of 18 (Article 2), unlike the YWD. This reinforces the preferability of the word 'children' over distinguishing between 'children', 'adolescents' and 'young persons'. Moreover, Article 7(1) ILO C182 expressly refers to penal sanctions, although allowing other appropriate sanctions. Paragraph 12 of ILO's Recommendation No. 190, though, does encourage Member States to punish as criminal offences practices similar to slavery, child prostitution and pornographic activities, and other illicit activities. Whilst the EU law Directives on sexual exploitation and trafficking do favour criminal sanctions, the YWD makes no reference to criminal sanctions, thus leaving Member States free not to use criminal sanctions to punish conducts that may fall within the 'worst forms of child labour' but are not within the remit of the sexual exploitation and trafficking Directives. Even if criminal sanctions may not be the most appropriate sanctions in certain instances (for example, when the perpetrators are the child's family members, in which case civil and socio-economic measures may be more suitable), their availability in the context of the YWD would still be an asset. More important, both ILO C138 and C182 clearly apply to both employment and work, thus not being limited to work relationships based on legally recognised employment contracts. The YWD, instead, requires an employment contract or employment relationship as recognised by individual Member States. Whether 'employment relationship' is as broad as 'work' is doubtful, therefore, the EU should ensure the amendment of this terminology at the first possible opportunity.

At any rate, mere compatibility is a very poor aim: the EU, as an organisation encompassing developed countries amongst the richest in the world, should aim higher in terms of social and labour standards. Indeed, in the light of the economic and social progress in the EU, and considering that Article 2(4) ILO C138 states that ‘a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years’, *e contrario* the EU should set the minimum age at 16 or 17. Yet, this suggestion raises problems that will be discussed below (section 5).

The UN framework has, however, contributed to the debate around working children not only through the ILO, but also through the CRC. Even before the CRC was approved, the 1924 (League of Nations) Geneva Declaration of the Rights of the Child and the 1959 UN Declaration of the Rights of the Child established that children should be protected against every form of exploitation (Articles 4 and 9 respectively). Article 32 CRC rephrased this obligation in terms of rights and rendered it binding on signatory states, by recognising children’s right to be protected from exploitative and harmful forms of work. Also, CRC Articles 11 and 35 on trafficking, 19 on abuse and neglect, and 34 on sexual exploitation, are of relevance to children working under certain circumstances.

Although the CRC had already been approved by the time the YWD was negotiated and approved, it does not feature in any shape or form in the YWD. This is symptomatic of a greater problem: the lack of commitment by EU law and policy to international children’s rights (Stalford and Drywood 2011: 199). The absence of any influence of the CRC on the YWD is reflected, as mentioned above, in the choice of terminology, as Article 3 distinguishes between ‘young persons’, children’ and adolescents’, although all of these fall below the age of 18. This lack of terminological consistency is secondary, though – substantive shortcomings may have much deeper consequences.

Some elements in the YWD may be linked to the principle of the evolving capacities of the child, a transversal principle in the CRC: Preamble Considerations No. 9 and 10 refer to the ‘nature of the transition from childhood to adult life’ and to the need to guarantee ‘working conditions appropriate to [children’s] age’, and Article 1(3) reinstates the latter idea. This principle could be used potentially to justify a more casuistic and individualised approach to working children, i.e., allowing some children to engage with work earlier and others later, depending on their specific development, capacities and skills. Whilst an attractive thought, considering it would allow an effective tailoring of the law to each child’s development and the safeguarding of children’s interests, this is in fact an impracticable solution: it would require a vast amount of resources to assess each individual case, and it would have the negative side-effect of opening up the system to abuses. The use of set ages (even if just presumed) to determine milestones in the legal rules applicable to children is a recognised necessity, for example in relation to criminal liability. Precocious children may, in any case, pursue their interests and foster their development even before they are able to engage with work, for example by becoming involved with (unpaid, voluntary) sport, cultural and social activities.

Strictly speaking, CRC's substantive standards seem to be respected by the EU's legal framework. Significantly, Article 1(3) YWD is compatible with the all-encompassing wording of Article 32(1) CRC. The fact that, contrarily to Article 32(1) CRC, the YWD does not use the words 'hazardous' (in relation to work) and 'spiritual' (in relation to children's development) is arguably of no significance, since Article 1(3) YWD's reference to 'safety'/'health' and 'moral or social development' achieve the same result (McGlynn 2002: 399). Nonetheless, the CRC is much more demanding and specific in relation to the range of enforcement measures (Article 32(2) CRC). These should include legislative, administrative, social and educational measures, including 'appropriate penalties or other sanctions' and not just 'measures' (Article 14 YWD). In the light of the growing alignment of the EU institutions with the CRC, including the CJEU<sup>29</sup>, the YWD could be amended to reflect the broader scope of the CRC.

#### 4.2. The Council of Europe framework

The CoE has also contributed greatly to the framework that currently exists to address issues related with working children, namely through its human rights instruments and institutions. The link between the regulation of work by children and human (including social) rights is evident, particularly in cases where some degree of exploitation can be identified. As Van Bueren highlights, the exploitation of children 'usually involves cumulative breaches of several fundamental rights, the most common being unlawful interference with family life and the rights to education, health, and leisure, all of which are equally essential for the healthy development and survival of the child' (Van Bueren 1995: 262). Some forms of exploitation of children, especially sexual exploitation and domestic servitude, may also amount to inhuman or degrading treatment and/or to slavery and forced labour (as seen in *Siliadin v France*<sup>30</sup> and *C. N. v United Kingdom*<sup>31</sup>), therefore constituting violations of Articles 3 and 4 ECHR.

There are no signs of lack of compatibility between the EU law analysed above and the relevant ECHR provisions and ECtHR case-law. Also, bearing in mind the level of protection offered to working children by EU law, the lack of involvement of the EU with direct enforcement of labour law policies within Member States, the use of the ECHR by the EU, and the use of the principle of margin of appreciation in the application of the ECHR, it is unlikely that the accession of the EU to the ECHR, as foreseen in Article 6(2) TEU, will be of any relevance to the situation of working children in Europe.

Also, within the context of the CoE, it is worth mentioning the 1996 (Revised) ESC. Although nine out of the 27 EU Member States are not bound by this Treaty,

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<sup>29</sup> Beginning in C-540/03, *European Parliament v Council of the European Union*, Judgment of 27 June 2006, and most recently in C-348/09, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, Judgment of 22 May 2012.

<sup>30</sup> Application No. 73316/01, Decision of 26 July 2005.

<sup>31</sup> Application No. 4239/08, Decision of 13 November 2012.

these Member States are bound by the original 1961 ESC, which contains similar (albeit slightly lower) standards (including in relation to working children). The bodies responsible for the enforcement of the ESC have dealt with working children related matters, namely age limits, the notion of light work, and enforcement.<sup>32</sup> Yet, the ESC weak supervision mechanism, combined with the prevalence of the CoE Committee of Ministers over the European Committee of Social Rights (which has tried to uphold higher socio-economic standards), have prevented the ESC from producing substantial changes to reality (Cullen 2000). The ESC remains, however, a significant international instrument setting minimum labour and social standards, including in the EU context, as evidenced by the reference to the ESC in Article 151 TFEU. Articles 7 and 17 ESC specifically regulate the protection of children. Partly due to their overall flexible wording and consensual content, one can assert that EU law, and the YWD in particular, complies with the ESC. EU provisions do not regulate pay, which is one of the elements mentioned in Article 7(5) and (7) ESC, but the EU's lack of competence in that regard (Article 153(5) TFEU) would not allow it to regulate on it.

Finally, it is worth mentioning that the CoE's instruments on trafficking – 2005 Convention on Action against Trafficking in Human Beings – and sexual exploitation – 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The fact that not all EU Member States have ratified these instruments and, consequently, are not bound by these instruments, makes the EU instruments all the more important to protect children from economic exploitation.

At any rate, the CoE is responsible for setting minimum standards potentially applicable to a large number of countries (currently 47), as opposed to the EU, which is in a much better position to set higher standards across a more limited geographical area. One can thus legitimately expect the EU to go much further than what is established in the ESC and the ECHR.

### **4.3. The EU's human rights framework**

The EU labour policy standards in relation to children also need to be confronted with the EU's own (increasingly strong) human rights agenda. The core of the EU's human rights agenda lies in Article 6 TEU's reference to the legally binding value of the CFR (discussed above in section 2), as well as the national constitutional traditions and ECHR constituting general principles of EU law. Crucially, Article 24 CFR establishes children's right to protection, care and participation, compatibly with the principles of best interests and evolving capacities of the child. Also Article 32 CFR prohibits child labour and requires the protection of young people at work, allowing for derogations on grounds of 'more favourable' outcomes for the children in question (perhaps in an allusion to combined work/training or work-experience

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<sup>32</sup> For relatively recent examples, see European Committee of Social Rights, Conclusions 2011 - Albania - Article 7-1, 12 September 2011 (Doc. No. 2011/def/ALB/), and Conclusions XIX-4 - Greece - Article 7-1, 12 September 2011 (Doc. No. 2011/def/GRC/).

schemes: Jacobs 2002:74). The CJEU has started referring to Article 24 CFR even before the CFR became binding<sup>33</sup>, but there has not been any case dealing with. Despite the broad terms adopted by these provisions, EU law arguably falls short of the standards established in these provisions, Article 32 CFR in particular. The second paragraph of Article 32 states that '[y]oung people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.' To the extent that exploitation may occur in the context of areas in relation to which EU law may be derogated (including domestic and family settings, and cultural or similar activities), and in the light of the weak enforcement mechanisms imposed at EU level, several aspects of the YWD may be considered in violation of Article 32 CFR. The main obstacle to this, however, is the fact that the Explanations relating to the CFR indicate that Article 32 is based, among others, on the YWD. With such a circular legal mechanism, any scope for using the CFR to improve the situation of working children could be severely curtailed, which can be considered to make a mockery of the 'fundamental rights check-list' system and impact assessment mechanism devised by the European Commission. Still, the CJEU or other institutions may decide to overlook the Explanations relating to the CFR and take a generous approach to Article 32 CFR, perhaps based on a sort of principle of evolutive interpretation.

Article 21 CFR also holds relevance in the context of working children, as it prohibits discrimination on grounds of age, among other grounds. This provision does not add anything to what the Framework Directive already does for working children – or at least there is no judicial evidence of the use of this provision to protect the rights of working children beyond the scope of the Framework Directive. Also, Advocate-General Scharpston, supporting the Commission's submission, has even asserted (expounding a legally doubtful reasoning) that 'there is no need to refer to the Charter where EU law is already explicit on the matter. Nor, a fortiori, can the Charter provide grounds for justification of unequal treatment where such grounds would otherwise be absent.'<sup>34</sup> At any rate, in case of conflict between Article 21 CFR and the Framework Directive, on the one hand, and the YWD, on the other, the Court would most likely consider the YWD provisions justifiable in the light of being backed by ILO instruments and Member States' international commitments (Cullen 2004: 329).

This analysis would be incomplete without a reference to the 1989 Community Charter, discussed above in section 2. This instrument is still held as valid and relevant, namely by being mentioned in Article 151 TFEU and the Preamble to the CFR, and by the possibility of the Courts using it as an interpretative tool. Paragraphs 20-23 refer to the 'protection of children and adolescents'. Whilst the Charter's minimum age of 15 and compulsory school age criteria (Paragraph 20) are respected by the YWD, the need to ensure 'equitable remuneration' (Paragraph 21) is not mentioned anywhere in EU (hard-)law. Also, although working conditions, in particular working time, are regulated by the YWD in terms generally compatible with Paragraph 22 Charter, there is no provision in the YWD clearly preventing

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<sup>33</sup> C-540/03, *European Parliament v Council of the European Union*, Judgment of 27 June 2006.

<sup>34</sup> Opinion of Advocate General Sharpston delivered on 20 September 2012, in C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*.

Member States from circumventing working time rules by using overtime (as established in Paragraph 22). Also, despite emphatic soft-law measures in this regard, an entitlement to vocational training (Paragraph 23) is missing from EU hard-law. If one considers that Paragraphs 20 and 22 Charter are mentioned in the Preamble to the YWD, but Paragraphs 21 (on remuneration) and 23 (on vocational training) are omitted, then it becomes clear which Charter's 'moral' obligations the EU institutions intended to fulfil. Equitable remuneration and entitlement to vocational training are, therefore, left to the luck of the OMC. As seen above, OMC indeed attempts to deal with these matters (at least with training), but as discussed in the next section, such crucial matters should not be wholly delegated to the OMC process.

## **5. Scope for improvement and policy recommendations**

As discussed in section 1, there are compelling reasons in favour of delaying the entrance of children in the labour market and, more generally, of preventing children from carrying out any work that may in any way affect their psychological or physical full development. Even economic arguments (utterly secondary when one is considering the best interests of children), point towards this policy: investing in education and training, rather than using young and unskilled work force, is the best way to secure a society made of individuals capable of contributing towards an innovative and sustainable world (European Commission 2012b). The alternative is the perpetuation of low-paid and low-skilled work force for the sake of short-term gain (but with long-term negative consequences). Fears relating to children's enhanced exploitation within the 'black economy' have not materialised – in fact, some Member States have even reported a significant increase in the employment rate of older children (e.g., Sweden, in relation to 16-17 year-olds). These fears should therefore not be used as arguments in favour of retaining the current, somewhat relaxed legal framework, let alone relaxing it further. The previous section explored several aspects in relation to which the current EU law on working children needs to be improved in order to fully comply with international and EU fundamental standards. The involvement of children with the world of labour falls neatly within the competence (even if shared) of the EU, and the EU is in a privileged position to address any lingering issues. Several areas within the EU's remit require attention; this section will, however, concentrate on the YWD substantive standards, due to their particular relevance to most working children.

Overall, the YWD could become stricter, as even supported by some Member States (e.g., Greece: European Commission 2004). Firstly, and most significantly, the general minimum age now set at 15 in the YWD should be raised to 16, if not 17, in order to prevent children from starting to work too early and enhance their qualifications – for the sake of children's preparation for the labour market or for the sake of a more qualified society more generally, but always with children's best interests as guiding principle. This would be consistent with the need to align the working minimum age with the age of compulsory full-time schooling (Article 1(1) YWD, Article 2(3) ILO C138). This is also in line with ILO Recommendation No. 146 (Article 7(1)), approved in 1973 (at the same time as ILO C138). Although

ideally the EU would follow this Recommendation and lead the way world-wide in this context, it cannot be ignored that this suggestion needs to be articulated with the education system of the Member States, as children may not be left without a place in the education system and without the right to seek employment. Currently, the majority of EU Member States (18) already set the compulsory school age at 16 (for full-time education), whilst six others set the age at 15, two set it at 18, and one allows different ages in different parts of its territory (Eurydice 2012). This means that, before the working minimum age could be raised to 16, those seven Member States who currently set the compulsory school age at 15 (at least in part of their territory) would need to raise it to 16. Since the EU would not be able to adopt any binding measures in this regard due to its limited competence in this field (Articles 6, 9 and 165-166 TFEU), any harmonisation would have to be achieved through the OMC.

Secondly, there is a strong case in favour of reducing the loopholes in the YWD. Firstly, the YWD should (at least potentially) apply to any work, independently of Member States considering it 'employment' or an 'employment relationship'; hence Article 2 YWD should be amended, namely in order to offer some degree of protection to children who are service providers and/or self-employed. Also, as discussed above, currently Article 2(2) YWD allows Member States to exclude from the protective scope of the legislation occasional or short-term work involving domestic service in a private household or non-harmful work for a family undertaking. Considering the evidence to the effect of the existence still nowadays of grave abuses in these contexts in EU Member States (Milieu 2009b), and the fact that inspecting these areas is considerably difficult, the EU should strongly consider the non-derogable inclusion of these areas within the scope of the YWD. The risk of going against the opinion of some of its Member States could be tempered with using a lighter touch regulation for this type of work, thus at least not allowing it to remain outside the scope of EU law all together. A similar move is favoured in relation to the ILO instruments by Van Bueren, who finds support in the lack of derogations in the CRC provisions (Van Bueren 1995: 266). This matter is also related to that of children performing artistic, sport or other activities allowed by law, but who fall outside the scope of protection of labour legislation due to the civil law nature of the relationship in question. This problem has presented itself in Romania (Milieu 2009b), for example, and cannot be addressed by the YWD provisions as they stand today. Without calling into question the possibility of children participating in such activities, as they can be beneficial to their physical and mental development, EU law should (through the YWD or another instrument) ensure that children are protected from economic exploitation and by high levels of health and safety even outside the remit of Member States' labour law frameworks (the approach followed by Hungary: Calvo/Rodríguez 2007: 4). More generally, exceptions related to artistic, sport or advertising activities should be re-thought and submitted to more precise requirements at EU level beyond the prior authorisation of the Member State competent authority (Article 4(1) YWD).

Thirdly, the notion of light work could be clarified, namely by excluding the possibility of considering 'light work' whole sectors of activity, as within most sectors (e.g. agriculture) there may be 'light' and 'non-light' activities. Moreover, even when considering a certain activity as 'light work', it should be subject to health and safety regulations, as even when carrying out 'light work', children may run risks. Also, an annex should be added to the directive with a non-exhaustive list of activities

constituting 'light work'.<sup>35</sup> The same could be done with regard to the notion of 'dangerous work', as suggested by a Member State (European Commission 2004: point 5). In relation to both these notions, as well as more generally, the YWD could make less use of open-textured words and concepts, following the lead of the ESC (Cullen 2000: 20).

Fourthly, and ideally, the EU would acquire competence in relation to pay and use it with regard to working children. If the EU were able to harmonise (and enforce) an obligation of equal pay between working children and adults, perhaps reality would drastically change. Indeed, it is worth looking into the 'unappreciated potential' of the principles of fair remuneration and equal pay for equal work: 'if children were paid equally to adults would child labour be so widespread?' (Van Bueren 1995: 271)

Fifthly, the distinction between children/adolescents/young persons should be replaced by the single category of 'children' – the distinction between legal and illegal work should be done exclusively on the basis of minimum ages and the characteristics of the work. Besides enhancing consistency with the CRC, the current EU agenda on children's rights and other EU law instruments (such as the sexual exploitation and the trafficking Directives), this amendment would also simplify greatly the transposing domestic provisions and avoid or at least render less excusable (intentional or unintentional) regressions in this regard, as it has happened in Romania, for example (Milieu 2009b).

Finally, and despite the obstacles that may be raised on grounds of (lack of) competence, the EU should (go on) encourage(ing) Member States to take a more holistic and CRC-friendly approach, informed by the indivisibility and interdependence of human rights, and consider the relevance of social, economic and educational measures in the enforcement of the applicable legal framework by labour inspectorate authorities and other actors. Knowing that the EU can nowadays legislate on health, safety and working conditions through the ordinary procedure (Article 153(2) TFEU), i.e., by engaging both the Parliament and the Council on a quasi-equal standing (Article 294 TFEU), allied with the fact that either the Parliament or the Council may take the initiative of requesting to the Commission to submit proposals (Articles 225 and 241 TFEU), offers some justifiable hope as to the possibility of a more children's rights centred approach being adopted in the field of labour.

## **6. Conclusion**

No doubt, any recommendation to strengthen EU law affecting working children will be met by Euro-sceptics with arguments relating to competence-creep, excessive costs, negative impact on the economy and detriment to national sovereignty. But that

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<sup>35</sup> Something the EESC already suggested: Opinion on the proposal for a Council Decision on the Protection of Young People at Work (92/C 313/19), 23 September 1992, OJ No C 313/92 P 70, 30 November 1992, point 2.4.2.

is a criticism that Euro-sceptics would direct against almost any action suggested by the EU, so it does not engage with the actual problem and arguments at hand. And one may of course criticise the current legal framework or an even more restrictive one for being overly protective and, consequently, favouring protection in detriment of children's participation, autonomy and privacy rights (as discussed in section 1). That may well be an attractive criticism, but it is one that forgets that the 'exercise' of those rights is most commonly to the benefit of others (employers and families) and detriment of children themselves, by entrapping them (to a greater or smaller extent) in a likely life-long cycle of low-skilled and low-pay employment. The larger picture entailed by this is the perpetuation of poor social and working standards, race-to-the-bottom-style competition, and a society unprepared to face the economic, environmental and technological challenges posed to us all in the future. Risks of clandestine work or diminishing opportunities of employment or training have not derived from the YWD or any other EU measures related to children. At any rate, none of these risks should be used credibly as an argument to override the principle of protection – rather than relaxing the rules, these should be enhanced and their enforcement should be secured. This would also send a strong moral message to non-EU countries and promote within and outside EU borders higher socio-economic standards on a long-term basis.

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