

Review of the balance of competences between the United Kingdom and the European Union: Social and Employment Review

Submission to the Department for Business, Innovation and Skills

Chartered Institute of Personnel and Development (CIPD)

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Background

1. The CIPD is the leading independent voice on workplace performance and skills. Our primary purpose is to improve the standard of people management and development across the economy and help our individual members do a better job for themselves and their organisations.
 2. Public policy at the CIPD exists to inform and shape debate, government policy and legislation in order to enable higher performance at work and better pathways into work, especially for young people. Our views are informed by evidence from 135,000 members responsible for the recruitment, management and development of a large proportion of the UK workforce.
 3. Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level. We draw on our extensive research and the expertise and experience of our members on the front-line to highlight and promote new and best practice and produce practical guidance for the benefit of employers, employees and policy makers.
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Question 1: To what extent is EU action in this area necessary for the operation of the single market?

4. The EU claims that its social and employment policies aim to “contribute to improving people’s living conditions with a view to sustainable growth and greater social cohesion”. The basis for EU action on social and employment issues appears, however, in practice to be largely political. Intervention in relation to minimum employment standards appears to be conceived as a pitch for popular support for the EU, though its effectiveness in this respect is doubtful.
5. The EU has no general jurisdiction in the fields of remuneration or social security, and this limits its ability to create a level playing field in relation to employment costs, which vary significantly both between and within member states.

6. Many UK employers believe that other member states are more lax in their approach to enforcement of rights derived from EU legislation than is the UK. This inevitably reduces the perceived legitimacy of regulation derived from the EU, for example in relation to health and safety.

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

7. Having mutually consistent levels of employment protection across EU states, thereby setting a “floor”, might help to limit the number of workers wishing to move to another EU country in order to improve their working conditions. This, in turn, would contribute to social stability. Common employment standards also help in principle to combat “social dumping”.
8. However, the influence of employment conditions relating to hours and holidays, or business transfer, will be dwarfed by factors such as pay levels, social security and availability of suitable work. Freedom of movement could be readily maintained (assuming the political will) without specific EU employment goals.

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

9. There is no pressure from CIPD members for a major reduction in the scale of employment regulation. Research evidence by the OECD and BIS does not support the claim that employment protection legislation is damaging the UK’s economic performance. Research conducted by CIPD showed that employment regulation was more frequently cited by employers as *aiding* jobs growth rather than hindering it (44% of employers we surveyed for our Summer 2011 Labour Market Outlook report stated that employment regulation aided jobs growth, compared to 25% citing it as an obstacle). Employers were also considerably more likely to cite access to finance and skills gaps as obstacles to jobs growth than employment regulation.
10. There is little evidence that UK employers would wish to dismantle significant areas of EU-derived employment protection. Most employers understand that fair treatment of employees is key to business performance, and are ready to support the objectives underpinning much employment regulation. Criticism of specific pieces of such regulation tends to be most evident when they are introduced, and

to fade over time as employers become familiar with their requirements. This was highlighted in recent research conducted by the Department for Business, Innovation and Skills, (*"The Employer Perceptions and Impact of Employment Regulation"*), which found that businesses that view employment law as burdensome often did so because of a lack of understanding of the law.

11. This, in turn, is linked to whether regulations and directives themselves are well drafted. The CIPD research highlighted above also explored employer perceptions of how well various specific employment regulations were drafted, including the Agency Workers Regulations, Working Time Regulations and the Data Protection Act. Whilst many employers were convinced to varying degrees of the necessity of most regulations (the Agency Workers Regulations and the right to request training being two notable exceptions), only a minority of employers thought regulations were well-drafted – a clear indication that a lack of employer comprehension may be colouring their perceptions of important and relevant aspects of employment law.
12. However, employers have expressed concerns about specific EU-derived legislation. The most pressing employer criticisms of employment law have historically been directed at the process of dispute resolution, and specifically the ease with which employees can impose costs on employers by bringing weak or vexatious claims to employment tribunals. Changes to the service threshold for bringing unfair dismissal claims, and the introduction of fees for bringing tribunal claims, are likely to do something to alleviate such concerns, though they may also have a negative impact on levels of employee engagement.
13. Employers have also expressed concern about the working time directive. However, it is unclear what significant changes would be likely to flow from removing the requirement to comply with this directive. The opportunity for individual employees to opt-out means that the working time regulations have had little impact on working hours in the UK. The provisions of the regulations on annual leave have probably had more influence but few employers would argue for their abolition.
14. One area where the UK would be likely to adopt somewhat less restrictive regulation than that currently required by the EU is that relating to the transfer of undertakings (TUPE). Adequate protection for workers whose jobs are

transferred could be maintained without the current statutory obstacles to bringing the pay and conditions of those affected into line with those of others employed by the acquirer. Forthcoming changes to the TUPE regulations announced by the Government are constrained by EU legislation and case law, and fail to address these problems. Employers would welcome the opportunity to make more sweeping changes in this area.

15. Discrimination is a second area in which UK employers would be likely to support some amendment to existing EU-based legislation. CIPD research highlights significant levels of concern amongst employers about the impact of current discrimination legislation which, due to EU law, allows for uncapped awards where discrimination in the workplace has been established. CIPD's 2011 Conflict Management survey showed that nearly two thirds (61%) of employers had experienced employees claiming unfair dismissal and "tagging on" a discrimination claim in the hope of being awarded more compensation. The existence of a cap on awards from discrimination might discourage employees from "trying their luck" with spurious claims.

16. Survey evidence suggests that employers' use of agency workers has been influenced primarily by economic factors, rather than by the regulations on agency working. In the absence of a successful appeal, the recent EAT judgement in the case of *Moran v Ideal Cleaning Services* is likely to further reduce the impact of the regulations. However, the regulations may have encouraged some employers to move from using employment agencies as a source of temporary workers and recruit zero-hours contract workers in their place, in order to avoid the bureaucracy involved in implementing the regulations. CIPD would support repeal of the agency working regulations in the absence of over-riding EU obligations in this area.

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

17. The UK's flexible labour market undoubtedly contributes significantly to its economic performance. EU social policy has, however, contributed nothing to this flexibility. There is a risk that inappropriate employment regulation will inhibit this flexibility (see below). It is hard to believe that the UK, as an advanced

industrial economy, has experienced much direct benefit in relation to employment from EU action on social policy.

18. The priority aims of EU social policy are “to increase employment and worker mobility, to improve the quality of jobs and working conditions, to inform and consult workers, to combat poverty and social exclusion, to promote equality between men and women, and to modernise social protection systems”. Job quality is affected more by the quality of line management than by conditions of employment. In terms of action to promote equality between men and women, the UK has for many years been making significant progress, not least in areas like flexible working and a new system of Shared Parental Leave. Our progress in these fields owes more to successive UK governments, pressure groups and other stakeholders than it does to EU activity.
19. Legislation in the areas of discrimination on grounds of sexual orientation, belief and age was introduced to give effect to the Equal Treatment Framework Directive. CIPD supports this legislation, though it will continue to present significant challenges to employers and tribunals. It could be said that it is in this area of equal opportunities that EU legislation has had most direct impact on UK employment policies.
20. Legislation on the information and consultation of employees has had almost no impact on UK workplaces: research suggests that effective consultation takes place where management is committed to the process (and not otherwise).
21. The regulations on collective redundancies have been instrumental in persuading many larger UK employers to adopt positive policies in this area. These include routine consultation of employee representatives, including trade unions.

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

22. Over the years the ECJ has made many highly significant rulings in the field of employment law, many of which have been UK cases. Some of these judgments have been controversial, and have required UK employers to change long-standing employment practices. For example:

- In 1990, the then ECJ ruled that employers must equalise occupational pension arrangements for male and female employees in the case of *Barber v Guardian Royal Exchange Group* [1990] IRLR 240, ECJ. As a result, across the whole of Europe occupational pension schemes have had to equalise retirement ages and ensure that their systems of accrual do not favour either men or women.
- In 2009 in *Stringer and others v HM Revenue and Customs* [2009] IRLR 214, ECJ the ECJ significantly overturned the decision of the UK courts on appeal. As a result it is now the case that workers must continue to accrue the holiday entitlements they are due under the Working Time Directive when they are off sick. So if an employee is away for a year before leaving or being dismissed on health grounds, accrued holiday pay has to be paid to them by their employer.

The resulting irritation caused to UK employers, and consequent hostility to the EU as a source of employment law, should not be under-estimated.

23. It may be suggested that the impact of EU action has been to increase collective rights. Certainly the EU seeks to ensure that trade union opinion is reflected in setting EU economic and social policies. However, EU efforts to promote collective processes on consultation through the Information and Consultation of Employees Directive have been unsuccessful.

Question 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?

24. Since we believe it unlikely that a major reduction could be achieved in the scale of employment regulation following any repatriation of powers (see answer to question 3), we believe that it is not in general possible to identify hard evidence about the impact of EU regulation, separate from that of domestic legislation. However, we think it likely that EU legislation has had some positive impact on employer practice in the UK in relation to equal opportunities and collective redundancies (see above).

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

25. We see little benefit likely to accrue to the UK from the EU taking more action in social policy (see our response to question 4 above).
26. Further movement towards completion of the single market depends on the free movement of goods, persons, services and capital between member states. **CIPD believes that the ability of UK employers to recruit workers from other member states, in order to fill vacancies for which there are no suitable domestic applicants, has had a net positive effect on the UK economy.** We would not wish to see the imposition of further constraints on the flow of such workers, whether by the EU or the UK Government.
27. Revision of the Posted Workers Directive, taking account of the ECJ judgments in the Viking and Laval cases, is likely to have only a limited effect on the movement of workers between member countries. Popular concerns about the economic and social impact of such movement are likely to have much more influence on its scale.

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?

28. It is worth noting that the precise impact of any changes to EU competences, and any subsequent changes made by a UK government, would necessarily depend on what happens to the Human Rights Act and the European Court of Justice. Even if EU law was reversed, those wishing to preserve the status quo would be able to do so in many cases through challenges in Strasbourg under the Human Rights Act— pending ongoing debate over whether the Act itself should be abolished.

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?

29. The principles of subsidiarity and proportionality are fundamental to the relationship between the EU and member states. However, it is doubtful how far

they can in practice be used to secure significantly greater flexibility for the UK in determining its employment policies.

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

30. The UK is disadvantaged in implementing EU legislation by the absence of national or sectoral machinery for consultation between employer and employee interests. The effect is that elements of flexibility that exist in other member countries and can be used in interpreting the legislation are not available to UK employers.
31. The CIPD believes that effective arrangements should be put in place for closer coordination between the UK government and key stakeholders about guiding objectives and principles before employment legislation is introduced or amended. **The CIPD has proposed the establishment of a Workplace Commission, on which both employers and trade unions would be represented, which would have this among other functions.**

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

32. The increasing assertiveness displayed by the European Parliament threatens to undermine the degree of balance achieved in recent years within the European Commission between economic and social policies.