

Balance of Competences Consultation Response

Social and Employment Policy

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The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

Introduction

- I. UK membership of the EU has brought significant benefits to solicitors and the clients they serve, in particular by enabling them to trade, provide services and establish across the EU and access justice where cross-border legal issues arise.
- II. The legal services sector is an important part of the UK economy in its own right while legal services are indispensable to the smooth functioning of businesses and the wider commercial environment.
- III. The UK legal services sector is outward facing and Scottish solicitors provide services to both British and non-British clients doing business in the Internal Market.
- IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields ranging from commercial transactions, intellectual property and competition law to employment law, civil justice and dispute resolution.
- V. The Law Society of Scotland and the legal profession as a whole therefore have a keen interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making. However, there is an important debate to be had as to where the Balance of Competence should lie and as such debate as to the appropriate level of EU competence in various policy areas and as such the Law Society will input into the other reviews of the balance of competences of most relevance to the legal profession.

The arguments for social and employment competence

1. To what extent is EU action in this area necessary for the operation of the single market?

1. The Law Society of Scotland does not consider that it is possible to say that any particular EU action in the employment and social spheres has been "necessary" for the operation of a single market. Clearly a single market can operate even

where fundamental aspects of employment and social policy differ as across member states (e.g. tax and social security).

2. However, unified requirements in relation to certain matters do appear to us to make the operation of a single market more effective, for example consultation and employment rights on business closures and transfers. This is because many social and employment policies are linked to the concept of a level playing field. Creation of a level playing field does not simply mean creating identical rules for social and employment law - not least as there is no legal basis set out in the Treaties which might be used to accomplish this. Rather, in this context, it relates to the fact that minimum protections may be necessary to avoid distortion of competition between businesses located in different Member States
3. The extent to which such action should be taken depends on the context and may be inextricably linked to the personal views and political views of those involved. It is important to ensure that where action is taken, the proposals comply with the key principles of proportionality and subsidiarity.
4. It must also be remembered that social and employment policy within the Internal Market is closely linked to the free movement of persons, one of the founding freedoms of the single market project. The Social Security Coordination Regulation which guarantees social rights for workers exercising their free movement rights is a particularly important example of this.

2. To what extent are social and employment goals a desirable function of the EU in their own right?

5. The Law Society of Scotland takes no position on the extent to which social and employment goals may be considered a desirable function of the EU in their own right.
6. It notes, however, that the answer will depend to some extent upon the extent to which social and employment goals are already met at a national level. For example, in the UK maternity rights are in excess of the minimum requirements set down by the EU.

3. What domestic legislation would the UK need in the absence of EU legislation?

7. In the absence of EU legislation, most if not all topics currently covered would still need to be dealt with under domestic law. The policy decisions as to the form such legislation would take would necessarily be affected by the positions of the relevant policy makers. The scope of and balance between rights and protections on the one hand and obligations on the other would therefore be subject to change.
8. It should also be noted that the UK would remain bound by international obligations regardless of the level at which action was taken in an EU context.

Impact on the national interest

4. What evidence is there that EU action in social policy advantages the UK?

9. The answer to this question depends on your political and economic perspective. The Law Society of Scotland does not offer any evidence on this point.

5. What evidence is there that EU action in social policy disadvantages the UK?

10. The answer to this question depends on your political and economic perspective. The Law Society of Scotland does not offer any evidence on this point.

6. Are there any other impacts of EU action in social policy that should be noted?

11. Employment and social legislation has a significant crossover with cultural norms meaning that it can be challenging to produce EU legislation which fits easily into the framework of every Member State. This may also have a more positive effect when good practices emerge or EU legislation results in a culture change that proves to be advantageous.
12. Workers now benefit from a broad range of rights throughout the EU, of particular benefit in those Member States which previously afforded much lower levels of social policy protection. Where protection was already fairly high EU action will not have made a significant difference.
13. It is also worth noting that the fundamental freedoms on which the Internal Market is based operate in conjunction with one another. Action in the sphere of social policy guarantees rights for UK citizens wishing to exercise their right of free movement within the EU. They are assured of rights, for example in relation to holiday entitlement, sick pay, or maternity benefit in all other Member States, including those which might not previously have afforded these advantages.

7. What evidence is there about the impact of EU action on the UK economy? How far can this be separated from any domestic legislation you would need in the absence of EU action?

14. The Law Society does not have any evidence as to the impact of EU action on the UK economy.
15. While the growth in employment rights and claims to employment tribunals has coincided with greater activity on employment and social issues at an EU level it is likely that irrespective of EU involvement the UK would have developed similar laws and employee protections in most of the same areas. This suggests that the answer to this question would be difficult, if not impossible to determine.
16. It is also hard to say with any certainty whether the domestic position would have been materially different without EU involvement.

Future options and challenges

8. How might the UK benefit from the EU taking more social action in social policy?

17. The answer to this question depends on your political and economic perspective. The Law Society of Scotland does not offer any evidence on this question.

9. How might the UK benefit from the EU taking less action in social policy, or from more action being taken at the national rather than EU level?

18. The answer to this question depends on your political perspective. The Law Society of Scotland does not offer any evidence on this question.

10. How could action in social policy be undertaken differently? For example, are there ways of improving how EU legislation is made e.g through greater adherence to the principles of subsidiarity and proportionality or the ways social partners are engaged?

19. The answer to this question depends on your political perspective. The Law Society of Scotland does not offer any evidence on this question.

11. How else could the UK implement its current obligations in this area?

20. The answer to this question depends on your political perspective. The Law Society of Scotland does not offer any evidence on this question.

12. What future challenge/opportunities might the UK face in this area and what impact might these have on national interests?

Increasing globalisation means that workers and capital are moving more quickly and more frequently. Employment and social policy needs to be culturally acceptable to the Member States but should be considered not only in terms of the Internal Market but also while keeping an eye to the wider international context.