HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Social and Employment Policy

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Executive Summary

This report examines the balance of competences between the European Union (EU) and the United Kingdom in the area of Social and Employment Policy and is led by the Department for Business, Innovation and Skills (BIS). The Department of Work and Pensions (DWP), the Government Equalities Office (GEO) and the Health and Safety Executive (HSE) have all contributed to this report and worked closely with BIS on its preparation. The report is a reflection and analysis of the evidence submitted by experts, non-governmental organisations, business-people, Members of Parliament and other interested parties, either in writing or orally, as well as a literature review of relevant material. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

For the purposes of this review social and employment policy is taken to include the main areas of regulation that impact on the workplace: equal treatment; regulation of the employment relationship; social protection; and health and safety at work. It also includes those areas of competence that are focused on improving coordination between Member States on social and employment issues, including employment promotion, social protection and the labour market aspects of the European Semester process. It does not include policy relating to fundamental rights or free movement of persons, which are dealt with in separate reports.[1] [2]

Originally there was no distinct treaty base for social and employment policy. As a result, a number of early directives in this area were adopted on the basis of Single Market Treaty bases. Although we have seen a pattern of increasing competence in this area since the Treaty of Rome, it was arguably the Treaty of Amsterdam which had the greatest impact in extending competence by incorporating the Social Chapter into the main body of the Treaty. The Social Chapter no longer exists as a separate instrument and it is not possible to 'opt out' of the provisions that had been in the Social Chapter.

Social and employment policy is one of the most controversial areas of EU competence and the debate about whether or not the balance is right between the EU and Member States goes to the heart of what the EU is about. Some of the arguments are philosophically driven, such as the belief that there is such a thing as a shared European social ideal, but for many the fundamental question about EU competence in this area centres on whether or not social

[1] HMG, *The Balance of Competences Between the UK and the EU: Fundamental Rights Report*, published in parallel.

[2] HMG, *The Balance of Competences Between the UK and the EU: Free Movement of Persons Report*, published in parallel.

policy is in itself an intrinsic element of the Single Market. The debate on this question is neither new domestically nor within the EU. Arguments on either side have resurfaced throughout the development of the EU, most notably following the introduction of the Single European Act and the speeches made respectively by Margaret Thatcher in Bruges and Jacques Delors to the Trades Union Congress in 1988, and at the time of the adoption of the Maastricht and Amsterdam Treaties in the UK.

Although this argument is not unique to the UK, other Member States have different cultural histories regarding employment and social policy and the role of the EU in this arena. For example, France, Germany, Italy and the Benelux countries were early supporters of European political integration, signalling a more open attitude to the EU having broader aims than the purely economic.

At one end of the spectrum, the EU is considered fundamentally an economic project. This report found that some proponents of this argument, including Dr Lee Rotherham and David Campbell Bannerman MEP felt that this meant that all social and employment competence should be removed from the Treaties and left to individual Member States. Others including EEF and the Confederation of British Industry (CBI) felt that the EU should only pursue social and employment policy objectives where it created a level playing field and supported the functioning of the Single Market.

At the other end of the spectrum were those respondents for whom EU competence in this area is valid in and of itself, regardless of whether it supports the Single Market. For example, the Trade Union Congress (TUC), Unite the Union (UNITE), GMB and UNISON argued that there was a moral case for EU intervention in this area. They cited a number of EU directives to argue that EU action has played a central role in maintaining employment, protecting working people from exploitation, combating discrimination and social exclusion and promoting high trust, high skilled workplaces.

It is worth noting that although many respondents to this review were pragmatic about the likelihood of continued EU competence in this area, there was far greater fragmentation in their views about whether EU action in social and employment policy was beneficial or necessary. For many it was not just a binary trade-off between economic and social policies, and the arguments were far more complex and nuanced. For example, many of the respondents who argued that there should be no or very limited EU competence over social and employment matters did so on the basis that these were important policies and needed to reflect domestic culture and traditions rather than because they thought that economic goals had primacy over social ones in and of themselves.

Chapter One sets out the development of EU competence in social and employment policy beginning with the position before the Treaty of Rome in 1957 and concluding with the Treaty of Lisbon and the Charter of Fundamental Rights. This chapter highlights the fact that, while the evolution process has been continuous, competence has not developed at the same rate or in the same way across all areas of social and employment policy. There are now separate and specific Treaty bases conferring competence to achieve social goals which are distinct from Single Market goals.

Chapter Two summarises the main articles in the EU Treaties that provide the legal basis for legislative and other EU action in the social policy area and where that competence has been exercised. This chapter aims to set out the extent of the EU's power to act, on its own and alongside Member States, how this has been exercised and what this potentially means for the split of competence between the EU and the UK.

Chapter Three summarises the views of respondents to our Call for Evidence on how this area of competence impacts on the UK's national interest. It notes the high degree of fragmentation amongst respondents and attempts to draw out some key areas of debate. These include the question of whether or not there is a link between social and employment policy and the Single Market, and the impact of EU competence in this area on the operation of the UK labour market. The chapter highlights that costs of complying with legislation in this area was a significant concern for a number of businesses and think tanks who responded to our Call for Evidence and discusses what the impact of this is. It also recognises that many correspondents, particularly trade unions, felt that the EU has had a real and beneficial impact on individual rights. The chapter also discusses some of the specific features of the legislative and non-legislative processes and the role of the Court of Justice of the EU (ECJ) in this area.

Chapter Four considers the potential future trends for social and employment competence at the EU level. The chapter observes that it is likely that there will be continued desire from some quarters – although not all - for greater EU action in this area. For some respondents this would be a positive step forwards. Others were more cautious, arguing against new legislation that would create further burdens on business. This chapter also brings together some of the suggestions for change we received during our Call for Evidence. These included: reducing the complexity and increasing the transparency of the legislative process; institutional change to the Commission and the ECJ; and ensuring that the UK is a constructive and engaged partner in EU negotiations.

Introduction

This report is one of 32 reports being produced as part of the Balance of Competences Review. The Foreign Secretary launched the Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. It will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information can be found on the review, including a timetable of reports to be published over the next two years, at: www.gov.uk/review-of-the-balance-of-competences.

The analysis in this report is based on evidence gathered following a Call for Evidence. It draws on written evidence submitted, notes of seminars or discussions held during the Call for Evidence period and existing material which has been brought to our attention by interested parties, such as past select committee reports or reports of the European Commission. A list of evidence submitted can be found in Annex A. A literature review of relevant material, as well as opinions received in the course of regular business from a range of organisations, people and countries, has also been drawn on.

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

Definition of EU Competence

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the Single Market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties.

Chapter 1: Development of EU Competence

1.1 Originally, the lack of a distinct Treaty base meant that most social and employment legislation needed to be justified by reference to its effect on the Single Market. This is now no longer the case because, following changes to the Treaties, most notably through the Maastricht and Amsterdam Treaties, social and employment policy has its own Treaty legal basis. These developments have been controversial both domestically and within the EU and the extent to which the EU has, or should have, social objectives has long been a matter of debate. This report found that opinion is still divided on this question. At one end of the spectrum, social objectives are seen as central to the European project as a good thing in their own right. At the other, the EU is considered a fundamentally economic union and social policy should only be brought in to the extent that it is necessary to achieve those economic aims. During our Call for Evidence we found a great deal of fragmentation of views between these two positions. This theme is explored further in later chapters.

1.2 The definition of 'social and employment policy' itself is open to some interpretation. For the purposes of this review it is taken to include the main areas of regulation that impact on the workplace: equal treatment, regulation of the employment relationship, social protection and health and safety at work. It also includes those areas of competence that are focused on improving coordination between Member States on social and employment issues including employment promotion, social protection and the labour market aspects of the European Semester process. It does not include policy relating to fundamental rights or free movement of persons, which are dealt with in separate reports. The following issues will also be dealt with as part of separate reports:

- A full discussion of the European Semester, which will be dealt with under the forthcoming review of the Economic and Monetary Policy (Semester 4);
- Vocational training, which falls within the scope of the Education review (Semester 4);
- Portability of pensions, which is included in the Free Movement of Persons review; occupational pensions, which is included in the Financial Services and the Free Movement of Capital review (published in parallel); and
- The European Social Fund will be covered under the Cohesion report (in parallel to this report), a wider consideration of subsidiarity and proportionality will be dealt with in the Semester 4 report of the same name and lastly, a full examination of non-discrimination is covered by the Fundamental Rights report (published in parallel).

Before the Treaty of Rome

1.3 EU social action can be traced back to the European Coal and Steel Community (ECSC), which was the model for the European Economic Community (EEC) and was established by France, Germany, Italy, Belgium, the Netherlands and Luxembourg; the States that went on to found the EEC.[1] The ECSC was proposed by France's Foreign Minister, Robert Schuman, in 1950, and based on the idea that pooling coal and steel production should 'make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible'.[2]

1.4 However, it was clear that the ECSC was intended to have social objectives from that early stage. Article 3(e) of the Treaty of Paris said that 'the institutions of the Community shall, within the limits of their respective powers, in the common interest […] promote improved working conditions and an improved standard of living for the workers in each of the industries for which it is responsible, so as to make possible their harmonisation while the improvement is being maintained'.

Treaty of Rome (1957) to 1980s

1.5 The Treaty of Rome, which was aimed at creating a common market covering the whole of the EEC, contained limited but important provisions on social and employment protection. There was no general power to make legislation but the Treaty did cover specific social and employment issues. For example, Articles 7 and 48(2) EEC which prohibited discrimination on grounds of nationality between workers of different Member States in the sphere of employment; a *Social Title* included the rule that men and women should receive equal pay for equal work, a provision on paid holiday schemes; and provisions establishing the European Social Fund.[3] [4] [5]

1.6 The Treaty also contained a general aspiration to improve living and working conditions reminiscent of the relevant article of the Treaty of Paris.[6] Article 118 EEC tasked the European Commission with promoting close cooperation between the Member States in the employment and social field. Importantly, legislative action in this area was not foreseen and the Commission was merely tasked to make studies, deliver opinions and to arrange consultations both on problems arising at national level and on those of concern to international organisations.

1.7 The Treaty did, however, confer some competence to act in relation to social and employment issues, particularly if doing so could be justified by reference to the Single Market. So, for example, Article 100 EEC on the establishment and functioning of the common market was used for the adoption of directives on health and safety at work and other employment protections.[7] The Single Market justifications for such legislation have included the increased risk of accidents caused by misunderstandings arising from the free movement of persons, which represented 'an obstacle to the functioning of the common market' and the argument that differences between Member States in the

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1 Treaty Establishing the European Coal and Steel Community (ECSC).

2 European Commission, *The Schuman Declaration – 9 May 1950* (1950). Available at: www.europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm, accessed on 23 May 2014.

3 Article 119 EEC.

4 Article 120 EEC.

5 Articles 123-127 EEC.

6 Article 117 EEC.

7 Now Article 115 TFEU.

level of regulation on particular issues 'can have a direct effect on the functioning of the common market'.[8] [9]

1.8 The law on equal pay illustrates how the rules on the Single Market and the emerging social and employment protections were closely bound up together. For example, a directive on equal pay was adopted in 1975 which says that 'implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market'.[10]

1.9 This is also an area where the ECJ played an important role in giving broad interpretation to the provisions of the Treaty in this area. In the case of *Defrenne v. Sabena* the Court confirmed that '[the] provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples'.[11] It cites the preamble to the Treaty to back this up but could equally have quoted Article 117 EEC which contained similar wording. In the same case, the Court also referred to Article 2 of the International Labour Organisation (ILO) Convention on equal pay in concluding that Article 119 should be interpreted in light of that provision to include the principle of equal pay for work of equal value.[12] This demonstrates that from an early stage the Court would look to international organisations to help interpret EU law.

1.10 Some social and employment legislation relied on Article 235 EEC which, in the absence of an express legal base, gave the Council a broad power to legislate if doing so was thought necessary to achieve, 'in the course of the operation of the common market, one of the objectives of the Community'.[13] Legislation adopted using this article suggests that the Community was thought to have social objectives. For example, the recitals to Directive 76/207/EEC on equal treatment say 'equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered'.[14] Again, we see the reliance placed on the wording of the preamble to the Treaty and Article 117 EEC.

Single European Act (SEA, 1986) and the Community Social Charter

1.11 The SEA set a deadline for completing the Single Market by 31 December 1992 and introduced Qualified Majority Voting (QMV) in Council in certain areas of EC competence to enable the adoption of legislation required to complete the internal market. It also introduced a new decision making procedure, the 'co-operation procedure', which gave a stronger role to the European Parliament than the consultation procedure.

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8 Council Directive 77/576/EEC on the approximation of the laws, regulations and administrative provisions of the member states relating to the provision of safety signs at places of work, 1977.

9 Council Directive 77/187/EEC on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 1977.

10 Council Directive 75/117, on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women, 1975, adopted under Article 100 EEC, 1975.

11 Defrenne v. Sabena, Case C-43/75, [1976]. 'The aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay' (para 9).

12 International Labour Organisation (ILO), Equal Remuneration Convention, 1951, C-100.

13 Now Article 352 TFEU.

14 The directive would have required unanimity, so all Member States including the UK must have agreed this text.

1.12 The SEA also contributed to the broadening of EU competence to legislate in the social policy field by inserting a new legal basis for health and safety at work (Article 118a EEC) into the EEC Treaty.[15] This article provided that Member States should 'pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers' and for the first time created a specific Treaty base for directives to achieve this objective. It contained the qualification that the powers are to be used to impose minimum requirements in relation to the health and safety of workers and that nothing in the directives made under this article may prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties. It also contained a further qualification in relation to small and medium-sized enterprises. This provides that minimum requirements adopted must 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. Whilst certain procedural changes have been made to how this competence operates in subsequent Treaty changes, the competence itself has not undergone significant substantive change since its introduction in the SEA.

1.13 Following the SEA, there was an intense debate about the place of social objectives in the European project. Some interpreted its focus on the Single Market as meaning that these objectives took primacy. This can be seen for example in Margaret Thatcher's 1988 Bruges speech where she said 'before I leave the subject of a Single Market, may I say that we certainly do not need new regulations which raise the cost of employment and make Europe's labour market less flexible and less competitive with overseas suppliers'.[16] However, the lack of any new express social provisions resulted in criticism from trade unions. In a speech by Jacques Delors, then Commission President, made to the TUC in September 1988 he said that 'the internal market should be designed to benefit each and every citizen of the Community. It is therefore necessary to improve workers' living and working conditions, and to provide better protection for their health and safety at work'.[17]

1.14 This debate led, in 1989, to the adoption of the Community Charter of the Fundamental Social Rights of Workers, known as the Community Social Charter. This was not legally binding and was adopted by all Member States except the UK. The Community Charter recognised rights in areas such as working conditions, employee involvement and health and safety. The Community Charter was the precursor to some aspects of the Charter of Fundamental Rights of the EU, where many of its provisions correspond to provisions of the European Convention on Human Rights. The Charter is discussed below.

1.15 The Community Charter was accompanied by an Action Programme which proposed numerous measures aimed at implementing the Charter and creating a social dimension to the Single Market. As a result, various new labour law directives were adopted during the 1990s, although these directives were adopted under Single Market or health and safety at work legal bases (below).

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[15] Now Article 153 TFEU.

[16] Margaret Thatcher, *The Bruges Speech* (1988). Available at: www.margaretthatcher.org/document/107332, last accessed on 23 May 2014.

[17] Jacques Delors, *It is Necessary to Work Together, Speech to TUC* (1988). Available at: pro-europa.eu/index.php?option=com_content&view=article&id=281:delors-necessary-to-work-together&catid=11:the-struggle-for-the-union-of-europe&Itemid=17, accessed on 23 May 2014.

The Treaty on European Union (TEU), Maastricht Treaty (1992) and The Social Chapter

1.16 The TEU, known as the Maastricht Treaty, replaced the existing statement of the Community's objectives and as a result changed the focus of the provision.[18] Whereas, previously, things like 'an accelerated raising of the standard of living' were supposed to be accomplished principally through the establishment of a common market, the new provision expressly recognised for the first time a range of other Community policies and activities. These included 'a policy in the social sphere comprising a European Social Fund' and promoting 'a high-level of social and employment protection'. The European Social Fund is dealt with in more detail in the Cohesion report, published alongside this one.

1.17 The main innovation of the Maastricht Treaty in the social and employment sphere was the Social Policy Agreement and Social Policy Protocol, collectively known as the 'Social Chapter', which was contained in a Protocol to the Treaty that applied to all Member States except the United Kingdom. The Social Chapter did two things. First, it gave greater powers (competences) to the EU to legislate. Second, it envisaged a greater role for the social partners (employer and employee representatives) to be consulted on social policy legislation as well as to have the option of implementing legislation. In addition, the Social Chapter gave the social partners the power to adopt European-wide collective agreements which could then be given legal effect by a Council decision.[19] See Box One for more detail on the Social Chapter.

1.18 The Maastricht Treaty was highly controversial in the UK where the Opposition was strongly against the UK's opt-out of the Social Chapter. The Government's policy on the Social Chapter was the subject of much Parliamentary debate, culminating in a confidence motion in the summer of 1993. In the debate, John Major (then Prime Minister), argued that 'there is no doubt that Britain – with low interest rates, competitive labour costs and competitive interest rates – has the leading edge in the marketplace in Europe. The Government has no intention of throwing away those hard won advantages, as the Social Chapter would compel us to do'.[20] In response, John Smith (then Leader of the Opposition) said 'the people of this country do not understand why they have a Government who wants to deny to them the social rights, the social opportunities and the social advantages which the whole Community wants for its citizens'.[21]

[18] Article 2 EC.

[19] Three main directives have been adopted via this route: Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP, and the ETUC, 1996 OJ L145; Directive 97/81/EC on part-time workers concerning the framework agreement on part-time working concluded by UNICE, CEEP and the ETUC, 1997; and Directive 99/70/EC on the framework agreement on fixed-term work concluded by UNICE, CEEP, and the ETUC.

[20] HC Deb 23 July 1993, vol 229 cc 625-724.

[21] Idem.

Box One: The Social Chapter

The Social Chapter was a legally binding instrument that gave greater powers (competences) to the EU to legislate and envisaged a greater role for the social partners as set out in paragraph 1.17.

The UK chose not to participate in the Social Chapter initially and so was not originally bound. As a result it applied to all Member States except the UK. In 1997, the then Labour Government agreed to be bound by the Social Chapter and its provisions were incorporated into the main body of the EC Treaty through the Treaty of Amsterdam. As a result, these provisions now apply to all Member States.

The other important consequence of the Social Chapter's incorporation into the EC Treaty was that all legislation adopted during the period of the UK's opt-out and based on Articles in the Social Protocol were extended to the UK without an opportunity for the UK to negotiate changes to make the legislation fit with UK employment practices. This included Directive 94/95 on European Works Council, Directive 97/80 on burden of proof, Directive 96/34/EC on parental leave and Directive 97/81/EC on part-time workers.[22]

The Social Chapter no longer exists as a separate instrument. As its provisions have been incorporated in the mainstream of the EU treaties they apply to all Member States – as such it is not possible to 'opt out' of the provisions that had been in the Social Chapter.

1.19 It is worth noting that the involvement of the European Parliament in relation to the Social Chapter provisions was under the co-operation procedure. This gave the European Parliament less influence than the new 'co-decision procedure', now known as the ordinary legislative procedure which was applied by the Maastricht Treaty to most Single Market legislation.

1.20 The powers to legislate in the Social Chapter built on the existing powers in relation to health and safety at work, adding new areas where the Community could make social and employment legislation for its own sake. The competence conferred here, and the express limits on the competence, were largely taken forward into the TFEU.[23] So, for example, the competence to make legislation by QMV on 'the information and consultation of workers' dates from this time as does the competence to make legislation by unanimity on 'social security and social protection of workers'.

1.21 After the Maastricht Treaty entered into force, a number of social and employment directives were adopted which applied to all Member States, including the UK, as they were based on provisions in the Treaty (Single Market and health and safety at work legal

[22] Council Directive 94/45/EC on the establishment of a european works Council Directive or a procedure in community-scale undertakings and community-scale groups of undertakings for the purposes of informing and consulting employees, 1994; Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, 1997; Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, 1996; and Council Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework Agreement on Part-Time Work, 1997.

[23] Title X of Part Three TFEU.

bases) rather than the Social Chapter. This included: the Young Workers Directive; the Pregnant Workers' Directive; the Working Time Directive; the Directive on proof of contract of employment; and the Posted Workers Directive.[24] [25] [26] [27] [28]

1.22 The Maastricht Treaty also extended the scope of the European Economic and Social Committee (EESC) to social policy and social and economic cohesion amongst other areas. The EESC is a consultative body of the EU, established by the Treaty of Rome of 1957, whose main task is to advise the European Parliament, Council and Commission on economic and social aspects of policy and legislation. The EESC is composed of, amongst others, employer and employee representatives who are independent and not paid. It is mandatory for the EESC to be consulted on issues laid out in the Treaties.

The Treaty of Amsterdam (1997)

1.23 The Treaty of Amsterdam inserted a new Title on Social Policy into the EC Treaty. This Title incorporated both existing Articles in the EC Treaty and the provisions of the Social Chapter that had been attached to the Maastricht Treaty. Although the UK had not originally participated in the Social Chapter, in 1997 the then Government agreed to be bound by its provisions. As a consequence of the incorporation of the Social Chapter into the mainstream of the EC Treaty, its provisions applied to all Member States, including the UK (see Box One for more detail). This was once again a controversial issue in the UK as demonstrated by the criticisms made by Malcolm Rifkind that the claim made by Tony Blair, then Labour leader, that Britain could safely opt in to the Social Chapter was 'at best disingenuous, at worst dishonest'.[29]

1.24 The Amsterdam Treaty also added the promotion of equality between men and women to the list of Community tasks in Article 2 EC and made equality between men and women something to be aimed for across the whole range of EU activity.[30] It also introduced a new legal base for discrimination legislation (the predecessor of the current Article 19 and 157(3) TFEU).

1.25 At the same time, a new Employment Title was added to the EC Treaty.[31] This created a very limited competence in relation to employment issues, only enabling the EU to adopt guidelines and make recommendations in relation to Member States' employment policy as well as acting to encourage cooperation between Member States and to support their

[24] Council Directive 94/33/EEC on the protection of young people at work, 1994 (adopted under Article 118a).

[25] Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 1992 (adopted under Article 118a).

[26] Directive 93/104/EEC concerning certain aspects of the organisation of working time, 1993, amended by Directive 2000/34/EC of the european parliament and of the council, 2000. Originally adopted under Article 118a EEC, then amended by Directive 2000/34/EC which was adopted under Article 137(2) EC, then repealed and replaced by Directive 2003/88/EC which was adopted under Article 137(2) EC.

[27] Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 1991, adopted under Article 100 EEC.

[28] Directive 96/71/EC of the european parliament and of the council concerning the posting of workers in the framework of the provision of services, 2003, adopted under Articles 57(2) and 66 EEC.

[29] P. Wallace, 'Blair Dishonest Over Social Chapter Opt-In', *The Independent*, 1 February 1996. Available at: www.independent.co.uk/news/uk/politics/blair-dishonest-over-social-chapter-optin-1316670.html, accessed on 23 May 2014.

[30] Article 3(2) EC.

[31] The predecessor of the current Articles 145 to 150 TFEU.

action in the field of employment.[32] This focus on cooperation between Member States was developed by subsequent Treaty changes.

Treaty of Nice (2003)

1.26 The Treaty of Nice inserted two new areas of cooperation to combat social exclusion and modernise social protection systems.[33] [34] This was given without prejudice to the existing power concerning social security and social protection and, importantly, the power to adopt directives was excluded. A caveat was added to clarify that, provisions adopted under this Article, should not affect the right of Member States to define the fundamental principles of their social security systems; must not significantly affect the financial equilibrium thereof; and should not prevent Member States from maintaining or introducing more stringent protective measures compatible with the Treaties.

1.27 Lastly, the Treaty of Nice replaced Article 121 of the Treaty of Rome, which had given the Council the power, acting unanimously, to assign tasks to the Commission in connection with the implementation of common measures, particularly as regards social security for migrant workers. The new provision in Article 144 EC gave the Council the power, after consulting the European Parliament, to establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission.[35]

Lisbon Treaty (2009) and the Charter of Fundamental Rights

1.28 In the field of social policy, the Lisbon Treaty made some important changes. It included in the objectives of the Union, listed by Article 3 TFEU, the 'well being of its people'; the establishment of a 'highly competitive social market economy, aiming at full employment and social progress'; its commitment to 'combat social exclusion and discrimination'; to 'promote social justice and protection, equality between women and men, solidarity between generations and protection of rights of the child'.[36]

1.29 The Treaty acknowledged the role of the EU regarding employment policy coordination and inserted a new 'horizontal' social clause in Article 9 TFEU, according to which the EU must take into account, in the definition and implementation of all its policies and activities, the 'requirements linked to the promotion of a high-level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.[37]

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[32] The new Article 128 EC was designed to dovetail with the existing Treaty provisions about economic policy coordination.

[33] This Treaty entered into force on 1 February 2003.

[34] In Article 137(1) EC, that is, the list of fields in which the Community must support and complement the activities of the Member States.

[35] Now Article 160 TFEU.

[36] The Treaty of Lisbon entered into force on 1 December 2009.

[37] Article 5. Articles 5(1) and (2) set out mandatory provisions as regards the coordination of economic and employment policy. Article 5(3) sets out optional social policy coordination: 'The Union may take initiatives to ensure coordination of Member States' social policies'.

1.30 The Treaty also referred in Article 152 TFEU to the special role of the social partners at the EU level. It commits the EU to facilitate dialogue between the social partners and refers to the 'Tripartite Social Summit for Growth and Employment' as a contributor to this social dialogue.[38] See Box Three regarding Social Partner Agreements.

1.31 Lastly, the Lisbon Treaty incorporated the Charter of Fundamental Rights into the primary law of the EU.[39] However, the Charter does not extend the EU's competence on fundamental rights.[40] The rights, freedoms and principles recognised by the EU are set out in the Charter of Fundamental Rights, which has the same legal value as the EU Treaties. The Charter draws on the constitutional traditions of the Member States and on international instruments such as the Council of Europe's European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms and European Social Charter. The Charter's provisions cover human dignity, basic freedoms, equality, solidarity, citizens' rights and justice. A number of these provisions are of direct relevance to labour law and working conditions. See Box Two for more detail.

[38] This takes place once a year, before the Spring European Council. It was established by: Council decision 2003/174/EC Establishing a Tripartite Social Summit for Growth and Employment, 2003.

[39] The Charter of Fundamental Rights was first proclaimed by the European Parliament, the Council of Ministers and the European Commission in 2000. The Charter was not given any binding legal effect. Its object was to reaffirm rights, freedoms and principles already recognised in EU law and to make them more accessible. A revised version of the Charter became legally binding with the entry into force of the Lisbon Treaty in December 2009.

[40] Article 6(1) of the TEU and Article 51(2) of the Charter. Protocol 30 of the EU Treaties also makes this clear.

Box Two: Provisions in the Charter of Fundamental Rights Relevant to Social Policy

- Every worker has the right to working conditions that respect his or her health, safety and dignity (Article 31).
- Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Article 31).
- Every worker has the right to protection against unjustified dismissal (including dismissal for a reason connected with maternity) (Articles 30 and 33).
- The employment of children is prohibited. The minimum age of admission to employment may not generally be lower than the minimum school-leaving age. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and harmful work (Article 32).
- No one shall be required to perform forced or compulsory labour, or held in slavery or servitude (Article 5).
- Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15).
- Every EU citizen has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State (Article 15).
- Nationals of non-EU countries who are authorised to work in the EU are entitled to working conditions equivalent to those of citizens of the Union (Article 15).
- Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, is prohibited (Article 21).
- Equality between women and men must be ensured in all areas, including employment, work and pay (Article 23).
- People with disabilities have a right to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community (Article 26).
- Everyone has the right to freedom of association, which implies the right to form and to join trade unions for the protection of interests (Article 12).
- Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices (Article 27). Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in the event of conflicts of interest, to take collective action to defend their interests, including strike action (Article 28).

1.32 The Charter, including the provisions on social policy, only applies to Member States when they are implementing EU law. Therefore, on one hand, the ECJ has referred to the Charter to support its arguments in areas or to show that it has recognised that the case raises issues of fundamental importance.[41] [42] On the other hand, the Court has refused to hear any references which raise issues of the compatibility of the reforms to national labour law introduced as part of the conditions for the bailout of some members of the Eurozone. For more information, please see Chapter Four. The Charter is covered in more detail in the Fundamental Rights Review.[43]

1.33 Finally, it is important to note that the UK is not just a member of the EU but is a member of other organisations too, for example the United Nations (UN), the Council of Europe (CoE) and the ILO which have reached various agreements that, depending on their content, have been given effect to by the UK. Accordingly, if the UK was not a member of the EU, it would still be bound by certain such agreements.

[41] For example, principles in the Charter were used to interpret the Working Time Directive widely. See also: Seda Küçükdeveci v Swedex GmbH & Co. KG, Case C-555/07 [2010] where the Court held that the principle of non-discrimination on grounds of age was a general principle of EU law which was given 'specific expression' in the Directive. The Court also made reference to Article 21(1) of the Charter which declares that 'any discrimination based on […] age […] shall be prohibited'.

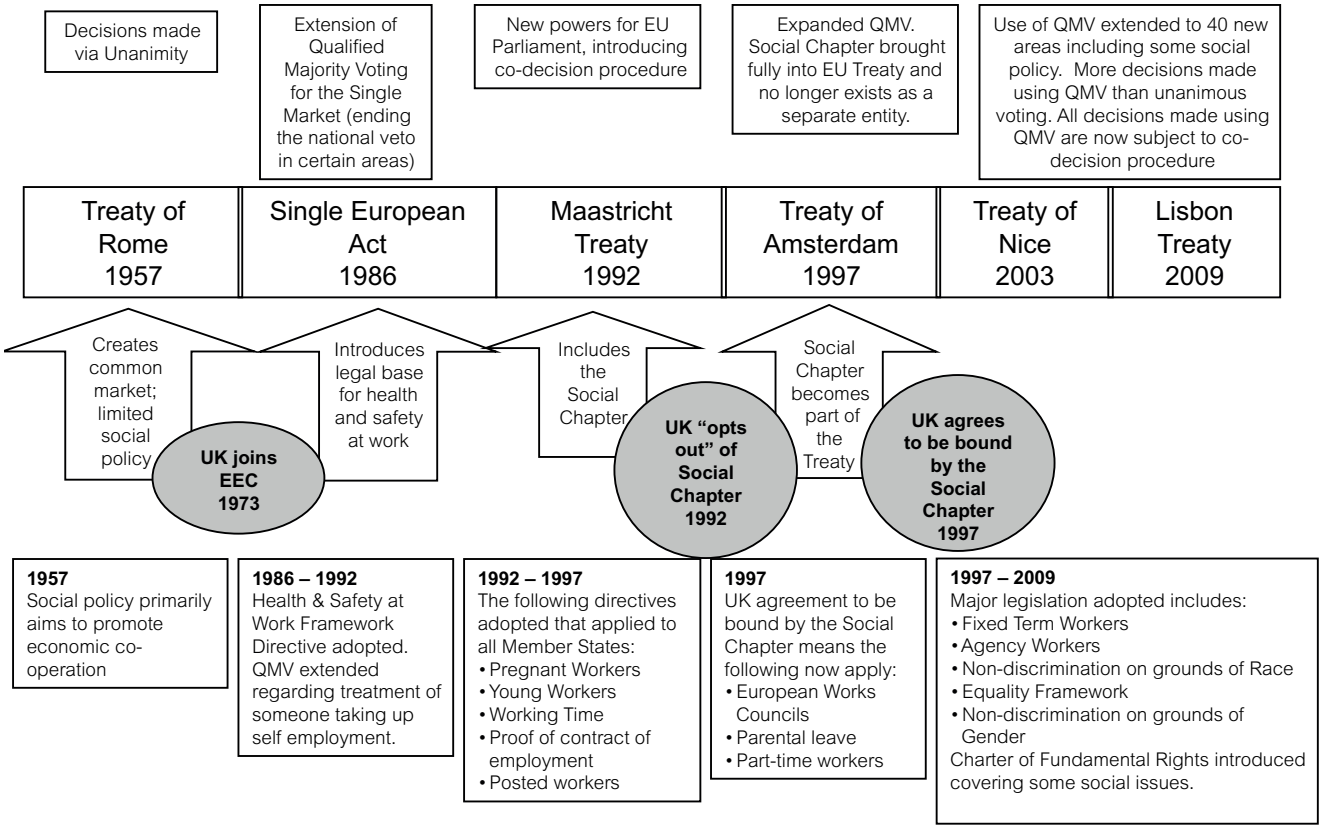
[42] Viking, Case C-438/05 [2007]; and Laval v Svenska, Case C-341/05 [2008]. The Court acknowledged for the first time that the right to take collective action, including the right to strike, was a fundamental right, referring to Article 28 of the Charter.

[43] HMG, *The Balance of Competences between the UK and the EU: Fundamental Rights Report*.

Chapter 2: Current State of Competence

2.1 As set out in Chapter One, there are now separate and specific Treaty bases conferring competence to achieve social goals which are distinct from Single Market goals. This chapter summarises the main articles in the EU Treaties that provide the legal basis for EU action in the social and employment policy area and where that competence has been exercised. This chapter aims to set out the extent of the EU's power to act, on its own and alongside Member States, and what this potentially means for the split of competence between the EU and the UK. The graph immediately below illustrates the key developments in EU social and employment competence and legislation.

Figure One: Timeline of the Key Developments in Social and Employment Competence and Legislation



Competence as set out in the Treaty

2.2 EU social and employment competence is set out in Articles 19 and 145-161 of TFEU. The main Treaty Articles affecting respective EU and UK competence are discussed below. Broadly speaking, competence can be divided into competence to combat discrimination and ensure equal treatment, competence to adopt measures in health and safety at work, conditions of work and social security, and competence to ensure cooperation between Member States.

2.3 Competence to combat discrimination and ensure equal treatment is set out in Articles 19 and 157 TFEU. Article 19 TFEU confers competence to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The power to legislate is 'without prejudice to the other provisions of the Treaties and within the limits of the powers conferred […] on the Union'. Competence in this field is shared between the Union and Member States. Article 19(1) confers power on the Council to take action to combat discrimination. Article 19(2) allows the Council and European Parliament to adopt non-harmonising incentive measures to support action taken by Member States in order to contribute to the achievement of the objectives in Paragraph One. Article 157 TFEU is concerned with gender equality and covers measures to ensure application of equal opportunities and equal treatment between men and women in matters of employment and occupation. Article 157(1) requires that men and women should receive equal pay for equal work or work of equal value. As Article 157(1) is directly applicable it overrides inconsistent national law.[1] The Court of Justice of the European Union held in *Barber v Guardian Royal Exchange Group*, that the requirement that men and women should receive equal pay extends to occupational pension schemes, subject to the temporal limitation that the Court imposed in that case.[2] [3] It means occupational pension schemes may not have unequal pension ages for men and women.[4] The role of the Court is discussed further in Chapter Three.

2.4 Competence to adopt measures to set minimum requirements in health and safety at work, conditions of work, social security and social protection of workers, and information and consultation of workers is set out in Article 153. This article confers competence on the EU to adopt legislative measures by the means of the ordinary legislative procedure, which requires agreement from both the European Parliament and the Council acting by QMV. However, unanimity is required in the Council for legislative measures on social security and social protection of workers, and termination of employment and conditions of employment for third-country nationals. Article 153 legislative measures may only be adopted through directives, not through regulations.[5]

2.5 Competence to ensure cooperation between Member States is set out in various articles in the Treaty. For example, Article 145 TFEU tasks the Member States to work together to develop a coordinated strategy for employment, whereas Article 148 TFEU sets out the process of reporting, collaboration and setting of employment guidelines and country

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1 In respect of direct applicability see Defrenne v. Sabena, Case C-43/75, [1976]. In respect of inconsistent national law see Macarthys v Smith, Case C-129/79, [1981].

2 Barber v Guardian Royal Exchange, Case C-262/88, [1990] and Article 5 of Directive 2006/54/EC Equal Opportunities of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006 [hereinafter Equal Treatment Employment Directive].

3 Now protected by Equal Treatment Employment Directive.

4 Barber, [1990].

5 As directives are implemented by the Member States they are generally less prescriptive than regulation and usually allow some degree of flexibility in how the Member States meet the directive's requirements.

specific recommendations. In particular, Article 148(2) provides for Member States 'to take into account' the Council guidelines and Article 148(3) provides for them to report on the implementation of their national policies. Moreover, the recommendations the Council can issue by virtue of Article 148(4) are based on the Member States' own reports and concern their national employment policies. Article 150 TFEU provides for an Employment Committee (EMCO). This comprises representatives from the Member States and the Commission and is central to the employment strategy coordination process. EMCO is where much of the work underpinning employment co-ordination takes place.

2.6 The non-binding process of cooperation between Member States on employment and social protection, generally referred to as the Open Method of Coordination (OMC) is set out in Article 156 TFEU. The Commission and Member States work together to support mutual learning and exchange of good practice, in particular through joint studies, consultations and peer reviews, establishment of guidelines and indicators, and monitoring and evaluation. The Article does not provide for any equivalent of the country specific recommendations or Employment Guidelines under Article 148. Lastly, Article 160 TFEU gives the power to establish the Social Protection Committee (SPC), which again comprises representatives of the Member States and the Commission, and promotes cooperation on social protection policies, in particular under the OMC. The SPC's main tasks are to monitor the social situation and the development of social protection policies; promote exchanges of information, experience and good practice; and prepare reports and opinions to Council.

2.7 In addition to these legal bases, the TFEU now also expressly recognises the social goals listed below as objectives of the EU. It is interesting to note that these include an express link at EU-level between economic aims and social progress:

- Work for Europe's sustainable development, based on balanced economic growth and price stability, and on a highly competitive social market economy, aiming at full employment and social progress (Article 3 TEU);
- Combat social exclusion and discrimination, and promote social justice and protection, gender equality, solidarity between generations and protection of children's rights (Article 3 TEU);
- Promote economic, social and territorial cohesion, and solidarity among EU countries (Article 3 TEU);
- Ensure economic and social progress by common action to eliminate barriers that divide Europe (Preamble to TFEU); and
- An objective of constantly improving people's living and working conditions (Preamble TFEU).

Legislative Position

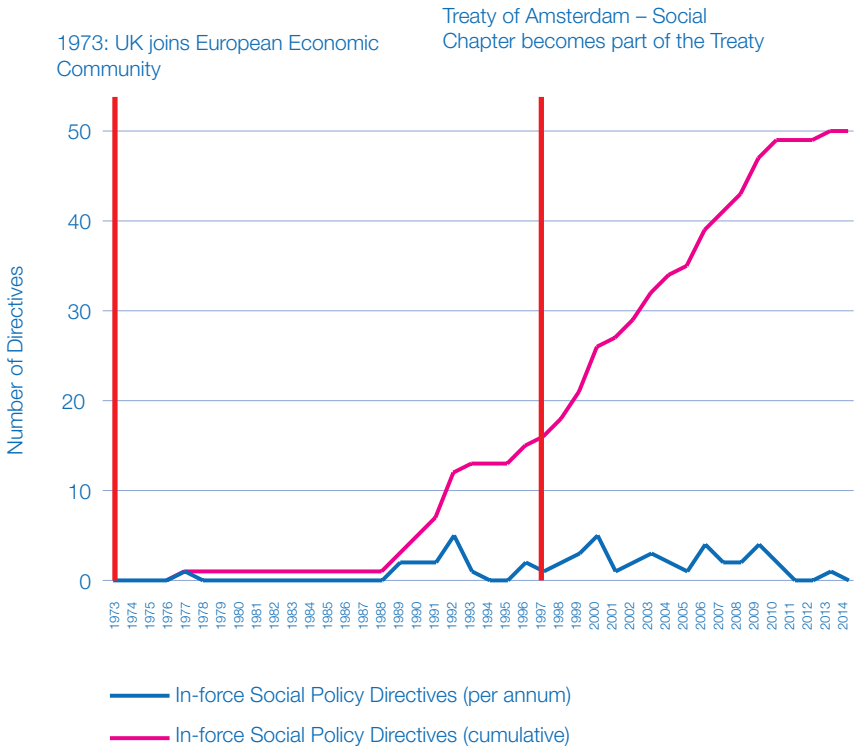
2.8 Since the 1970s the EU has adopted a series of directives on health and safety, working conditions, and the information, consultation and participation of workers. Graph One shows the annual quantity (blue line in the graph) and cumulative total (pink line in the graph) of EU social and employment directives adopted by the EU since 1973.[6] It does not look at the value of burdens imposed, which will be cumulatively felt, nor does it assess the impact on the UK labour market. For a full discussion of the costs of social and employment policy to business, see Chapter Three.

[6] Not Regulations.

2.9 No conclusions about the cumulative impact of EU social and employment directives can be drawn from this graph, in particular because in many cases the UK had pre-existing requirements in place. The graph counts social and employment directives that are currently in force. Directives are plotted according to the year they were adopted, not the year when the UK implemented them. The graph shows that initially the flow of new EU legislation in this field was relatively slow. This picked up through the late 1980s, following the introduction of the SEA, see Chapter One, and the early 2000s but has since tailed off again. On average there have been nearly two new directives introduced every year since 1986 and this falls to one a year if the whole period of EU membership since 1973 is considered.

2.10 It is important to note that the graph plots directives, which are currently in force according to the year they were adopted, not the year when the UK implemented them.[7] In several cases, pre-existing UK legislation would have meant that the UK was already adhering fully or in-part to the requirements of that Directive. Furthermore, legislation that was agreed in Brussels under the Social Chapter was not implemented in the UK until 1998.

Graph One: EU Directives on Social and Employment Policy Currently Affecting the UK[8]



7 This excludes repealed directives and directives repealed by recast/codified directives, which amalgamate previous directives into one new one. We have not included amendments because these can both increase and reduce burdens and thus would give an inaccurate picture.

8 Since the 1970s, the EU has adopted a series of directives on health and safety, working conditions, and the information, consultation and participation of workers. The graph above shows the annual quantity (blue line in the graph) and cumulative total (pink line in the graph) of EU social and employment directives (not regulations) adopted by the EU since 1973. It does not look at the value of burdens imposed, which will be cumulatively felt, nor does it assess the impact on the UK labour market. For a full discussion of the costs of social and employment policy to business, see paragraphs 3.63 to 3.84. No conclusions about the cumulative impact of EU social and employment directives can be drawn from this graph, in particular because in many cases the UK had pre-existing requirements in place. The graph counts social and employment directives that are currently in force. Directives are plotted according to the year they were adopted, not the year when the UK implemented them. The graph shows that initially the flow of new EU legislation in this field was relatively slow. This picked up through the late 1980s, following the introduction of the SEA, see paragraph 1.11 and the early 2000s but has since tailed off again. On average, there have been nearly two new directives introduced every year since 1986 and this falls to one a year if the whole period of EU membership since 1973 is considered.

Employment and Labour

2.11 Prior to the Treaty of Amsterdam, legislation regulating the employment relationship was adopted using legal bases on health and safety at work and completing the Single Market. This was the case for example for the first labour law directives adopted in the 1970s on collective redundancies; transfers of undertakings; and insolvency.[9] In this case, the specific trigger was the economic crisis of the time, marked by the oil crisis, high inflation and unemployment and a key justification for these directives was to narrow differences among national provisions that directly affected the functioning of the common market.

2.12 This was also the case more controversially for the Working Time Directive (WTD) which was adopted under the health and safety at work legal base at the time.[10] The UK challenged the choice of legal base of the original directive, arguing that this was intended to achieve social policy and job creation objectives, and as a result should have been based on either Article 100 EEC or Article 235 EEC which, unlike Article 118a EEC, require unanimous voting.[11] [12] [13] In this case, which some respondents to our Call for Evidence cited as an example of the ECJ extending competence, see Chapter Three, the Court favoured a broad reading of the term health and safety 'where the principal aim of the measure in question is the protection of health and safety of workers, Article 118a must be used, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market'.

2.13 As a result of the incorporation of the Social Chapter into the EC Treaty by the Treaty of Amsterdam, the primary legal base for adopting employment legislation is a social policy legal base: Article 153 TFEU. This article confers competence on the EU to adopt measures to set minimum standards in the areas of working conditions, protection of workers where their employment contract is terminated, information and consultation and collective representation.

2.14 There is currently a body of European labour law in place covering health and safety for fixed-term and temporary workers (1991); informing employees about their employment conditions (1991); parental leave (1992); working time (1993); young workers (1994); European Works Councils (1994); posted workers (1996); and agency workers (2008).[14] A feature of these measures is that they are based on the principle of minimum, but not

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9 Directive 75/129/EC on the Approximation of the Laws of the Member States relating to Collective Redundancies, 1992; Directive 77/187/EC on the Approximation of the Laws of the Member States relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 2001; and Directive 80/987/EEC on the Approximation of the Laws of the Member States relating to the Protection of Employees in the Event of the Insolvency of their Employer, 1980. All three were adopted under Article 100 EEC.

10 Article 118a of the EEC.

11 UK v. EU Council, Case C-84/94, [1996].

12 Now Article 115 TFEU.

13 Now Article 308 TFEU.

14 Council Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, 1991. Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 1991. Council Directive 96/34/EC on the framework agreement on parental leave, 1996. Council Directive 93/104/EC concerning certain aspects of the organization of working time, 1993. Council Directive 94/33/EC on the protection of young people at work, 1994. Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, 1994. Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, 1996. Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work, 2008.

minimal, harmonisation: States are free to impose standards over and above the minima specified in the directives.

2.15 It is worth noting that in some of these cases the UK had protections in place for employees before the EU took action and was able to successfully export these standards to the EU. This was the case for example in relation to the insolvency of an employer, where there were requirements in place for the Secretary of State to pay British employees redundancy pay on the insolvency of their employer from 1965. In other cases, such as the Pregnant Workers Directive, although the UK had pre-existing protections in place, these have not been adopted by the EU. In part this reflects the fact that there are very different models of labour market regulation across the EU and the challenge that the EU faces in delivering legislation that is compatible with all Member States.

Box Three: Social Partner Agreements

A unique feature of social and employment competence is the role conferred on social partners under the Maastricht Treaty (1992) to negotiate agreements on certain issues which could be given legal force by directives.

The provision allowing this was initially included in the Social Chapter. As this did not initially apply to the UK, legislation adopted on the basis of the new arrangements, for example, European Works Councils, did not apply to the UK at the time of adoption. However, all social partner agreements adopted under the Social Chapter were extended to the UK when the UK ended its 'opt out' in 1997.

Following 1997 the social partners have reached agreements on employment and health and safety at work issues that have been implemented by directives. This includes part-time work (1997), fixed-term work (1999) and the prevention of sharps injuries in the hospital and healthcare sector (2010). In several industries the social partners negotiated agreements (implemented by directives) that adapted the 1993 working time directive to the specific situations of their sectors: seafarers (1999), civil aviation (2000) and mobile workers in cross-border railway services (2005).[15]

Social partners were unable to reach agreement on agency workers and most recently on a revision to the WTD. The former was eventually agreed using the usual legislative route.

Health and Safety at Work

2.16 The basic elements of EU health and safety at work competence, the power to set minimum requirements to protect the health and safety of workers, have remained unchanged since the introduction of the SEA. Using this competence, the EU has developed a comprehensive set of laws covering health and safety at work. The basic obligations on employers are set out in Directive 89/391/EEC on 'the measures to

[15] Council Directive 97/81/EC concerning the framework agreement on part-time work, 1997, Council Directive 1999/70/EC concerning the framework agreement on fixed-term work, 1997, Council Directive 2010/32/EU on prevention from sharp injuries in the hospital and healthcare sector, 2010, Directive 1999/95/EC of the European Parliament and of the Council concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports, 1999, Council Directive 2000/79/EC concerning the European Agreement on the organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), 2010, Council Directive 2005/47/EC on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector, 2005.

encourage improvements in the safety and health of workers' adopted under Article 118a EEC.[16] This requires employers to take a structured approach to managing health and safety at work, including consulting their employees.

2.17 There are also 23 related directives dealing with:

- Specific types of risks, for example, physical, chemical and biological;
- Specific types of worker, for example, young, pregnant and temporary;
- Specific sectors, for example, construction, fishing and mining.

2.18 The model of a directive establishing a basic list of goal-setting obligations on employers is, to some extent, based on the UK's Health and Safety at Work etc. Act 1974 given that the UK's goal-setting system of regulating health and safety at work was well-regarded internationally for its success in reducing work-related injuries and ill-health.[17] However, the Framework Directive also included elements of a more prescriptive nature to flesh out certain requirements that reflected continental approaches to health and safety regulation, such as on the use of preventative and protective services in the workplace. In particular, it does not qualify the extent of the duties on the employer to seek a proportionate balance between cost and risk, such as the UK system does through the So Far As Is Reasonably Practicable (SFAIRP) qualification in the 1974 Act. This was the subject of a long-running dispute between the UK and the European Commission that was finally settled in the UK's favour by the ECJ in 2007. See Box Four below.[18]

Box Four: SFAIRP

SFAIRP (So Far As Is Reasonably Practicable) is used to qualify the general duty on employers to protect their employees set out in section 2(1) of the Health and Safety at Work etc. Act 1974. Section 2(1) states that:

> 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'.

Where an employee is exposed to a risk to his health or safety, the employer will have failed to satisfy the duty imposed by Section 2 unless he or she took all reasonably practicable measures to avert the risk. In deciding what is reasonably practicable, an employer must (and ultimately a court would) weigh the extent of the risk against the sacrifice, whether in money, time or trouble, of preventing the risk from arising. Only if there is a 'gross disproportion' between them – the risk being insignificant in relation to the sacrifice – will the employer have discharged the burden.

The UK relied on this principle in transposing Article 5(1) of Directive 89/391/EEC. Article 5(1) states that:

> 'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work'.[19]

[16] Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, 1989.

[17] Health and Safety at Work etc. Act 1974.

[18] Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, Case C-127/05, [2007].

[19] Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, 1989.

Article 5(4) of the Directive provides that Member States are entitled to restrict or limit an employer's responsibility in circumstances equating to a force majeure. However, the Commission argued that the UK's use of SFAIRP went beyond this in qualifying the duty on employers in Article 5(1). The Commission also believed that because UK efforts to secure the inclusion of SFAIRP in the definition of employer responsibilities had been rejected during the original negotiations on the Directive, it was accepted that the intention of the Directive was to impose a 'no-fault liability regime' on employers. This meant that employers would be liable for the consequences of any event detrimental to workers' health and safety, regardless of whether that event or those consequences could be attributed to any form of negligence on the part of the employer in adopting preventive measures.

In October 2004, the Commission referred the UK to the ECJ for incorrect transposition of Article 5(1) of Directive 89/391/EEC. The Court, in its judgement of 14 June 2007, dismissed the Commission's case against the UK and ordered it to pay the costs of the action.

Non-Discrimination and Equality

2.19 The EU has developed comprehensive legislation in the area of non-discrimination and equality. It began with sex equality in the employment context and has now extended to race, disability, sexual orientation, age and religion or belief in employment, and race and sex in the provision of goods and services. A proposal for a new directive that aims to ensure that discrimination on the basis of age, disability, religion or belief and sexual orientation have the same or similar levels of protection as provided for race is currently being negotiated in the Council.

2.20 The primary legal bases for adopting equal treatment measures are now Articles 19, 153 and 157 TFEU. Article 19 TFEU confers competence on the EU to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 153 TFEU permits the EU to support and complement the activities of the Member States to achieve equality between men and women with regard to labour market opportunities and treatment at work. Article 157(3) TFEU permits measures to be adopted to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including on equal pay. The main directives that have been adopted under these legal bases are:

- The Race Directive implements the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive prohibits discrimination on the grounds of race in employment, training, social protection, including social security and healthcare, education, access to and supply of goods and services which are available to the public;[20]
- The Employment Framework Directive combats discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment;[21]

[20] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000.

[21] Council Directive 2000/78/EC establishing a general framework for equal treatment In employment and occupation, 2000.

- The Gender Directive implements the principle of equal treatment between men and women in the access to and supply of goods and services. This Directive prohibits discrimination on the grounds of sex in the provision of goods and services;[22]
- The Recast Gender Directive, which amended and consolidated earlier directives relating to gender equality implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[23] This recast directive contains provisions to implement the principle of equal treatment in relation to employment, training, working conditions, including pay and occupational social security schemes.

2.21 The above EU measures have been transposed into law in Great Britain by means of the Equality Act 2010.

Social Protection

2.22 Article 153 TFEU gives the Council the power to adopt directives, but not directly applicable regulations, setting out minimum requirements in relation to social security and social protection of workers. To date, this power has not been used. If it were used, it would be subject to the limits set out in Article 153(2) which excludes any harmonisation of national laws and Article 153(4) which prevents the adoption of any provision that would affect the right of each Member State to define the fundamental principles of their social security system, or significantly affect the financial equilibrium of the social security system of the Member State. Unanimity in Council is also required for any such directive.

2.23 That said, some EU legislation that impacts on employment and social protection has been introduced to achieve other policy goals, such as equal treatment, or in support of one of the fundamental freedoms, such as the right to free movement under Article 48 TFEU. For example, Regulation 883/2004 seeks to support free movement by providing for social security coordination between Member States; Directive 98/49 supports employed and self-employed workers moving within the Community by safeguarding their supplementary pension built up in one Member State when they leave to work in another Member State; and Decision 492/2011 establishes information-sharing on job vacancies and other cooperation between Member States Public Employment Services (EURES).[24] [25] [26] These measures are covered by the Balance of Competences review on Free Movement of Persons.

2.24 In addition, some EU legislation provides financial support to assist Member States to achieve various employment and social policy objectives, and the Commission to support these. Most notably the European Social Fund (ESF), to support employment opportunities for workers by complementing Member States' jobs and training policies; the European Globalisation Fund (EGF), to support actions that reintegrate redundant workers in to the labour market where national measures are not already in place; and

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[22] Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004.

[23] Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 2006.

[24] Regulation 883/2004/EC of the european parliament and of the council on the coordination of social security systems, 2004.

[25] Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the community, 1998.

[26] Commission Decision 492/2011/EEC implementing Regulation 492/2011/EEC of the european parliament and of the council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES, 2012.

the Programme for Employment and Social Innovation (EaSI), directly managed by the Commission to help support development of EU and national policy and employment and social protection, and cooperation between public employment services. [27] EaSI succeeds earlier programmes and primarily allows the Commission to buy-in services and expertise not readily available in-house. In particular, it develops existing EU-level capacity for testing and evaluating policy innovations that might be of value to Member States and developing micro and social enterprise. The ESF and EGF are covered by the review on Cohesion policy.[28]

Subsidiarity and Proportionality

2.25 As with other EU competence that is not exclusive, EU social and employment legislation must respect the principles of subsidiarity. All EU action is subject to the principle of proportionality. Subsidiarity and proportionality will be dealt with by the review of Subsidiarity and Proportionality.[29]

2.26 Subsidiarity means that decisions should be taken at the lowest appropriate level. This means that the EU should only act if and in so far as the proposed action's objectives cannot be sufficiently achieved by its Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved by the EU. So, for example, minimum standards necessary to ensure fair competition in the Single Market required EU level action. Proportionality means that the content and form of European Union action must not exceed what is necessary to achieve the objectives set out in the EU Treaties.

2.27 Reforms introduced as part of the Lisbon Treaty strengthen policing of the principle of subsidiarity by giving national Parliaments the power to send proposals for legislative acts back for review if they consider that they are not in line with the principle of subsidiarity[30]. If enough national Parliaments submit reasoned opinions the institution from which the proposal originates (Commission, Council, and European Parliament and so on) must review and decide whether to maintain, amend or withdraw the proposal. If it decides to maintain the proposal, the relevant EU body must give reasons for the decision in a reasoned opinion. Social and employment policy saw the first withdrawal of a proposed legislative act under this process in response to the Monti II proposal discussed in Box Five.

[27] Regulation 2013/1296.

[28] HMG, *The Balance of Competences Between the UK and the EU: Cohesion Report*, published in parallel.

[29] HMG, *The Balance of Competences Between the UK and the EU: Subsidiarity and Proportionality Report*, published in Semester 4.

[30] Protocol (No 2) TFEU.

Box Five: Case Study – Monti II Proposal[31]

This case concerned the proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II). The stated aim of the Commission proposal was to clarify the interaction between the exercise of social rights and the exercise of the rights to freedom of establishment and to provide services enshrined in the Treaty.

It tried to address the concerns raised by stakeholders (especially trade unions) that, following the *Viking* Line and *Laval* judgments of the Court of Justice, economic freedoms prevail over the right to strike in the Single Market and was considered important because of the difficulty in finding common ground in industrial conflict situations involving business and workers in different Member States.[32] The proposal sought to do so by clarifying in a legislative instrument that no primacy exists between the two.

In response, national Parliaments issued 12 reasoned opinions on the Monti II proposal, representing 19 votes (18 being the threshold), and thus for the first time triggered a so-called yellow card.[33] Objections included doubts about the added value of the proposal; the need for the action proposed; and that the proposal breached the principle of subsidiarity.

After an assessment of the arguments put forward by national Parliaments in their reasoned opinions, the Commission's view was that the principle of subsidiarity had not been breached. However, this was not the view of the national Parliaments who objected. As there had been sufficient reasoned opinions to trigger the so called 'yellow card procedure' the Commission took note of the views expressed by national Parliaments, the state of play of the discussions on the draft regulation amongst Member States and comments from social partners. The Commission's stated reason for withdrawing its proposal was that it recognised that its proposal was unlikely to gather the necessary political support within the European Parliament and Council to enable adoption. However, the fact remains that this was the first time a yellow card was issued and the proposal was withdrawn by the Commission.

Non-Legislative Action

2.28 Directives and regulations are not the only way that the EU pursues its objectives in the fields of labour law and working conditions. There are also non-legally binding legal acts such as recommendations and opinions that can be used by the Council and the Commission to set out a particular course of action or a view on an issue. Their effect is one of 'soft' law to influence national governments or the parties to whom they are addressed. Soft law on work-related matters may also take the form of policy coordination, exchanges of good practice, benchmarking and codes of conduct.

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[31] Commission Proposal for Council Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services, 2012.

[32] International Transport Workers' Federation and Finnish Seamen's Union v Viking Line Case C-438/05, [2007] and Laval v Svenska Byggnadsarbetareförbundet, Case C-341/05 [2007].

[33] The reasoned opinions were issued by SE Riksdag (2 votes), DK Folketing (2 votes), FI Eduskunta (2 votes), FR Sénat (1 vote), PL Sejm (1 vote), PT Assembleia da República (2 votes), LV Saeima (2 votes), LU Chambre des Députés (2 votes), BE Chambre des Représentants (1 vote), UK House of Commons (1 vote), NL Tweede Kamer (1 vote) and MT Kamra tad-Deputati (2 votes).

The Open Method of Cooperation (OMC)

2.29 Much of the EU-level action in the areas of employment promotion and social protection involves voluntary cooperation between Member States, to support mutual learning through exchange of information and good practice, leaving national governments to decide on the appropriate action. This is facilitated by the European Commission under OMC, which has been used chiefly in areas where there is limited scope for EU-level legislation. The process has been presented as a more flexible alternative to further law, though another view is that it is a means for the European Commission to promote national policy models it identifies as the most effective. The OMC was formally adopted by Member States as part of the Lisbon Strategy from 2000 'to become the most competitive and dynamic knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion'.

2.30 In the subsequent years, the OMC has been progressively introduced in the employment and social affairs field as a means of supporting mutual learning on how Member States might address agreed common challenges, and measure progress against agreed common indicators, while respecting distinct national policies and traditions. The main levers are the exchange of information and good practice between Member States, including expert analysis and peer review, together with engagement with other stakeholders. At a practical level, it involves annual programmes of joint studies, consultations, conferences and other expert stakeholder meetings, establishment of guidelines and indicators, and monitoring and evaluation. This occurs principally via the Employment and Social Protection Committees, which comprise delegates from all Member States and the Commission, which provide advice to Ministers at the Employment and Social Policy Council. These committees are usually attended by officials from the Department for Work and Pensions (DWP), and meet approximately once a month. The European Parliament has no direct role in the OMC.

Box Six: The European Semester

Building on the existing mechanisms for economic, employment and social protection coordination, in 2010 Member States adopted the *Europe 2020 Strategy* (EU2020) 'to support smart, sustainable and inclusive growth'. This sets ambitious EU-level objectives on employment, innovation, education, social inclusion and climate change/energy to be reached by 2020.

The coordination of employment policy as part of EU2020 takes place under the broader umbrella of the European Semester, a yearly cycle of economic policy coordination and surveillance. Member States and the Commission jointly report on progress against agreed Europe 2020 EU-level targets, including to raise the employment rate to 75%, and lift at least 20 million people out of the risk of poverty and social exclusion.

The coordination and surveillance process involves presentation of Member States' reform plans to the Commission and other Member States, and the production of a National Reform Programme report. The European Parliament again has no formal role.

Following the submission of the National Reform Programme reports by Member States, which give an account of each Member State's progress against the previous year's Country Specific Recommendations, as well as other developments and plans, the Commission prepares annual Country Specific Recommendations (CSRs) for each Member State. The CSRs are discussed by Member States, including at the Employment and Social Protection Committees, then by Ministers at the relevant Council and are then endorsed by Heads of State and Government at the European Council, before formal adoption at the end of June or in early July. This timing is intended to allow the recommendations to be available to Member States before they finalise their plans and draft budgets for the following year. Nevertheless, CSRs are non-binding on Member States.

Chapter 3: Impact on the National Interest

3.1 As we have seen, there is now a fairly substantial level of EU competence where social and employment policy is concerned. This chapter summarises the views of respondents to our Call for Evidence on how this impacts on the UK's national interest.

3.2 As set out in the Call for Evidence, social and employment policy is one of the most controversial areas of EU competence and the debate about whether or not the balance is right between the EU and Member States goes to the heart of what the EU is about. At its root, this is a philosophical and political question about whether the EU is fundamentally an economic union or has a legitimate set of social goals at its core. Some of the arguments are philosophically driven, such as the belief that there is such a thing as a shared European social ideal, but for many the fundamental debate about EU competence in this area centres on whether or not social policy is in itself an intrinsic element of the Single Market.

3.3 There is therefore a spectrum of views, even amongst those who support the European project. At one end, the EU is considered to be fundamentally an economic union which should not intervene on social and employment issues at all, and at the other end are those that want common social and employment standards throughout the EU. It is worth noting that although many respondents to this review were pragmatic about the likelihood of continued EU competence in this area, we found far greater fragmentation in their views about whether EU action in social employment policy was beneficial or necessary. We found that it was not just a binary trade-off between economic and social policies, and the arguments were far more complex and nuanced than that. For example, many of the respondents that argued that there should be no or very limited EU competence over social and employment matters did so on the basis that these are important policies and needed to reflect domestic culture and traditions rather than because they thought that economic goals had primacy over social ones in and of themselves. Others argued that some minimum level of social and employment policy is required for the functioning of the Single Market.

3.4 Opinion polling suggests that the general public have strong views on EU social and employment policy. For example, a 2012 YouGov poll found that 67% of respondents felt employment rights should be decided by the UK Government compared to only 26% that favoured some EU involvement in this competence.[1] The strength of these views may not be reflected throughout this report as the majority of respondents to our Call

[1] YouGov, *YouGov Survey Results, Field Work 13-21 February* (2012), available at: cdn.yougov.com/cumulus_uploads/document/9y0pzou4rx/Results%20120222%20Cross%20Country%20EU.pdf, accessed on 27 May 2014.

for Evidence were business, legal organisations, trade unions, academics, public sector bodies and MEPs.[2] Of the responses we did receive, almost all respondents argued that EU competence over social and employment policy has had an impact on the UK, but there was little consensus about what that impact has been and whether it has been positive or negative. Key themes that emerged were the link between social and employment policy and the Single Market; the specific features of the legislative and non-legislative processes and the impact of EU competence on social and employment policy on the UK labour market, business bodies' costs and individual rights.

Social and Employment Policy and the Single Market

3.5 Given the controversial nature of EU competence in social and employment policy, our Call for Evidence asked respondents to comment on the extent to which EU action in this area is necessary for the operation of the Single Market. In-line with the Single Market review, we found that there are strong views on both sides of the debate.[3]

3.6 For some respondents, EU competence in this area is valid in and of itself, regardless of whether it supports the Single Market or not. For example, the TUC, UNITE, GMB and UNISON argued that there is a moral case for EU intervention in this area. In their view, EU action has played a central role in maintaining employment, protecting working people from exploitation, combating discrimination and social exclusion and promoting high trust, high skilled workplaces. The TUC cited as evidence both ECJ case law – for being influential in combating sex discrimination in pay and other terms and conditions – and EU legislation, including directives covering acquired rights, collective redundancies, part time and fixed-term workers. It also pointed to the Treaty to underline its view that these are central objectives of the EU. For example, it highlighted that 'article 3(3), which provides for the establishment of the internal market, notably does not describe it as an end in itself, but rather as a means to achieving different ends including the creation of '[..] a social market economy, aiming at full employment and social progress'.

3.7 A similar view was expressed by the Scottish Government who said that European social policy is necessary and noted that it complements its own policy concerning supporting individuals into work.

3.8 Other respondents, including Dr Lee Rotherham and David Campbell Bannerman MEP, felt that the current level of EU competence over social and employment policy was not necessary for the operation of the Single Market. Dr Rotherham and Robert Oulds in their report, *The Bottom Line*, commented that 'the entire competence of Employment should […] be removed from the treaties, and ideally Social Affairs with it'.[4] [5] In his response to our Call for Evidence, Mr Campbell Bannerman suggested '[…] the deletion of EEA's social policy provisions […] on the grounds that this area is not directly about trade and should be left to the nation state to decide'.

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2 Please see Annex A for full list of respondents.

3 HMG, *The Balance of Competences Between the UK and the EU: Single Market Synoptic Report* (2013).

4 Robert Oulds and Dr Lee Rotherham, *The Bottom Line* (2005).

5 Evidence submitted to: HMG, *The Balance of Competences Between the UK and the EU: Single Market*.

3.9 The Institute of Directors (IoD) also commented that it was 'far from obvious why the EU should set social and employment goals and impose them on its Member States – sometimes against their wishes and even against their interests'. A 2013 IoD survey of its members on the usefulness of current EU interventions found that employment and social affairs were considered to be most unhelpful.[6] It noted that employment and social affairs was the only area where a majority of the 1,300 survey respondents (57%) said it was unhelpful and it ranked last in terms of the balance between helpfulness versus unhelpfulness.

3.10 Some respondents to our Call for Evidence considered in more depth the question of whether there was a link between the Single Market and social and employment policy. These respondents tended to focus on arguments around whether EU competence in this area facilitated free movement and/or created a level-playing field that supported competition and prevented social dumping between Member States. In considering this question, some respondents made international comparisons. For example, the Centre for Employers and Enterprises Providing Public Services (CEEP) UK noted in their response that other Single Markets operate effectively without extensive harmonisation of employment standards.[7] Box Seven considers the comparison between the EU and other large single trading markets in the USA and Canada, both in terms of the extent to which there are common social and employment rules in these jurisdictions and the labour market outcomes they achieve.

[6] IoD, *submission of evidence*.

[7] CEEP UK is the Voice of UK Public Employers in Europe. CEEP UK is a member of European CEEP.

Box Seven: The USA and Canada

Although not direct comparators to the EU, both the USA and Canada have systems that are fairly similar to the current EU model in that they set a framework for social policy at federal level but allow a degree of autonomy at state or province level. This seems to suggest that there is no compelling economic need for full harmonisation of social standards although it could also be concluded from their models that some degree of minimum standards is important.

It is interesting to note that we currently see greater variation in labour market outcomes in the EU than in either the USA or Canada. For example, in 2013 the unemployment rate across states in the USA ranged from 2.9% in North Dakota to 9.8% in Nevada and in Canada from 4.6% in Alberta in 2013 to 11.5% in Prince Edward Island.[8] [9] In comparison, the unemployment rates across the EU in 2013 showed greater variation. For example, the unemployment rate in 2013 ranged from 4.9% in Austria to 27.5% in Greece.[10] [11]

Of course, the model of labour regulation is not the only factor that is likely to have had an impact on these figures. For example, one factor limiting the harmonisation of labour market outcomes within the EU may be its relatively limited labour mobility. A 2008 study conducted by the EU suggested evidence that labour mobility in 2006 between states in the USA was much higher than both between and within EU Member States.[12] For example, the study showed the share of working age residents who moved from a different region or State within the same country to be 1.98% for the USA, 0.96% for EU27 1.12% for EU15 and 0.34% for EU12.[13] Other factors that might explain the disparity in unemployment and employment rates in the EU include language differences and incomplete portability of public welfare entitlements.

3.11 The argument that there is a link between the Single Market and social and employment competence is that, by setting minimum requirements, EU competence in this area ensures that businesses in the Single Market compete within the same basic framework of rules and workers enjoy the same basic level of protections. This ensures fair competition between companies and prevents exploitation of workers by avoiding a 'race to the bottom' where businesses seek to become more competitive by undercutting each other on wage and social and employment costs. This argument was made by the TUC, UNISON, ARCO, Associated Society of Locomotive Engineers and Firemen (ASLEF), GMB, Thompsons Solicitors, and Unite.

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8 US Department of Labour, *Unemployment Rate for the States* (2013).

9 Government of Canada, *Labour Force, Employment and Unemployment, Levels and Rates by Province* (2013).

10 *European Commission, Unemployment – LFS Adjusted Series*, (Unemployed persons comprise persons aged 15 to 74 who were: a. without work during the reference week, b. currently available for work, c. actively seeking work), available at: epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/main_tables, accessed on 27 May 2014.

11 It is also worth noting that the variation in the EU labour market was much lower before 2008. Note that even a well functioning labour market might be expected to take time to react to an economic shock, and this perhaps partly explains the current high variation in unemployment rates across the EU at the moment. There may be an expectation, that over time, when economic growth returns, that EU unemployment rates will begin to converge again.

12 *Zuzana Gáková and Lewis Dijkstra*, 'Labour Mobility Between the Regions of the EU-27 and a Comparison with the USA', *European Union Regional Policy* 02/2008 (2008).

13 The EU regions where the largest proportions of people were leaving were found to have high unemployment rates and low wages relative to other regions. Those regions that received the most migrants were found to have growing employment levels but not necessarily higher wages. Optimal Integration in the Single Market: A Synoptic Review, Europe Economics report for BIS, April 2013.

3.12 This message also came out strongly from research BIS commissioned to understand how businesses feel about the EU's influence on UK law in the field of employment.[14] This research found that, regardless of their overall stance on the EU, nearly all respondents said the only way to ensure a fair and competitive common market within the EU was for at least some laws, particularly those relating to competition, services and treatment of employees, to be controlled centrally. Even amongst those with concerns about the EU's influence on UK law, this research found that there was an acknowledgement that there was a role for the EU to ensure Member States could not gain an unfair competitive advantage over one another.

3.13 However, the views of business respondents to our Call for Evidence were less clear cut. On the one hand, the FSB observed that 'employment and social policy agreed at EU-level can be helpful for businesses as it levels the playing field within the Single Market. Businesses who operate cross-border suffer where there is too much variation in regulation, as it increases uncertainty, compliance costs and administrative burdens'.[15] London Chamber of Commerce and Industry (LCCI) also noted that 'any differences in national regulations may add to business costs and disincentivise companies from trading or expanding abroad'.[16] Similarly, in its response to our Call for Evidence, the CBI indicated that a poll of its members showed while there were frustrations, 52% said they had benefited directly from the introduction of common standards whilst only 15% suggested the impact had been negative. However, despite the benefits of some commonly agreed rules, 52% of businesses believed that if the UK were to leave the EU, the overall burden of regulation on their businesses would decrease.

3.14 The counter argument was made most strongly by the IoD who rejected arguments that minimum labour standards were needed to create a level-playing field for businesses in Europe to prevent 'social dumping' and a race to the bottom. The IoD pointed out that 'EU companies are competing not just in Europe but globally. Excessive regulation will make them globally uncompetitive, against the long-term interests of the European workforce'.[17] They added that imposing minimum labour standards is an inefficient and largely ineffective way of creating a level playing field in terms of costs for two reasons. Firstly, because the 'biggest cost component of labour comprises wages and social security contributions, neither of which is regulated at the EU-level', and secondly because it believed that if 'legislators impose ever higher costs and burdens on employing people, companies will increasingly use ways to avoid employing people, for example using service companies, self employed contractors and workers based outside the EEA'.[18]

3.15 In addition to this, our discussions with stakeholders as part of this Call for Evidence highlighted that some businesses have doubts about the existence or possibility of creating a level-playing field in this area at all. These respondents often highlighted that there were important cultural differences in how Member States implemented EU legislation. This was confirmed by the BIS research which identified that many businesses perceived that the UK abides by EU laws 'to the letter' whereas other Member States, it is perceived, are more likely to fail to enforce EU regulations.[19]

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[14] The IFF Research commissioned by BIS, *UK Business Views of The Balance of Competences between the EU and the UK* (2014).

[15] FSB, *submission of evidence*.

[16] LCCI, *submission of evidence*.

[17] IoD, *submission of evidence*.

[18] Idem.

[19] IFF, *UK Business Views of The Balance of Competences*.

3.16 Many respondents argued that full social harmonisation was not required to facilitate the Single Market. For EEF, EU action should be limited to a framework of minimum standards. At present, they believe that EU legislation goes beyond such minimum requirements, citing as an example the WTD. Similarly, in his response on behalf of Liberal Democrat MEPs, Phil Bennion MEP, set out that they 'believe that such action should not be unfettered and controls should be exerted where possible to ensure that proposals are proportionate and remain within EU competence'.[20]

3.17 In common with the responses to the Single Market review, we also found that some respondents felt that some elements of common employment law could be helpful in ensuring free movement of persons and in facilitating cross-border establishment and provision of services. For example, the Bar Council of England and Wales, and Royal College of Nursing felt that this has had a positive impact in enabling British workers to work in other Member States and ensuring the fair treatment of workers from other countries coming to the UK. The Bar Council argued that 'one of the basic foundations of the Single Market is free movement of persons. Individuals who are vulnerable to discrimination will be reluctant to exercise their free movement rights unless they are guaranteed a comparable standard of protection from discrimination in the Member State to which they are moving'.[21]

3.18 These issues will be explored in more detail in the Balance of Competences Free Movement of Persons Review.[22]

EU Social and Employment Legislation

3.19 As set out in Chapter One, the earliest EU social and employment legislation was adopted under economic legal bases. As competence expanded to include health and safety at work, working conditions and equal treatment the number of measures increased. This legislation has the potential to impact on the UK in a number of ways. Firstly it can confer rights on individuals in some areas. Where these go beyond existing national legislation they increase protection and aim to improve the living and working conditions of those individuals who are eligible. Secondly, it can increase costs for employers by impacting on the organisation of the workplace and creating administrative requirements and burdens when employing staff. These impacts are considered later in this chapter.

3.20 These impacts may have changed over time as the world of work has developed during the period since the Treaties were first adopted in the 1950s. There has been considerable structural change in EU Member State's economies since then. For example, the British economy has shifted to one in which service industries such as banking and insurance play a larger role than they once did, while industries such as iron and steel manufacturing, heavy engineering and mining have reduced, giving rise to new and different employment practices and challenges. In addition, technologies have changed over the years, introducing some new risks whilst diminishing others. This has, arguably, impacted on the need for legislation, particularly some aspects of health and safety, although the goal-setting approach of the Health and Safety at Work etc Act 1974 means that such changes can be accommodated more easily than in a prescriptive system.

3.21 Lastly, EU social and employment legislation has the potential to impact on the UK's ability to define its own social policy, for example by setting standards or ways of

[20] Phil Bennion MEP, *submission of evidence*.

[21] Bar Council, *submission of evidence*.

[22] HMG, *The Balance of Competences between the UK and the EU: Free Movement of Persons Report*.

regulating the labour market. Our Call for Evidence highlighted a number of features of how the EU legislates that are particularly relevant in this area, including the role of social partners, minimum requirements and non-regression clauses. Although very few correspondents commented on non-regression clauses, the role of social partners and minimum requirements attracted more attention.[23] Respondents also highlighted the need for a greater focus on better regulation and the role played by the ECJ and the European Parliament in interpreting and shaping EU social and employment law.

The Role of Social Partners

3.22 The role of the social partners in legislation is a unique feature of social competence which gives social partners a formal role in defining labour market rules at a national-level by reaching mutual agreement.[24] This is then aligned to the legislative process. This is a common feature in the national systems of other Member States that is different from the UK model. In the UK, this sort of collective agreement has been predominantly made at company level rather than national-level. This means that these company agreements do not have formal implications for national social legislation. At the EU-level however, the social partners have the right to adopt Europe-wide collective agreements which can be given legal effect by the Council.

3.23 This issue was picked up by a number of respondents to our Call for Evidence. UNISON, the TUC, British Medical Association and Professor Collins all highlighted the benefits of social dialogue.[25] For example, UNISON pointed to the value of social partner commitment in negotiating effective solutions that reflect the needs of the specific industries and argued that employee representatives and employers are best placed to ensure such solutions are effective if they have been agreed through negotiations. FSB, on the other hand, commented that 'from the perspective of UK small firms, the 'social dialogue' process can appear opaque and remote, and we believe the voice of many small and micro businesses is missing in the process, particularly in the sectoral social dialogue'.[26]

3.24 Professor Collins and the Fire Sector Federation also raised concerns over the representativeness of the process. For the Fire Sector Federation this was because many workers, such as part-time workers and SME employees, are not part of the recognised social partner negotiation groups and hence are 'outside the tent' when discussions are held.[27] They suggested that there is a need to increase the consultative process so that such groups, now a very significant part of the workforce, are not disenfranchised.

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[23] Non-regression clauses are not included in all EU directives, but where they are included they mean, in very general terms and subject to some exceptions, that it is not possible for a Member State, when implementing the directive, to row back from the existing domestic legislation if the EU measure being implemented is less generous.

[24] The social partner organisations represent the interests of workers and European employers. The main cross-industry organisations representing social partners at European level are: the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (BUSINESSEUROPE), the European Association of Craft, Small & Medium-sized Enterprises (UEAPME) and the CEEP. Alongside these cross-industry organisations are many other socio-professional groups representing specific or sectoral interests. The Treaty of Lisbon (Article 152 of the TFEU) recognises the role of the social partners in labour relations and European social dialogue. They represent their members during consultations with the Commission and the negotiation of collective agreements. They also sit with the European Economic and Social Committee, alongside other organisations representing civil society. Please see list, available at: europa.eu/legislation_summaries/glossary/social_partners_en.htm, accessed on 27 May 2014.

[25] Professor Collins is a Vinerian Professor of English Law at All Souls College, University of Oxford. Professor Collins submitted evidence to this report in a personal capacity.

[26] FSB, *submission of evidence*.

[27] Fire Sector Federation, *submission of evidence*.

3.25 In the area of health and safety at work, the Royal College of Nursing argued that the social dialogue process has led to positive outcomes for the UK and that a good example was the Framework Agreement on the prevention of sharp injuries in the hospital and healthcare sector.[28] They felt the lessons of the agreement could be shared and that consideration should be given to extending social dialogue to other health settings such as primary care. However, this view was balanced by the view of the National Hairdressers' Federation (NHF) which was concerned that proposals can result in disproportionate outcomes. It referred to a Framework Agreement on the protection of occupational safety and health in hairdressing that the social partners have requested be implemented by a Directive. The NHF noted that 'the proposals arrived at through social dialogue would place a disproportionate burden of cost and unnecessary conditions on the hairdressing industry'. The Government, supported by other Member States, shares this view of this particular agreement.

Minimum Requirements

3.26 EU competence to legislate on employment and health and safety at work issues is limited to the adoption of minimum requirements.[29] Member States have to ensure their own domestic legislation complies with these rules as a minimum and once EU legislation is adopted can no longer apply previously lower standards. In theory this practice ensures that the EU respects the principles of subsidiarity and proportionality by ensuring that EU regulation is the minimum necessary and that it is for Member States to decide when it is necessary to go beyond the minimum. However, as discussed below, a number of respondents felt that this was not working in practice.

3.27 A number of respondents felt that the minimum requirements limitation is important in relation to the Single Market. For example, the British Hospitality Association commented that 'it seems reasonable that citizens should be able to rely on minimum employment standards everywhere in the EEA, but not that those standards should necessarily be identical in each Member State'.[30] However, some respondents argued that in some cases current EU rules go beyond the minimum required. For example, EEF said 'all too often we believe this has been exceeded, and EU law imposed higher standards of compliance than the minimum requires. The WTD and the Posting of Workers Directive are but two examples, where we question whether EU law has provided only the minimum protection required'.[31]

3.28 This was echoed by a number of respondents who felt that EU legislation is too detailed. For CEEP UK, CBI and FSB, this meant the requirements imposed on the UK were too prescriptive and that the national interest would be better served if the EU focused more on the goals and outcomes that it wanted to achieve and allowed Member States greater discretion in deciding how to achieve those outcomes. The CBI summarised the argument, saying that 'prescriptive requirements can undermine the principle of subsidiarity by failing to recognise the diversity of models within the EU. Rather than attempting to impose aspects of one model on other Member States the focus should instead be on outcomes rather than

[28] Implemented by Council Directive 2010/32/EU on the prevention from sharp injuries in the hospital and healthcare sector implementing the framework agreement concluded by HOSPEEM and EPSU, 2010.

[29] Article 153 (2) TFEU.

[30] British Hospitality Association, *submission of evidence*.

[31] EEF, *submission of evidence*.

process'.[32] They pointed to the Working Time, Temporary Agency Workers and Artificial Optical Radiation directives as examples of prescriptive requirements that, in their view, undermine the principle of subsidiarity.

3.29 Building on this theme, the FSB felt that although the Single Market requires common rules, regulation designed at Member State-level is more likely to be a better 'fit' to national/regional systems and local labour markets than EU-wide rules. This was supported by findings from research commissioned by BIS which found that there was a common perception that regulations stemming from the EU are more complicated than those made in the UK due to the perceived 'extra layers' of regulation stemming from the multiple countries involved in EU decision making, as well as the perception that the UK would have to create additional laws on top of its own legislation in response.[33]

3.30 The Dutch review of the principles of subsidiarity and proportionality also highlighted concerns that legislation in the social and employment field goes beyond the minimum standards necessary. For example, in relation to health and safety and welfare legislation the report concluded that 'EU legislation in this area is highly detailed and specific about means (rather than ends). This can limit the options for tailoring implementation to national circumstances and lead to higher implementation costs […]. The Netherlands is pressing for a system in which legislation on working conditions focuses on essentials and the sectors themselves are given the freedom to flesh out the provisions in sector-wide agreements (self-regulation) […] arrangements involving trade unions and employers' associations, such as the agreement in the hairdressing sector, should be evaluated in the light of European principles of 'smart regulation'. This includes carrying out full impact assessments'.[34]

Better Regulation

3.31 There was a general theme in the comments from respondents that legislation that derives from the EU is hard to understand and there is a need for increased transparency. For example, the IoD felt that the processes for making EU legislation are complicated and opaque and that the number of players involved (including the Commission, the Council, the European Parliament and the EU social partners) tended to force compromises. A further factor is that, following the enlargement of the EU, there is now a much greater range of labour market models and challenges across the EU than there originally was. These differences between Member States is one of the reasons why getting agreement on social policy files can be challenging as every Member State seeks to ensure that EU action fits with, or does not pose challenges for, their domestic systems.

3.32 EEF recognised that the Commission has been moving in the direction of better regulation, commenting that 'the Top 10 most burdensome regulations for SMEs, the REFIT programme, the current evaluation of all worker protection health and safety directives, fitness checks and the attention being given to robust impact assessments are all ways in which the proportionality, appropriateness and impact of EU legislation can be assessed and measured'.[35] Some respondents however felt there was room for improvement. For example, the IoD felt that the 'EU institutions have been slow to adopt better regulation principles, and remain well behind best practice in this area'.[36]

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[32] CBI, *submission of evidence*.

[33] IFF, *UK Business Views of The Balance of Competences*.

[34] Government of The Netherlands, *Testing European Legislation for Subsidiarity and Proportionality – Dutch List of Points for Action* (2013).

[35] EEF, *submission of evidence*. EEF is known as the manufacturers' organisation.

[36] IoD, *submission of evidence.*

Similarly, the LCCI supported the UK's active engagement in reforming EU legislation and suggested the Commission should carry out further reviews of existing legislation to check fitness for purpose.

3.33 The Government has a strong domestic and EU better regulation agenda, and believes that EU social and employment law should not impose unnecessary burdens on business. In particular it believes that the EU should not take action unless it is underpinned by a credible impact assessment, which should demonstrate that the measure will support competitiveness, economic growth and job creation. Impact assessments should also reflect the Commission's own Think Small First Principle, in order to ensure that small businesses are not disproportionately affected by proposed legislation. The recent report by the Prime Minister's Business Taskforce highlighted a number of social and employment directives where a closer application of better regulation principles is needed.[37] This included the WTD and Temporary Agency Workers Directive, and the written risk assessment requirement of the Health and Safety at Work Framework Directive mentioned below. Additionally, they proposed that the Commission should be subject to a range of better regulation principles when it goes out to consultation, including publishing provisional impact assessments.

3.34 Some of these views were echoed by the IoD, CBI, FSB, Open Europe and Anthea McIntyre MEP. Both the IoD and FSB argued that EU legislation has too often failed to take into account the nature of small and micro firms, thereby imposing disproportionate burdens on small firms. FSB added 'the EU should drive forward an ambitious regulatory reform programme so laws are smart, proportionate and evidence-based and always "Think Small First".[38] Anthea McIntyre MEP commented 'by obliging the British government to implement various 'one size fits all' directives and regulations, EU action in the field of social policy will, with the best of intentions, add disproportionate and overly burdensome requirements on British businesses, particularly SMEs and micro-enterprises, which will limit their ability to grow and create jobs'.[39] Open Europe called for 'a general small business exemption [...] from the main bulk of EU social law'.[40]

3.35 There was in particular a call for the EU to adopt a more proportionate approach to regulation of health and safety at work from a number of organisations including the CBI, FSB, EEF, British Ceramic Federation, and the National Farmers' Union (NFU). They compared unfavourably the EU's inflexible hazard-based system with the UK's more flexible, risk-based approach. The Prime Minister's Business Taskforce recommended that Member States should have the flexibility to determine when written risk assessments are required, in line with their national circumstances (see Box Nine). This would be instead of the current prescriptive requirement which requires a written risk assessment regardless of the level of hazard present. The Government has taken the opportunity of the evaluation of all health and safety at work directives that the Commission is currently undertaking to provide some suggestions for more proportionate approaches in this area.

3.36 Respondents including the CBI, FSB and the IoD also argued strongly in favour of the need to improve impact assessments at EU-level to improve the quality and legitimacy of the legislative framework. This included giving greater consideration to the Commission's Impact Assessment Board (IAB) opinions before the adoption of a Commission proposal

[37] 'Cut EU Red Tape': A Report From the Business Taskforce (2013).

[38] FSB, *submission of evidence*.

[39] Anthea McIntyre MEP, *submission of evidence*.

[40] Open Europe, *submission of evidence*.

and making regular use of independent expert knowledge.[41] Increasing independence in the process was important for the FSB who argued for 'robust, evidence-based impact assessments, with clear cost-benefit analysis, consultation-stage impact assessments, and greater independence for the Impact Assessment Board.'

3.37 The IoD and CBI also highlighted the importance of increasing transparency, arguing for impact assessments to be published at different stages in the legislative process. For the IoD this would 'enhance transparency in the process, and would help the co-legislators make more informed decisions on proposed legislation'.[42] In addition, it is worth observing that the Commission has no formal process for post-implementation assessment within the Treaties. However, post-implementation assessment does happen and many directives expressly provide for assessment after a specified time period.

The European Court of Justice (ECJ)

3.38 The role of the ECJ was particularly controversial to many of those who responded to our Call for Evidence and attended our stakeholder round-table meetings. Some respondents including the IoD and EEF criticised the Court for what might be termed as 'judicial activism' in shaping EU law, most notably in the fields of employment regulation and discrimination. For example, the IoD stated that the Court 'has taken a number of decisions that have a major impact and cost on employers, that effectively change the law at a stroke, and against which there is no appeal'.[43] The CIPD also underlined a series of ECJ judgments which it felt have meant UK employers having to abandon long standing practices.

3.39 These arguments have some sympathisers in the academic community. Professor Stephan Leibfried has indicated that in the face of the Single Market Member States are no longer fully in control of their national welfare policies as authority has partially transferred to the EU. He remarked 'a series of ECJ rulings and Commission-Council initiatives is [sic] the source of new social policy. While the latter are stasis-prone, the ECJ's design fosters activism. Faced with litigation, the ECJ cannot avoid making what are essentially policy decisions'.[44] The Call for Evidence gave *Test Achats* as an example where the Court extended the scope of EU social legislation beyond the initial intentions of the legislators. In this case, the Court ruled invalid a specific provision of the Gender Directive – see Box Eight for more detail.

[41] The IAB is a central quality control and support function working under the authority of the Commission President. It was created at the end of 2006. It is chaired by the Deputy Secretary General responsible for Better Regulation. The Board examines and issues opinions on all the Commission's impact assessments.

[42] IoD, *submission of evidence*.

[43] IoD, *submission of evidence*.

[44] H. Wallace, M. A. Pollack and A. R. Young, *Policy-Making in the European Union* (2010).

Box Eight: Test Achats[47]

In this 2011 case a Belgian consumer association, Test Achats, asked the ECJ to consider whether Article 5(2) Council Directive 2004/113/EC (the Gender Directive), which permitted Member States to allow proportionate differences in insurance premiums and benefits between men and women, was compatible with the principle of equal treatment of men and women, protected as a fundamental right in the European Union (TEU) and Articles 21 and 23 of the Charter of Fundamental Rights.

The ECJ ruled that the provision allowing for proportionate differences in insurance premiums and benefits between men and women was invalid. The impact of this ruling was that the derogation permitted by Article 5 (2) of the Directive ceased to have effect from 21 December 2012. This means that insurers can no longer take gender into account when determining premiums and benefits.

The judgement had an effect of making a fundamental change to the way insurance premiums are calculated for many insurers who used gender as a risk factor in pricing both general and life insurance policies.

It could also incentivise riskier behaviour, which would lead to the cost of insurance rising to compensate. For example, if gender neutral pricing was introduced into life assurance, men who have on average a lower life expectancy would find life insurance to be good value and women, who have on average a higher life expectancy, would find life insurance poor value. This could lead to fewer low risk people taking out life assurance, resulting in the insurer's portfolio becoming increasingly risky and corresponding costs.

3.40 The CIPD cited two other problematic cases: (i) *Barber v Guardian Royal Exchange Group*, as a result of which employers across Europe had to equalise male and female retirement ages so that neither sex was advantaged over the other; and (ii) *Stringer and others v HM Revenue and Customs.*[46] [47] This latter case is one in a series of ECJ judgments on the WTD that have caused problems for Member States, employers and individuals. In this case, the Court ruled that Member States could prevent annual leave from being taken during sick leave but the right to paid annual leave could not be extinguished at the end of the leave year, even where the worker's incapacity to work had persisted until the end of his employment relationship. The IoD considered the Court's rulings on the interaction of sick and annual leave and the calculation of holiday pay to be particularly 'egregious'.[48] The Government intervened in the Stringer case but without success.

3.41 Another example, in the Government's view, of the way ECJ judgments can restrict Member States' flexibility to implement EU directives to suit their national systems can be seen in the *Commission v Germany* case illustrated in Box Nine below.[49]

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[45] Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers, Case C-236/09 [2009].

[46] Barber, [1990]. In Barber, the ECJ agreed with Mr Barber's claim that he had been discriminated against because he was not granted an immediate pension on his dismissal at 52 whereas a women in the same circumstanced would have been. The Court held that pension benefits were subject to Article 119 (141 TFEU) and therefore constituted 'pay'.

[47] Stringer and others v Her Majesty's Revenue and Customs, Case C-520/06, [2008] The ECJ held that legislation cannot allow that the right to take paid leave is extinguished at the end of the year if the worker does not work because of sickness. If employment is terminated then a worker is entitled to get an allowance of lieu according to Art 7(2). The purpose of the Directive, one of the most important social rights for workers, was to allow a period of rest and it was legitimate that if one was actually ill, there was no rest.

[48] IoD, *submission of evidence*.

[49] Commission of the European Communities v Federal Republic of Germany, Case C-5/00, [2002].

Box Nine: Impact of ECJ judgment on Health and Safety Risk Assessment

The ECJ made a judgement in 2002 that severely restricted what was the perceived flexibility of Member States to determine the circumstances when a written health and safety risk assessment is required. This was on the basis of a case brought by the European Commission against Germany over the latter's national legislation exempting employers of less than eleven persons from keeping documents containing risk assessment results.

Article 9 of Directive 89/391/EEC requires employers to be in possession of an assessment of risks to safety and health at work. This is qualified by Article 9(2) that allows member states to define, in light of the activities and sizes of undertakings, when a documented risk assessment is required.

It was on the understanding of this flexibility that the UK exempted businesses with fewer than five employees from the requirement to document the risk assessment, and Germany took a similar approach with its exemption for businesses with fewer than eleven employees. Germany was, however, referred to the ECJ over its exemption, with the Court ruling that its exemption breached the obligations of the Directive for employers to keep documented risk assessments. In particular, the Court noted that Article 9(2) should be interpreted to mean that a documented risk assessment is always required: the flexibility for member states is only to define the extent of the documentation required and not to provide blanket exemptions as Germany had done.

The UK has maintained its exemption despite the ruling because we consider that our legislation taken as a whole nevertheless still properly implements the Directive, but the ruling has had the consequence of severely limiting the ability of member states to further adapt the risk assessment requirement to ensure that it is applied in a proportionate way, particularly as conditions in the workplace change.

The UK is therefore pressing for the reinstatement of the national flexibility that it thought it had originally signed up to. In particular, the Prime Minister's Business Taskforce on EU regulation has recommended that the 'European Commission should give national governments the flexibility to decide when small low-risk businesses need to keep written risk assessments. National governments are best placed to judge which businesses are low-risk, and should be able to decide where exempting businesses from record-keeping is appropriate'.[52] The objective is to ensure a continued proper focus on risk management and avoid the need for businesses to provide unnecessary paperwork.

3.42 As we have already seen in earlier chapters, the Court has also been influential in the development of EU competence and action in the social and employment field. For example, even before there were specific social or employment legal bases within the Treaty it ruled, *Defrenne v. Sabena*, that the EU 'is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples'.[51] In doing so it looked beyond the specific Treaty provisions to the ILO to support its argument. Likewise, in *UK v EU Council*, the Court favoured a broad reading of the term health and safety, arguing that the principle aim of the WTD was the health and safety of workers and the fact that the health and safety impact of certain of the restrictions had not been

[50] 'Cut EU Red Tape': A Report from the Business Taskforce (2013).

[51] Defrenne v. Sabena, Case C-43/75, [1976].

scientifically demonstrated did not prevent them from being health and safety measures for the purposes of the Treaty.[52]

3.43 In addition to these cases, even though there are express restrictions on social policy competence set out in the Treaty that it does not extend to 'pay, the right of association, the right to strike or the right to impose lock-outs', the ECJ has still allowed EU legislation to have an impact on these excluded areas so long as they are not the primary policy goals.[53] For example, in *Viking* the ECJ was able to consider issues which are beyond legislative competence of the EU.[54] The reason why *Viking* is criticised is that some, for example trade unions, think it gives primacy of economic rights over social rights.

3.44 The Court has tended to allow individuals to take direct advantage of the rights afforded to them by EU law across the public and private sectors. Some of the key cases developing the concept of direct effect – where individuals can rely on EU law – are in this area. For example, cases *Mangold* and *Küçükdeveci* decided that the principle of non-discrimination on the grounds of age was a general principle of EU law so that could be relied on directly in any dispute between a worker and an employer rather than just public sector disputes as would usually be the case.[55] [56] [57]

3.45 However, in considering these issues, the Law Society of England and Wales sounded a note of caution, arguing that 'the European Community (as it was originally known) was founded as a body based on the rule of law and by necessity involves ceding some authority to the EU institutions. Pooling sovereignty in this way also requires a system of judicial oversight to ensure that the Member States and the institutions (such as the Council, the Commission and the Parliament) act in accordance with the Treaty rules. The ECJ is therefore an essential part of the EU legal system'.[58] They felt that it is important to have consistent interpretation and application of the rules across the Member States and that the ECJ is often put in the difficult position of having to interpret EU legislation that is ambiguous, with the result that some or other Member State is likely to be unhappy that the view of the court was not their understanding when negotiating the directive.

3.46 Some wider consequences of the role played by the ECJ were also highlighted by respondents. These included the increased use of courts, the lack of flexibility in settling disputes and the fact that litigation can be rigid, time consuming and expensive. Professor Hugh Collins noted that the requirement to ensure the effectiveness of EU law and the conferral of rights on individuals has resulted in the increased use of legal redress in employment disputes. Lewis Silkin indicated that using legal redress as the method to enforce EU measures domestically restricts the use of more informal alternatives to the resolution of disputes for example; any deficiency in a collective redundancy consultation cannot be settled directly between the parties in a settlement agreement.

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[52] United Kingdom of Great Britain and Northern Ireland v Council of the European Union – Council Directive 93/104/EC concerning certain aspects of the organization of working time – Action for annulment. – Case C-84/94 [1996].

[53] Article 153(5) TFEU.

[54] International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05 [2007].

[55] Werner Mangold v Rüdiger Helm, Case C-144/04 [2005].

[56] Seda Küçükdeveci v Swedex GmbH & Co. KG, Case C-555/07 [2010].

[57] But compare: Association de Médiation Sociale, Case C-176/12, where the Court held that Article 27 of the Charter of Fundamental Rights (concerning workers' right to information and consultation) did not have direct effect between two private parties.

[58] Law Society, *submission of evidence*.

Implementation and Enforcement

3.47 Due to the fact that the majority of EU social and employment legislation is in the form of directives, it needs, once adopted, to be transposed and implemented into UK law. The Government is committed to doing so in the least burdensome way to business and to tackling existing cases of gold-plating, where it is felt that UK law goes beyond the requirements of EU law. However, many respondents felt that implementation of EU legislation into UK law is still an area of concern. There were two particular issues raised during our Call for Evidence.

3.48 The first concern was that in implementing EU legislation, the UK goes beyond the requirements of the directives and gold-plates. This was raised by Open Europe and Anthea McIntyre MEP, LCCI, and Dr. Lee Rotherham. The IoD argued that the Government should use shorter, simpler legislation with more of the detail provided in guidance. Their report, the *Midas Touch*, highlights a number of directives where they considered the UK Government to have gold-plated including the Working Time Directive, the Temporary Agency Workers Directive and various non-discrimination directives.[59] It acknowledges that the Government has taken action to tackle gold-plating but feels this has been limited and should go further. FSB on the other hand accepted that it may at times be in the UK's interests to 'gold-plate' EU law, but they felt that there should be absolute transparency around this and that the UK Government should justify why it has occurred. In 2010, the Government announced its Guiding Principles for EU Legislation and put in place a scrutiny and challenge process to ensure that Departments do not gold-plate or place unnecessary burdens on UK business when transposing EU law.[60]

3.49 The second concern was a common belief that the UK applies EU legislation to the letter while other Member States do not. This was raised by the IoD, LCCI and CEEP UK. The IoD said that 'other Member States take a much less risk-averse approach, and produce simple, shorter and less burdensome implementing legislation than the UK'.[61] In addition, BIS research suggests that businesses perceive that the lack of enforcement of EU legislation in other Member States puts UK businesses at a disadvantage compared to businesses based in other Member States and felt that the UK Government should have more influence over the extent to which EU laws are implemented in the UK.[62]

3.50 The 2006 Davidson Review of gold-plating found that 'evidence to support assertions that the UK implements and enforces more rigorously than other Member States is often lacking. Furthermore, the review heard similar concerns about their governments from business representatives in other European countries. Unlike in the UK, very few other EU governments currently have explicit policies or procedures to guard specifically against over-implementation – the UK is regarded by some as a leader in this field'.[63]

3.51 What is interesting to note is the way in which the UK enforces labour law is markedly different from how the majority of other EU Member States go about it. Many Member States have a dedicated labour inspectorate covering labour market issues, whereas in the UK such matters are dealt with by a range of different bodies, including HSE, the Employment Agency Standards Inspectorate, the Gangmasters Licensing Authority, local authorities and HM Revenue and Customs. However, there was no suggestion in the responses that the UK's enforcement of employment legislation was inefficient in

[59] IoD, *The Midas Touch: Gold-Plating of EU Employment Directives in UK Law* (2013).

[60] HMG, *Transposition Guidance: How to implement European Directives effectively* (2013).

[61] IoD, *submission of evidence*.

[62] IFF, *UK Business Views of The Balance of Competences*.

[63] BIS, The Davidson Review Implementation of Legislation (2006).

not gathering its various 'agents' under one wing. The UK's risk based enforcement on health and safety is a further illustration of how Member States' approaches can vary. We have proportionate, risk-based inspection and enforcement regimes for occupational safety and health in Britain that are not necessarily mirrored elsewhere – for example, all businesses are targeted for inspection in some countries, regardless of the risk.

3.52 Some respondents to our Call for Evidence, including CEEP UK, concluded that the role of the European Commission should be less about regulating and more about ensuring compliance. The LCCI indicated that the Commission should also ensure consistent implementation of EU directives at Member State-level.

Impact of EU Social and Employment Competence on the UK Labour Market

3.53 Looking beyond the features of how the EU acts and the potential impact of this, a number of respondents commented in detail on the impact that the exercise of EU competence in this area has on the UK labour market, including business costs and the benefits conferred on individuals. In particular, the costs imposed on business as a result of EU social and employment legislation have generated much discussion both within this exercise and more widely. For example, the Prime Minister's Business Taskforce cited health and safety and employment regulation as among the EU laws hampering growth and impeding business competitiveness. In response to the Department of Health's Balance of Competences review, the *Daily Mail* Online has noted that 'the [working time] rules are also seen by many business leaders as uncompetitive when EU countries are up against booming economies such as India and China'.[64] [65]

3.54 One of the main criticisms of EU action is that EU legislation seeks to impose a one-size fits all approach on Member States that does not fit with national systems and hampers labour market flexibility. For example, BIS research found that business feels that legislation deriving from the EU is not as well tailored to the needs of UK business as domestically generated legislation.[66] This research is relevant because although all Member States, including the UK, had social and employment protections in place prior to EU action in this area there are significant differences between Member States in their labour market models, culture and approach to social and employment policy and regulation. It also means that within Member States, social and employment legislation can either be EU or domestic in origin – our research found that often business did not know where legislation originated from.

3.55 One example of the differences between Member States is that the UK model is increasingly characterised by a focus on individual rights that enables employees and employers to define mutually agreeable terms. This compares to the more collective systems in other Member States such as Germany and the Scandinavian countries. What is interesting to note is that the UK still has a relatively high level of union membership compared to those Member States with a more collective system. For example, the trade union density in 2010 was 7.8% for France and 18.6% for Germany while it was 26.4%

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[64] HMG, *The Balance of Competences Between the UK and the EU: Health Report* (2013).

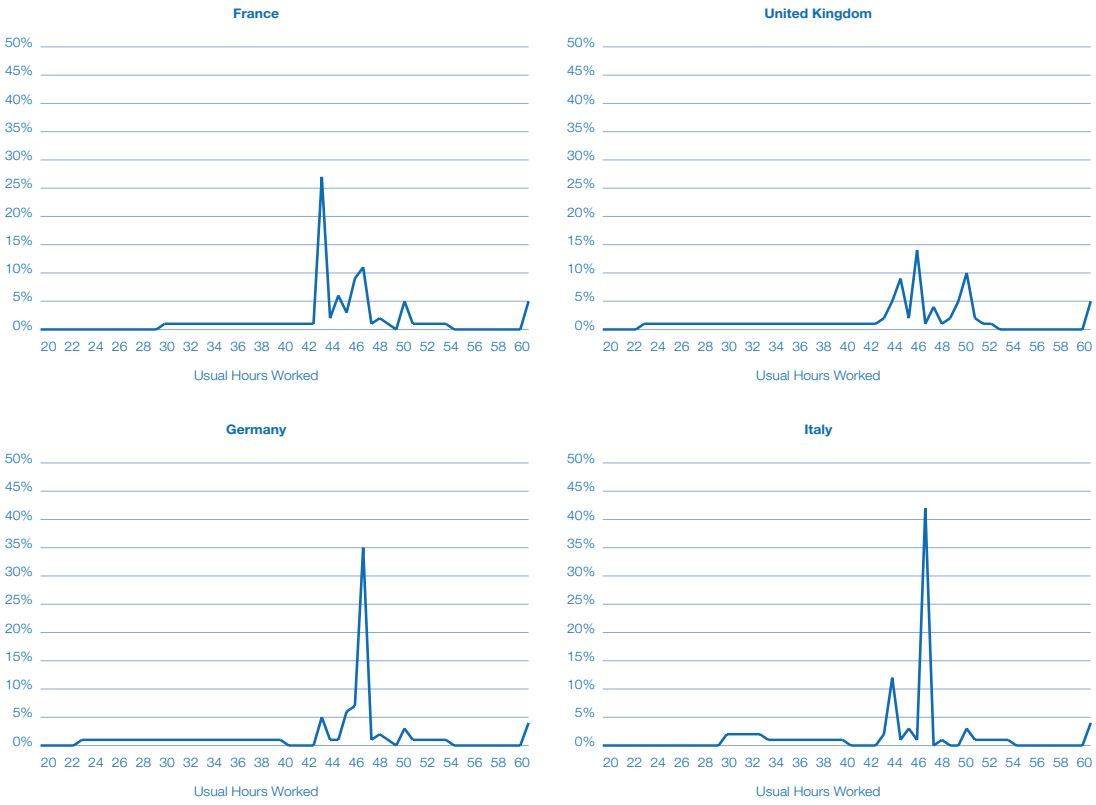
[65] James Chapman, 'The EU Red Tape That's Strangling the NHS: Hague to Reveal Extent of Meddling as Evidence Shows Patients are at Risk from Strict Rules on Working Hours,' *Daily Mail* (22 July, 2013). Available at: www.dailymail.co.uk/news/article-2372903/EU-red-tape-thats-strangling-NHS-William-Hague-reveal-extent-meddling.html, accessed on 27 May 2014.

[66] See the IFF Research commissioned by BIS, UK Business Views of The Balance of Competences between the EU and the UK, 2014. The respondents felt that UK would legislate in a way that was more tailored to the UK and its own economic environment, without needing to take into account the welfare or economies of a number of other countries.

for the UK.[67] However, this was still lower in comparison to other Member States such as Denmark (68.5%) and Belgium (50.6%).

3.56 One result of the fact that the UK model focuses on the relationship between an individual employee and their employer is that they are able to develop arrangements that suit the individual circumstances. As a result, there is a much wider range of patterns of work in the UK than other Member States, see Graph Two below. Based on 2013 figures, 26.9% of the UK workforce was employed part time compared to the EU average of 20.3%.[68] Part-time work is also less likely to be temporary than in other Member States, as is demonstrated by the fact that in 2013 94% of the UK workforce was in permanent work, one of the highest rates in the EU, and part-time workers have the same level of protection as full time workers.[69] As a result, the UK does not consider part-time work to be inherently more precarious than full time work in the same way that some other Member States do.

Graph Two: Usual Hours Worked in United Kingdom, Italy, Germany and France[70]



3.57 Internationally, the UK is recognised as having one of the lightest touch employment regimes. The OECD ranks the UK as having the fourth lightest employment law regime

[67] Trade union density corresponds to the ratio of wage and salary earners that are trade union members, divided by the total number of wage and salary earners (OECD Labour Force Statistics). Density is calculated using survey data, wherever possible, and administrative data adjusted for non-active and self-employed members otherwise.

[68] European Commission, *Temporary Employees as a Percentage of the Total Number of Employees*, four quarter average (Q4 2012 to Q3 2013) – *LFS Adjusted Series*, available at: epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/database, accessed on 30 April 2014.

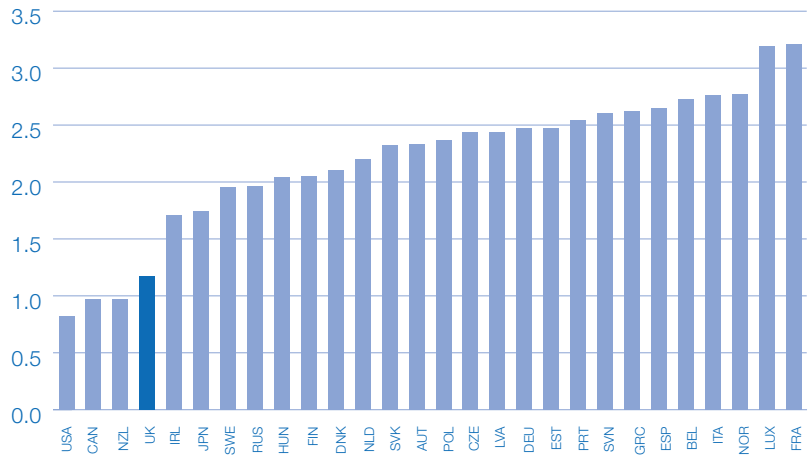
[69] European Commission, *Temporary Employees as a Percentage of the Total Number of Employees*, four quarter average (Q4 2012 to Q3 2013) – *LFS Adjusted Series*, available at: epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database, accessed on 30 April 2014.

[70] European Commission, Distribution of Usual Hours Worked (annual average 2013) – Data requested from Eurostat and received on 5 May 2014.

in the developed world (Graph Three).[71] This is based on an assessment of measures regulating dismissal, individual and collective redundancy, and temporary workers, some of which are regulated at the EU level whilst others are wholly domestic. The reason the UK scores so well might be because it has lighter touch domestic legislation and, possibly, because of the manner in which it implements EU legislation compared to other Member States. It is important to note that the indicator mainly looks at the rigidity of the legislative framework and does not measure performance of countries in terms of compliance and enforcement. BIS commissioned research found that many businesses perceived that the UK was at a disadvantage compared to other Member States as it would abide by EU laws 'to the letter' whereas other states would be likely to fail to enforce the regulations.[72]

Graph Three: Comparison of Employment Protection Legislation[73]

Index of strictness



3.58 Perhaps as a result of the differences in labour market models between Member States, labour market outcomes are very different across Member States. The employment rates for all people above the minimum school leaving age ranged from 76.5% in the Netherlands to 53.2% in Greece. The UK's labour market is high performing, both historically and compared to other countries.[74] For example, there are currently more

[71] Graph Three looks at a much smaller subset of regulation compared to Graph One and some of these regulations are set nationally. Graph Three mainly attempts to compare elements of the legislative framework across the various OECD and EU countries but does not take into account compliance (see note to Graph Three).

[72] IFF, *UK Business Views of The Balance of Competences*.

[73] This graph is based on BIS calculations using OECD data for Indicators of Employment Protection. The countries are scored on a 0-6 scale, with higher values representing stricter or more rigid regulation. The indicator assesses three areas of legislation – individual dismissal of workers with regular contracts, additional costs for collective dismissals and regulation of temporary contracts, and regulation of fixed-term and temporary work agency contracts. The OECD indicators of employment protection legislation measure the procedures and costs involved in dismissing individuals or groups of workers and the procedures involved in hiring workers on fixed-term or temporary work agency contracts. www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm. It is important to note that the indicator mainly looks at the rigidity of the legislative framework and does not measure performance of countries in terms of compliance and enforcement. The employment protection legislation does not cover all areas of EU employment legislation and for example does not include Directives such as the WTD and the Pregnant Workers Directive.

[74] European Commission, Employment rate – LFS Adjusted Series. Available at: www.epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_lfs/data/maintables, accessed on 2 June 2014.

people in employment than ever before and our employment rate is higher and our unemployment rate is lower than the EU averages.[75] [76]

3.59 Given these factors, and especially the fact that there would have been domestic legislation in this area, even without EU action, the extent of the impact of EU action on the UK labour market as a whole is hard to determine and was the subject of much debate during our Call for Evidence. A number of business representatives, including the CIPD, argued that the UK's labour market success is in spite of EU action on social and employment policy. The CIPD said that the UK's flexible labour market is a large contributory factor in its economic performance but that the EU has contributed nothing to this flexibility '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'. In particular, they felt that UK efforts to promote equality between men and women have been more influential than EU activity in this area. They also argued that EU legislation on information and consultation has had little effect in the UK, although they highlighted discrimination and collective redundancies as areas where EU action had value.

3.60 On the other hand, from their perspectives, the TUC, the Equality and Diversity Forum, UNISON, Discrimination Law Association, UK Race and Europe Network, GMB in Europe and Thompsons Solicitors did not feel that EU legislation in the field of social and employment policy has a negative impact on the UK. Some of the reasons given included that, by ensuring fairness, the talent of all groups is utilised and certain groups are not pushed to the economic margins and that the health and safety framework delivers significant benefit through preventing illness and injury.[77] [78] UNISON said that they 'do not consider that there is a negative impact of EU action on the UK economy, the contrary, it is our view that it is beneficial'.[79] The TUC felt that if equality, employment rights and health and safety standards were abandoned across the EU the resulting 'race to the bottom' would lead to a reduction in the number of high skilled, high productivity workplaces.[80]

3.61 One additional factor that came up in research commissioned by BIS was that the EU was perceived to be more stable as a body and therefore that laws made by the EU could be considered to be more fixed, making it easier for business to plan ahead.[81] [82]

3.62 It is difficult to draw firm conclusions about the impact of EU social and employment competence on the UK labour market as a whole. It is clear that the UK performs well compared to other Member States and that this performance is driven at least in part by

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[75] The working age employment rate in the UK (16 to 64) is 72.5 per cent (2014 Q1) and the unemployment rate (16 and over) is 6.8 per cent (2014 Q1), Office for National Statistics. Available at: www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?cdid=LF9D&dataset=lms&table-id=08 www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?cdid=MGSX&dataset=lms&table-id=09, accessed on 2 June 2014.

[76] Labour Market statistics, January 2014. International comparisons calculated by using employment rates as published by EUROSTAT: (not seasonally adjusted).

[77] Discrimination Law Association, *submission of evidence:* specifically regarding anti-discrimination legislation.

[78] Thompsons Solicitors argued that the scale of those benefits has grown more rapidly the more the environment has been shaped by EU legislation and that since 2006/07 there has been a significant downward trend in injury and illness numbers in the UK and that the estimated cost of workplace injuries and ill-health fell by around £2.5bn. However, there is some difficulty in determining with certainty what effect EU legislation has had in lowering accident and ill-health rates.

[79] Unison, *submission of evidence*.

[80] TUC, *submission of evidence*.

[81] IFF, *UK Business Views of the Balance of Competences*.

[82] EEF, *submission of evidence*.

structural and cultural differences. What is less clear is whether EU legislation has had the effect of restricting UK labour market flexibility or in fact benefitted the market as a whole. This question merits further consideration through the lenses of the costs and benefits triggered by EU social legislation on business and individuals.

EU Social Policy Costs for Business

3.63 Employers, particularly those in small businesses, regularly raise concerns about the impact of employment law on their businesses in terms of cost.[83] Such costs can harm the growth potential of business and, arguably, puts UK and EU business at a competitive disadvantage compared to international competitors. For example, the IoD suggested that if the UK were free to set its own employment law suited to the UK labour market and culture, it could be 'expected to lead to fewer costs and burdens on business, with consequent benefits for shareholders, employers and taxpayers'. The English Business Survey found that a quarter of businesses felt that EU legislation has an impact on their business with 46% of businesses saying that the impacts are negative compared to 29% who felt that they were positive.[84] [85]

3.64 In its response to our Call for Evidence the CBI said that despite the benefits of some commonly agreed rules, EU competence on social policy remains one of the most controversial areas of EU competence for its members. When asked to rank their priorities for reform of the EU, tackling the burden of some regulations, particularly employment law, was a top priority of CBI members. 49% of businesses polled reported that creating employment law through Europe impacted negatively on their businesses, while only 22% saw a positive impact.[86] 52% of businesses polled believed that should the UK withdraw from the EU the regulatory burden on them would be reduced and that as a result 'most businesses would prefer social issues to be dealt with at national level'.[87] Likewise, the LCCI noted that, because of the increased costs imposed by it, 'employment legislation […] is the top area of competence London businesses believe should be transferred from the EU to the UK's national government, with 62% calling for it to be repatriated as part of a renegotiation process'.[88] [89]

3.65 It is hard to quantify the exact costs for business of EU social policy and there are no agreed figures. Indeed, the FSB argued that there is a 'serious lack of evidence' concerning the cost and benefits of the UK's EU membership. There are a number of reasons why it is challenging to develop a clear picture of the costs. In particular, it is difficult to disaggregate the costs arising from EU action from what costs may have existed anyway as a result of domestic legislation.

3.66 As highlighted above, all Member States, including the UK, had some degree of social and employment protection in place prior to EU action in this area. Although it is difficult

[83] For example, please see: J. Kitching and R. Blackburn, 'Employer Perceptions and the Impact of Employment Regulation Research' (2008); FSB, *Regulatory Reform: Where Next?* (2012); Better Regulation Executive, *Lightening the Load: The Regulatory Impact on the UK's Smallest Businesses* (2010).

[84] English Business Survey, *Ad Hoc Questions Commissioned by BIS, Summary Results from the July and August 2013 English Business Survey Questions Relating EU Regulation on Employment and Service Provision* (2014).

[85] Of those who said yes to impact, 29% of businesses said the impacts are positive, 46% said the impacts are negative and 25% said that they did not know.

[86] CBI/You Gov Survey, 2013. Available at: www.cbi.org.uk/media-centre/press-releases/2013/09/8-out-of-10-firms-say-uk-must-stay-in-eu-cbi-yougov-survey/ accessed on 28 May 2014.

[87] CBI, *Our Global Future: the Business Vision for a reformed EU* (2013).

[88] London Chamber of Commerce and Industry, *Help or Hindrance? The Value of EU Membership to London Businesses* (2013).

[89] LCCI, *submission of evidence*.

to identity what kind of legislation the UK would have in place in the absence of any EU action in this area, it is possible to identify a number of areas where the UK has taken action independent of the EU to extend legislation in this area. For example, the UK already had a well-established health and safety system at the time the Single European Act came about and although it is likely that left to its own devices the UK may have taken a more risk-based approach than that which emerged at EU-level, it is hard to assess what the costs might have been in these hypothetical circumstances. Similarly, although the WTD was new to the UK when introduced, the UK Government extended the annual leave allowance in 2007 and 2009 independently of EU action. As was flagged by some respondents to our Call for Evidence, even if the EU no longer had competence over social and employment issues, the legislation would remain in place until the UK Government chose to remove it and it is impossible to know which provisions the UK would choose to retain.[90]

3.67 That said, there are a number of sources that can be pointed to that try to assess the costs of social and employment competence to business. Open Europe's November 2011 report *Repatriating EU Social Policy* used Government impact assessments to estimate that the annual cost to UK business and public sector of EU social policy was £8.6bn pa.[91] For lobby group Fresh Start, this highlights the 'ever increasing regulatory burden on British business and employers' imposed by EU-driven social and employment law. They highlighted in particular that 'if the burden of this type of EU legislation was halved, it could deliver a £4.3bn direct boost to the UK's GDP, as well as 60,000 new jobs'.[92]

3.68 The IoD and FSB also cited this report in their responses but FSB underlined that 'it was impossible to know which provisions the UK would reinstate in the absence of the EU regulation'.[93] [94] However, because this report is based on cost estimates contained within impact assessments written before EU legislation was implemented, this £8.6bn figure should be treated with a degree of caution. For example, the figures have not been updated to include an assessment of whether the initial estimates were an accurate reflection of the actual experience of business in implementing legislation and nor do they take account of the impact of subsequent changes to the rules as a result of judgments of the ECJ – many of which were considered to be significant by respondents to our Call for Evidence. In addition, a number of participants to the roundtable discussions we held as part of the Call for Evidence process felt that whilst there may have been high initial transition costs, these had since been incorporated into business as usual. The ongoing operating costs as a result of EU legislation might be lower than initially anticipated and indeed there may now be a cost associated with changing the rules back. Lastly, this figure does not take account of benefits identified in impact assessments so arguably only represents one side of the story. On this point in particular, the IoD observed that many of the benefits accrue to employees, so constitute a 'transfer payment' from employer to employee.[95]

3.69 What is clear is that business feels that there is a significant cost burden as a result of EU legislation and that there are some pieces of legislation that are more burdensome

[90] For example, please see FSB, *submission of evidence*.

[91] James Booth, *Repatriating EU Social Policy: The Best Choice for Jobs and Growth?* (2011).

[92] Fresh Start, *submission of evidence*.

[93] James Booth, *Repatriating EU Social Policy: The Best Choice for Jobs and Growth?* (2011).

[94] FSB, *submission of evidence*.

[95] IoD, *submission of evidence*.

than others. In order to better understand this, and in addition to the Open Europe report discussed above, we have looked at the European Commission's report on the top ten most burdensome regulations for SMEs, Open Europe's October 2013 list of the 100 costliest EU regulations, IoD's the *Midas Touch* report and responses to our Call for Evidence.[96] [97] [98]

3.70 Although a number of social and employment policies were included in the top 20 of Open Europe's October 2013 list of the 100 costliest EU regulations - including the Control of Vibration at Work Regulations (2005); Fixed-term Employees Regulations (2002); and the Employment Equality Age Regulations (2006) – there are two pieces of employment legislation resulting from the EU that are consistently raised as being the most burdensome in this and other commentaries: the Working Time and Temporary Agency Workers Directives. Evidence submitted by Andrea Leadsom MP on behalf of Fresh Start, for example, argues that (based on Government figures) over two-thirds of the annual cost to business from EU regulation comes from the WTD and the Temporary Agency Workers Directive. In addition, a number of respondents to our Call for Evidence raised the Acquired Rights Directive as a source of particular frustration.

The Working Time Directive (WTD)

3.71 The WTD is one of the most controversial pieces of EU Social and Employment legislation and was the Directive that was raised most frequently by those responding to our Call for Evidence. The Directive contains restrictions on night work, requirements for regular rest breaks and four weeks paid annual leave. It also introduced the requirement for a maximum working week of 48 hours – but the individual can opt-out of this element.

3.72 The objective of the WTD was to protect the health and safety of workers by setting minimum requirements on working hours, rest breaks and annual leave. A BIS review of the evidence shows that since 1998 there has been a decline in the incidence of long-hours working in the UK and a general trend towards shorter working hours.[99] It is possible that this is, at least in part, due to the introduction of the 48-hour maximum working week, although we have also seen a general trend over this period towards a more diverse range of working patterns. The evidence also suggests that UK workers are taking their annual leave (and are sometimes getting annual leave entitlements beyond those provided for in law). Respondents, including the BMA, the Royal College of Midwives, Health Education England and others point out that the WTD has benefits to staff and to patient safety in the NHS.[100] The evidence surrounding the health and safety benefits of working shorter hours is inconclusive but what is clear is that the UK has one of the best health and safety records in the EU.[101]

3.73 However, it is clear from the responses to this Call for Evidence that UK businesses have concerns over the costs that accompany these benefits. The main challenges raised by respondents were the risk of losing the individual right to opt-out of the 48 hour maximum working week.[102] Business also raised problems, problems caused by ECJ judgments

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[96] European Commission, *Results of the Public Consultation on the TOP10 Most Burdensome Legislative Acts for SMEs* (2013).

[97] Open Europe, *Top 100 EU Regulations Cost the UK Economy £27.4bn a Year – and Costs Outweigh Benefits in a Quarter of Cases* (2013).

[98] IoD, *The Midas Touch: Gold-Plating of EU Employment Directives in UK Law* (2013).

[99] This review will be published in due course.

[100] HMG, *The Balance of Competences between the UK and the EU: Health Report*.

[101] HSE, *European Comparisons Summary of GB Performance* (2014).

[102] This was raised by: CBI; LCCI; IoD; British Veterinary Association and Fire Service Federation.

surrounding on-call working, accrual and carry-over of annual leave as well as payment for annual leave.[103]

3.74 Government analysts are currently re-assessing the ongoing costs of the WTD. It is clear that costs would dramatically rise if the flexibility afforded by the individual opt-out were no longer available. It is also clear that respondents to our Call for Evidence feel that the ECJ judgments pose further significant costs that the opt-out does not alleviate and where additional flexibility would be welcomed.

3.75 An independent taskforce, chaired by the Royal College of Surgeons, published its report looking into the implementation of the WTD and its impact on the NHS and health professionals in March 2014.[104] The taskforce found that whilst the reduction in hours worked has reduced fatigue, the implementation of the WTD in the NHS has caused major challenges for certain specialities, both in terms of delivering patient care and postgraduate training. The rigid application of ECJ judgments has contributed to inflexibility in the system.

The Temporary Agency Workers Directive

3.76 The Temporary Agency Workers Directive (TAWD) was implemented in the UK by the Agency Workers Regulations (AWR). The Directive gives all agency workers equal treatment entitlements in relation to access to facilities and information on vacancies from day one. After 12 weeks with the same hirer in the same role, agency workers are entitled to the same basic working and employment conditions, including pay and annual leave, as directly recruited employees. In the UK, the 12 week qualifying period applies because there is a Social Partner Agreement between the TUC and CBI.

3.77 As allowed in the Directive, the UK regulations provide for an exemption from the equal pay provisions where an agency worker has a contract of employment with the agency and is paid between assignments. As it is an exemption from the equal pay provisions only, day one rights apply and after 12 weeks the worker qualifies under the AWR for equal treatment in relation to the duration of working time, night work, rest periods and rest breaks and annual leave, in these circumstances the entitlement is to time off rather than pay. The exemption is known as 'pay between assignments' or 'the Swedish derogation'.

3.78 It is too early to assess the full impact of the implementation of the Directive in the UK, as the AWR only fully came into force in October 2011. Whilst initially there were concerns that the use of the agency workers might fall following the introduction of AWR, initial review of the evidence suggests that in fact the use of agency workers might have increased post AWR.[105] According to the Recruitment and Employment Confederation's (REC) Industry Trend Survey (2013) there are 1.1m agency workers in the UK, this constitutes 3.6% of the UK labour workforce.[106] [107] However, there does

[103] This was raised by: CBI; IoD; NFU; FSB; Open Europe; Lewis Silkin; and health sector stakeholders, some of whom did so in response to the Balance of Competences report on health.

[104] Report of the Independent Working Time Regulations Taskforce to the Department Of Health, *The Implementation of the Working Time Directive, and its Impact on the NHS and Health Professionals* (2014).

[105] *Recruitment Industry Trends Survey 2012/13; and REC Medium Term Market Forecast.*

[106] Markit, *Report on Jobs* (2014) and Markit, *Medium-Term Market Forecast* (2014). They are monthly publications produced by Markit, sponsored by Recruitment and Employment Confederation (REC) and KPMG LLP and are available only via membership.

[107] ONS Labour Market statistics state there were 30.4m workers in the UK (November to December 2013). Office for National Statistics, Labour market statistics, available at: www.ons.gov.uk/ons/rel/lms/labour-market-statistics/may-2014/statistical-bulletin.html, accessed on 2 June 2014.

appear to have been a change in the length of assignments. Analysis of the *Labour Force Survey* suggests that there has been a reduction in the proportion of workers working 3 to 6 months and an increase in the proportion working over a year. This indicates that although some firms may have responded to the regulation by employing workers on shorter contracts (i.e. less than 3 months), there has not been an impact on agency workers on longer term assignments.

3.79 Initial indications from BIS's examination of the paperwork obligations of the AWD suggest there may have been transitional costs for agencies and hirers in implementing the Directive.[108] These costs may have arisen from introducing new, custom built IT packages, or updating pre-existing software and increasing awareness of the regulations.[109] The CBI's view was that the AWD was one of a number whose prescriptive requirements undermined the principle of subsidiarity. In the CBI's view the Directive was unnecessary and 'has cost UK employers £1.9bn per year, largely in compliance cost and red tape'.[110]

3.80 The CIPD, the LCCI, Anthea McIntyre MEP and David Campbell Bannerman also raised concerns with the AWD, in particular that it negatively impacts on the flexibility of the labour market by disincentivising businesses from recruiting temporary staff. The CIPD and Mr Campbell Bannerman argued that the Directive should be repealed. LCCI stated that the Directive was particularly restrictive for businesses that have a very changeable workforce or a seasonal business model. Anthea McIntyre considered that this Directive was amongst the most burdensome to businesses, especially SMEs.

3.81 However, the TUC, UNISON and GMB noted in their responses the benefits for agency workers themselves in terms of increased pay and workplace rights. TUC and GMB added that there is no evidence that giving equal treatment rights to agency workers has meant employment losses or reduced workforce flexibility.

The Acquired Rights Directive

3.82 The purpose of the Acquired Rights Directive (ARD) is to protect employees' terms and conditions when the business for which they work changes hands.[111] It is implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended. Among those who commented adversely on the ARD or TUPE in our Call for Evidence were the CIPD, EEF and Lewis Silkin. The CIPD believed that if free to do so the UK would be likely to adopt law somewhat less restrictive than 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'. CEEP UK referred to TUPE as one of a number of pieces of legislation stemming from EU law which had led to indirect compliance costs.

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[108] The Government's examination of the paperwork obligations of the Temporary Agency Workers Directive (TAWD) was announced in the Autumn Statement in 2011. The purpose of the examination was to ensure that businesses understand the Agency Workers Regulations (AWR) so that they can comply with and implement them in the simplest way possible. This examination is continuing.

[109] The examination of the paperwork obligations of the Agency Workers Directive (AWD) was announced in the Autumn Statement in 2011. The purpose of the examination was to ensure that businesses understand the Agency Workers Regulations (AWR) so that they can comply with and implement them in the simplest way possible. This examination is ongoing.

[110] CBI, *submission of evidence*.

[111] Council Directive 77/187/EEC on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 1977

3.83 The Government is aware from its recent review of the TUPE Regulations that an impact of the ARD that many businesses find particularly difficult is the fact that it is not possible to change terms and conditions after a transfer if the reason for doing so is connected to the transfer, which will be the case if the employer wishes merely to bring into line the terms of transferred staff with those of existing staff.[112]. This is so even if the employee agrees to the change and can cause particular difficulties for employers, as it can lead to businesses having employees working alongside each other and doing the same job but on different terms and conditions. It addition to this it imposes administrative costs such as having to run multiple pay rolls. The Prime Minister's Business Taskforce drew attention to this problem in their October 2013 report.

3.84 However, the Royal College of Nursing, the BMA and the TUC were among those who responded to our Call for Evidence and commented favourably on the ARD/TUPE. The Royal College of Nurses said 'the EU's TUPE legislation has been a cornerstone in providing legal protection to staff when [….] reconfigurations take place'. The TUC indicated that the Directive, along with the Collective Redundancies Directive, benefitted employers, employees and the wider economy by ensuing that restructuring went through in a more socially acceptable, less damaging way and avoided disputes.

Impact on Individuals

3.85 The cause in which EU social and employment rules impose burdens on business, and a more positive impact of EU action in this area, is the benefits that they confer on individuals. These benefits are much harder to quantify but might include improved living standards, better work-life balance, health and wellbeing and more inclusive, fairer workplaces.

3.86 Once again, it is difficult to assess the extent to which improvements in living standards in the UK are driven by EU action on social and employment policy or other factors. For example, the proportion of people in relative poverty has fallen in the UK, unlike in other developed countries and incomes at the lower end of the income distribution have been maintained despite average weekly wages falling since the recession.[113] [114] This could, however, be due to various domestic factors including the minimum wage, the tax and benefits system, and general strong labour market performance.

[112] BIS, *Transfer of Undertakings (Protection of Employment) Regulations 2006 Government Response to Consultation* (2013).

[113] OECD, *Income Distribution and Poverty: Poverty rate (50% Median Income)* (2014), available at: stats.oecd.org/Index.aspx?QueryId=47991, accessed on March 2014.

[114] Various sources have confirmed that average real wages have been falling in recent years. For example, please see: ONS, *An Examination of Falling Real Wages, 2010 – 2013* (2014), available at: www.ons.gov.uk/ons/rel/elmr/an-examination-of-falling-real-wages/2010-to-2013/art-an-examination-of-falling-real-wages.html, accessed on 28 May 2014. The real equivalised household income (before housing costs) at the bottom decile increased by around 5% between 2007/08 and 2011/12, whereas the change over this period at most other deciles was negative. Please see: DWP and ONS, *Households Below Average Income An Analysis of the Income Distribution 1994/95 – 2011/12* (2013).

3.87 A number of respondents including the TUC, BMA, Royal College of Midwives and the Bar Council of England and Wales were supportive of EU action on social and employment policy, highlighting, especially, the benefits that accrue to workers. The following areas were highlighted as having been particularly beneficial: tackling discrimination and promoting equality including through equal pay; equal treatment for part-time, fixed-term workers and agency workers; worker protection, in particular through the WTD, improved protection when pregnant or on maternity leave and protections for staff affected by restructuring or dismissal, through regulations implementing the ARD and the Collective Redundancies Directive; improvements in health and safety at work; employment promotion; and the right of employees to be informed and consulted about changes affecting the business.[115]

3.88 The Bar Council of England and Wales and the Equality and Diversity Forum both argue that EU anti-discrimination law has had a positive impact on the UK by giving employees protection and ensuring that workplaces have become more inclusive and which value their employee's skills regardless of their religion, sexual orientation or age. In particular the Bar Council argued that 'where EU law has had a clear impact on domestic anti-discrimination law, that impact has generally had the effect of improving the quality of UK anti-discrimination legislation, in particular through the impact of pioneering judgments of the ECJ. For example, in 1996, *in P v S and Cornwall County Council*, the ECJ held that the dismissal of a woman following gender reassignment was unlawful discrimination on grounds of sex. This led to [the] amendment of the Sex Discrimination Act 1975. Although the decision was novel at the time, few would argue today that the law should not protect people from dismissal following gender reassignment'.[116] [117]

The OMC and the European Semester

3.89 Although the earlier part of this chapter focuses on the impacts of legislative action undertaken by the EU, it is important to consider the impact of EU competences focused on improving cooperation and coordination between Member States, especially as we have seen a move towards greater use of coordination rather than legislation, based on the experience of the OMC.

3.90 The OMC and the European Semester were the subject of a number of comments in response to the Call for Evidence. All contributors noted that this cooperative approach reflected Member States' primary competence for their national employment and social protection policies, with the EU playing only a supporting role. For example, The Convention of Scottish Local Authorities (COSLA) commented that 'it does not pursue the aim of harmonisation, setting of standards or regulation but duly acknowledges differences in domestic legislation, service provision etc. in different national policy context'.[118] For Anthea McIntyre MEP, the British Government is best placed to make decisions (on whether or not to legislate on areas of social policy), and on the difficulty in agreeing law at EU-level that is proportionate and meets the needs of all Member States. Although Ms McIntyre did not name the OMC directly, she did comment that 'EU action in social policy can help raise awareness among Member States of particular social issues' and that one way of doing this was 'by using innovative non-legislative measures that would facilitate mutual learning and cooperation among Member States.'

[115] Council Directive 98/59/EC on the Approximation of the Laws of the Member States relating to collective redundancies, 1998.

[116] P v S and Cornwall County Council, Equal Treatment for Men and Women – Dismissal of A Transsexual, Case C-13/94.

[117] Bar Council, *submission of evidence*.

[118] COSLA, *submission of evidence*.

3.91 Similarly, Phil Bennion MEP on behalf of Liberal Democrat MEPs observed that: 'this is an area in which Member States are best placed to make the required reforms but the EU can play a coordination and guidance role through non-legally binding Council recommendations, through the OMC or through incentive measures'. The literature confirms these views, for example, Stuchlík and Kellermann argue that 'national standards are compared mainly by means of the OMC. However, since there are no penalty mechanisms the OMC is primarily used in policy areas in which the EU has little or no power'.[119]

3.92 Clearly, the impact of the OMC is primarily upon Governments and is felt by business and individuals only as a result of action that Governments take in response to the process. However, we have found that although there is broad consensus that the OMC respects national competence, views differ on how much of an impact it has had on Member States' national policies. The TUC commented that 'The problem is not that the EU is over-mighty in matters relating to social security, but that measures such as OMC and recommendations on minimum standards are inadequate'.[120] In contrast, Phil Bennion MEP felt that 'action at EU level has the advantage of building on the experiences of 28 Member States when considering, and sharing information on, the possible ways to resolve these issues'.

3.93 Although responses to this Call for Evidence were fairly evenly split, the UK Government has said publicly that on balance it believes that there is value in the OMC and the Semester as a useful resource and driver for national policy reform, including to help develop the Single Market. This recognises that, while responsibility lies predominantly with individual Member States, we face common challenges where targeted, voluntary, EU-level cooperation can add real value, especially by facilitating mutual learning through the exchange of information and dissemination of good practice. It is especially useful where common challenges and broad policy approaches are agreed, leaving detailed policy implementation to Member States, who can best tailor the detail to their distinct national, regional and even local circumstances. In common with other Member States, and the Commission, the UK continues to seek improvements to the process to keep burdens manageable, focus on outcomes rather than the detailed policy to deliver them and, in particular, to improve added value while fully respecting competence and the principles of subsidiarity and proportionality.

[119] Andrei Stuchlik and Christian Kellermann, *Europe on the Way to a Social Union?* (2009).

[120] TUC, *submission of evidence*.

Chapter 4: Future Options and Challenges

4.1 We have seen throughout this report that there is a great deal of fragmentation about whether EU competence in this area is a good thing. The same variety of views exists on the question of what type of role respondents want the EU to play in the future. For example, the Road Haulage Association, David Campbell Bannerman MEP and Business for Britain all queried whether there should be any European competence over employment and social policy going forwards. At the other end of the spectrum, UNISON, TUC, Discrimination Law Association, UK Race and Europe Network, GMB, ASLEF, UNITE and the Bar Council of England and Wales argued that the EU should continue to protect or extend the existing minimum floor of rights.

4.2 A number of respondents fell in between these two arguments, for example, the CBI summarised the views of their members as follows 'taken as a single issue, most businesses would prefer social issues to be dealt with at national level. But put into the context of the benefits of the EU in other areas – in particular the Single Market – CBI members feel that retaining decision making in Brussels might be acceptable if significant reforms were made to how the EU carries out social policy'. EEF remarked 'we do not believe that the UK could succeed in seeking a narrower remit for the EU which would exclude, as an objective, the improvement of the social protection of workers'. However, EEF concluded that '[…] [EU Social and Employment policy] has always been solely focused on further regulation and tightening or extending existing law, and not upon its impact upon jobs, growth and businesses. This we believe needs to be addressed, with a greater focus on supporting Europe's industrial base and reducing both the direct costs and administrative burden of regulation'.[1] [2]

4.3 This theme of reform was common in response to our Call for Evidence. This chapter therefore considers the potential future trends at the EU level, highlights challenges and opportunities for the UK in the fields of legislation and coordination, and brigades together the ideas for reform suggested by respondents to our Call for Evidence.

Future Trends

4.4 As set out in Chapter Two, although the flow of new legislation picked up through the 1990s and early 2000s, this has since tailed off and we have instead seen a greater emphasis on the EU's role of coordinating policy across Member States. Indeed, in her legal evidence paper commissioned as part of this review, Professor Catherine

[1] CBI, *submission of evidence*.

[2] EEF, *submission of evidence*.

Barnard cites the response to the Eurozone crisis as marking a new EU trend towards deregulation of national labour standards. She argues that this is demonstrated by the fact that the Memoranda of Understanding that countries in receipt of a bail-out have signed up to include reforms of national labour law systems. It should be noted that in some areas these reforms go beyond where the EU had previously legislated and even beyond EU competence. For example, even though there is no EU competence to legislate regarding pay, Ireland committed to cutting its minimum wage by one euro an hour and Portugal committed to temporarily suspending salary bonus payments for some civil servants and pensioners.[3] [4]

4.5 The focus on austerity was subsequently challenged by those that argued that Europe must create opportunities for people and boost social investment.[5] For example, the December 2013 European Council (EU Heads of State and Government) agreed to better highlight the key challenges facing Member States through a new social scoreboard of agreed headline indicators. Recognising the greater inter-dependence of Eurozone Member States, it was also agreed that work would be pursued on 'mutually agreed contractual arrangements' to drive structural reform, which would cover a broad range of growth and job enhancing policies and measures; and 'associated solidarity mechanisms' to offer financial support to Member States engaging in the contractual arrangements. The details of these are to be agreed by leaders in October 2014. Importantly, the European Council also agreed that participation in any such 'further measures to enhance the social dimension in the Euro area are voluntary for those outside the single currency and will be fully compatible with the Single Market in all aspects'.[6]

4.6 Although these measures, apart from the scoreboard, will only apply automatically to Eurozone Member States, their introduction does give a strong indication of the likely future direction of travel within the EU. By strengthening the link between social policy and the mechanisms that were originally set up for economic management it explicitly recognises a knock-on social impact of economic policy. Arguably, it also gives the Commission greater leverage over what Member States do at national level on social policy.

4.7 It remains to be seen what the focus of these processes will be and whether the recent push for deregulation of national labour laws will have an impact on the broader EU agenda in this field. However, what is clear is that there remain forces within the EU who want to see the Commission adopt an active social agenda looking forwards. For

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[3] For Ireland see: Implementing Decision 2011/77/EU on granting Union financial assistance to Ireland for a period of three years under the provisions of the Treaty and Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The accompanying Memorandum of Understanding signed on 16 December 2010 and its first update lay down the economic policy conditions on the basis of which the financial assistance is granted. Implementing Decision 2011/77/EU was amended by Implementing Decision 2011/326/EU 2011.

[4] For Portugal see: Implementing Decision 2011/344/EU (OJ [2011] L159/88) to make available to Portugal medium-term financial assistance for a period of three years 2011-2014 in accordance with Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The accompanying Memorandum of Understanding signed on the same day and its successive supplements lay down the economic policy conditions on the basis of which the financial assistance is disbursed.

[5] Lazslo Andor, Pervenche Beres, Joan Burton, Yves Leterme and Henri Malosse, *Austerity Could Only Ever Bring Europe so Far.* Available at www.theguardian.com/commentisfree/2013/may/28/europe-solution-economic-monetary-union, accessed on 28 May 2014.

[6] European Council (19/20 December 2013) Conclusions, available at www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140245.pdf accessed on 30 May 2014

instance, the French Minister for European Affairs and his German counterpart were recently quoted as saying that 'we shall, of course, be very vigilant to ensure that the social dimension is not the poor relation of European integration'.[7] This contrasts with the Prime Minister's Business Taskforce which said 'UK and European companies are in competition with the best in the world. They will not succeed if they are subject to additional costs and burdens which their competitors in other developed markets do not face. We must ensure that EU rules do not put European firms at a competitive disadvantage in the race for international business'.[8]

Legislative Action

4.8 It is therefore possible that, looking forwards, there will be an increased focus on social and employment legislation from the EU. In some areas, the Government has welcomed this. For example, the Commission is currently carrying out a review of all health and safety at work directives, which the Government sees as an opportunity to ensure that we have an EU framework that remains fit for purpose in providing necessary, evidence-based protections for workers while keeping burdens on business to the absolute minimum necessary.[9] This view is shared by the CBI and EEF in their responses to the review. The Government believes that the Commission should use the review to identify measures that are no longer necessary, do not comply with the principles of better regulation or lack the evidence to justify their continued existence. The Government has already looked at the stock of directives and believes that there are candidates for repeal without reducing levels of protection for workers. These include the Artificial Optical Radiation and Electro Magnetic Fields Directives.[10] However, in other areas the Government has argued strongly against new legislation for example the Pregnant Workers Directive.

4.9 It is interesting to note that although a number of stakeholders said that they would welcome additional EU action, their reasoning for this was very different. Broadly speaking, trade unions and some NGOs working on individual rights primarily highlighted the need to improve individual rights and the enforcement of existing rights, citing a number of policy areas where they felt protections could be improved. However, the business representatives who wanted more EU action primarily highlighted areas where they felt action was necessary to support the Single Market.

4.10 So, for example, the EDF, TUC, UNISON and GMB raised a range of issues where they felt additional legislation would be beneficial to the UK. This included extending rights for fathers; introducing paid parental leave entitlements; and adopting the draft Pregnant Workers Directive in order to improve female participation and ensure that fewer women work beneath their skill and qualification level after having children. GMB and EDF also

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7 Franco-German Council of Ministers, Joint Article by M. Thierry Repentin, Minister Delegate for European Affairs and his German counterpart, *La Croix* (19 February 2014). An English translation is available at: www.ambafrance-uk.org/France-and-Germany-vow-to-uphold, accessed on 30 May 2014.

8 'Cut EU Red Tape': A Report From the Business Taskforce (2013).

9 Details of the review can be viewed at: www.ec.europa.eu/social/main.jsp?catId=148&langId=en&callId=360&furtherCalls=yes, accessed on 28 May 2014.

10 Directive 2006/25/EC of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), 2006. Directive 2004/40/EC of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). 2004.

suggested that extending the scope of the non-discrimination and equality directive to all sectors would benefit UK citizens when they are living, working or travelling across the EU.[11]

4.11 However, the IoD felt that the UK could benefit from the EU taking more action to facilitate freedom of movement and limiting Member States' ability to impose new regulations for the successful functioning of the Single Market. They said 'EU rules limiting Member States' powers to impose conditions, requirements, restrictions, limits, procedures, costs and burdens on employers seeking to employ someone from a different country, or to post someone temporarily to another Member State, would be welcome. Such EU rules would not only have the benefit of reducing or limiting regulatory barriers to employing workers across borders, they would also help reduce the differences between national rules'.[12]

4.12 On a similar note, although the Liberal Democrat MEPs who responded to the Call for Evidence did not support the expansion of EU action, they did argue that subject to certain provisos (including that the action is absolutely necessary, adheres to the principles of subsidiarity and proportionality and is supported by robust impact assessments), further EU action in social policy could benefit the UK provided that it was within the current competence. In particular, they suggested that additional areas of minimum standards could continue to reinforce the level-playing field across the Member States and strengthen the Single Market. They also believe that this could promote the social convergence within and between Member States in order to gradually bring lagging Member States up to the average level. This, they argue, would mean businesses would be less likely to relocate to benefit from cheaper running costs and all Europeans would benefit from similar rights and protections.

4.13 The CBI in their report *Our Global Future* and Open Europe in their evidence noted that one of the potential risks for the UK of a renewed legislative agenda combined with the greater cooperation between Eurozone Member States was that this could potentially give rise to caucusing between Eurozone Member States before proposals come to Council for full negotiation.[13] [14] New QMV rules are due to come in on 1 November 2014 (Article 16 TEU) which will mean that if the Eurozone countries vote together they have a qualified majority and would therefore potentially be able to outvote non-Eurozone Member States on employment, health and safety and non-discrimination issues. This risk was acknowledged by the German Chancellor Angela Merkel in a speech in February 2014 where she noted that non-Eurozone EU Member States must not be put at a systematic disadvantage.[15]

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[11] There are already EU directives in place that provide for protection from discrimination for all grounds in the workplace (employment, work and vocational training areas) but protection against discrimination in the provision of goods and services is currently restricted to race and gender. There is no protection provided at EU level from discrimination on grounds of religion or belief, age, disability and sexual orientation in the provision of goods and services, though a draft directive has been proposed by the European Commission and is currently being negotiated in the Council.

[12] IoD, *submission of evidence*.

[13] CBI, *Our Global Future: The Business Vision for a Reformed EU* (2013).

[14] James Booth, *Repatriating EU Social Policy: The best Choice for Jobs and Growth?* (2011).

[15] For a full transcript of the press conference, held on 27 February 2014, please see: www.gov.uk/government/speeches/david-cameron-and-angela-merkel-press-conference-february-2014, accessed on 30 May 2014.

Coordination between Member States

4.14 In contrast, respondents generally considered the increasing focus on coordination between Member States to be a positive alternative to legislation. For example, COSLA suggested that the Commission should work towards improving the existing social and employment legislation through non-binding instruments such as good practice guidelines rather than further directives. They indicated that this is where the EU could add the greatest value as opposed to setting out rules that lack the flexibility Member States need.

4.15 That said, experience of the non-legislative areas of cooperation, such as the OMC and European Semester, highlights an appetite for improved processes from the EU Member State Ministers. In the spirit of mutual learning, which these processes largely support, Ministers have regularly supported proposals from the Employment and Social Protection Committees to reduce the burdens of such activity while maximising its added value. For example, Ministers from EU Member States at the June 2011 Employment and Social Policy Council (EPSCO) endorsed the view that: 'The Social OMC has proved a flexible, successful and effective instrument to bring forward common priorities for social policy at EU and national level. However, there is a need to improve its visibility and impact'.[16] This should include 'considerably lighter reporting', while also 'enhancing mutual learning and analytical capacity' and 'enhancing stakeholders' involvement'.[17] In a similar vein, Ministers and the Commission have jointly sought to improve the European Semester process, again through improved dialogue, recognising that national buy-in is essential if genuine reform is to take place.

Potential Future Reforms

4.16 As set out throughout this document, a number of respondents raised concerns about and made suggestions for improvements to the legislative process and the impact of the EU institutions. This section brings together some of the suggestions for change that we received during our Call for Evidence.

- A number of respondents, for example the IoD and FSB, felt that the current legislative processes are too complex and lack transparency. Issues raised included the fact that the number of interested parties (including for example the Commission, the European Parliament and the Social Partners) means that proposals are difficult to negotiate. Anthea McIntyre pointed out that when EU legislation is agreed it incorporates a significant number of compromises for everyone. Discussions during our Call for Evidence highlighted the view that the role played by the European Parliament in particular could have a significant impact on the UK in the future. It was also raised at our evidence-gathering events that it is difficult for external stakeholders to get information about negotiations and that proposals change significantly during the process so that initial impact assessments become out of date.

- As we saw in Chapter Three, a strong theme in responses to our Call for Evidence was about the need for more consistent adoption of the principles of better regulation by the Commission. Going forward, the CBI underlined the need for 'proportionate, risk-based and evidence-based' EU policy where the need for change was substantial.[18] For respondents to our Call for Evidence, this was not

[16] The Social Protection Committee, *The Future of the Social Open Method of Coordination (OMC)* – Endorsement of the Opinion of the Social Protection Committee (2011).

[17] Idem.

[18] CBI, *submission of evidence*.

about reducing the protections for employees but about understanding at an early stage what the impact was of regulation on business costs. The FSB argued for the consistent adoption of the *Think Small First* principle, and exploring alternative ways of achieving goals. The CBI, EEF, Anthea McIntyre MEP and FSB called for all new legislation to be evidence-based. Anthea McIntyre MEP went further and suggested an independent body to promote smart regulation and assess the costs and benefits of proposals. The Prime Minister's Business Taskforce called on the Commission to adopt a new 'common sense filter' for all new proposals.[19] The LCCI argued that the role of the European Commission should be less about regulating and more about ensuring compliance and consistent implementation of EU directives at Member State-level. Lastly in this area, a number of respondents, for example the IoD, highlighted that the UK needed to be vigilant to the risk of gold-plating.

- Although a number of respondents to our Call for Evidence saw the benefits of the social partner processes, they also felt that they should be improved to ensure they are more democratic. In particular, respondents raised concerns about the representativeness of the processes. One potential solution would be for agreements that are intended to become legislative to have a higher threshold for Member State representation. The FSB suggested that the Government should exercise more scrutiny over social partner agreements. The reforms that the Government would like to see include steps to ensure transparency so that it is clear what negotiations are taking place, such as quarterly letters from the Commission to Council and inclusion in the Commission Work Programme of those areas where social partner negotiations are expected that could turn into legislative proposals, and impact assessments and assessments of proportionality for SMEs for all legislative proposals. Some respondents also suggested that there was potential for the UK to make increased use of social dialogue and collective bargaining.

4.17 As we saw in Chapter Three, the impact that the ECJ has had was particularly controversial amongst respondents to our Call for Evidence. This is because the Court was perceived on occasions to have taken an expansive approach to the interpretation of EU law on employment and social policy which had imposed burdens on business. It was suggested that without institutional change, there was a potential risk that this would continue. In our discussions with our stakeholders, a number suggested that there would be merit in institutional change to give Council a mechanism to respond to ECJ judgments that go beyond their intentions.

4.18 Lastly, the EEF indicated that the UK should ensure that it is a constructive and engaged partner in EU negotiations, highlighting the importance of timely engagement with the European institutions at all levels and the need to build consensus with like-minded Member States.

[19] 'Cut EU Red Tape': A Report From the Business Taskforce (2013).

Annex A: List of Evidence Received (including oral evidence)

Andrea Leadsom MP on behalf of Fresh Start Project

Anthea McIntyre MEP, Conservative Spokesman on Social and Employment Affairs

ARCO

Associated Society of Locomotive Engineers and Firemen (ASLEF)

Bar Council of England & Wales

British Ceramic Confederation

British Hospitality Association

British Medical Association

Business for Britain

CBI

CEEP UK

Chartered Institute of Personnel and Development (CIPD)

Co-operatives UK

Convention of Scottish Local Authorities (COSLA)

David Campbell Bannerman MEP

Discrimination Law Association

Dr Lee Rotherham

EEF

Equality & Diversity Forum

Federation of Small Businesses (FSB)

Fire Sector Federation

GMB

Institute of Directors (IoD)

Institution of Occupational Safety and Health

Law Society of England and Wales

Law Society of Scotland

Lewis Silkin LLP

LELU, University of Liverpool

London Chamber of Commerce and Industry

National Farmers' Union

National Hairdressers' Federation

Open Europe

Phil Bennion MEP on behalf of UK Liberal Democrat MEPs

Prof. Hugh Collins

Road Haulage Association

Royal College of Midwives

Royal College of Nursing

The Northern Ireland Executive

The Foreign Policy Centre

The Scottish Government

The Young Foundation

Thompsons Solicitors

TUC (ETUC endorsed the TUC's response)

UK Race and European Network

UNISON

Unite the Union

A submission to this report was specifically commissioned. Professor Catherine Barnard, Professor of EU law and Employment Law, University of Cambridge, was commissioned to provide a legal analysis of the development of European competence within the Social and Employment policy area.

In addition to the formal submissions to the Single Market Call for Evidence, the following responses to other reports have been considered:

The Single Market Report

The Health Report

The Transport Report

The Animal Health and Welfare and Food Safety Report

Any references to MEPs reflect their status at the time of the Call for Evidence period.

Annex B: Engagement Events

A number of engagement events were held during the duration of the Call for Evidence period to explore the issues raised within the scope of the Social and Employment Policy Review. These events included:

Roundtable discussions with business stakeholders in London and Brussels

Roundtable with trade unions

CEEP UK members roundtable

One to one meetings with several stakeholders: EEG, IoD, Prof. Hugh Collins and REC.

In addition, presentations and discussions on the review were held with a number of other bodies including:

ELR Business challenge panel – A discussion on the Call for Evidence questions.

Small Business Trade Association Forum – A presentation of the Call for Evidence.

Each event and attendees are stated below.

Brussels Roundtable attendees

European Commission, European Trade Union Confederation, European Parliament, European Small Business Alliance, Portuguese Permanent Representation to the EU, Estonian Permanent Representation to the EU, Scottish Government EU office, Slovak Permanent Representation to the EU.

CEEP UK Roundtable

A round table with members in regards to the Social and Employment Review's Call for Evidence.

EEG meeting

BIS officials met with members of EEG to acquire evidence and discuss the Social and Employment Review.

ELR Business Challenge Panel

BIS official attended to discuss the Social and Employment Review.

Roundtable with trade unions

A round table hosted by Ms. Elena Crasta with ETUC and TUC members to raise awareness and interest in the Social and Employment Policy Review in order to gather evidence for an ETUC and TUC submission.

HIGs (Horizontal Interest Groups) Meeting

Organised by the FCO, a meeting to present the current emerging themes from the Call for Evidence, to discuss the review and to acquire more evidence for the Social and Employment Policy Review.

IoD meeting

Meeting between IoD and BIS officials to acquire evidence on the Social and Employment Policy Review.

London Roundtable attendees

Business for Britain, IoD, CBI, EEF, CBI, CIPD, Maternity Action, School of Law and Social Justice, BT internet/European Employers, European Committee, Interel Group, Royal College of Nursing, FSB, Joseph Rowntree Charitable Trust, Law Society, Jaguar Land Rover.

Prof. Hugh Collins meeting

Meeting between Hugh Collins and BIS Legal to gain the views and interests from the law perspective.

REC meeting

Meeting between REC and BIS officials to discuss the Call for Evidence and the views of REC.

Small Business Trade Association Forum discussion

A meeting hosted by HSE calling for evidence on the Social and Employment review with members of the forum.

Annex C: Other Sources

The following list is not exhaustive but sets out some of the main sources drawn upon in preparing the analysis.

Cut EU Red Tape: Report from The Prime Minister's Business Taskforce, October 2013.

Centre for European Reform, *Review of the Balance of Competences between the UK and the EU* (2013).

Centre for European Reform, *Tilting at European Windmills* (2013).

Confederation of British Industry (CBI), *Our Global Future; the Business Vision for a Reformed EU* (2013).

Conservative Home, *We Should Get Rid of European Financial and Employment Regulations that Hinder Job Creation and Economic Growth* (2011).

Delors Jacques, *TUC Speech – It is Necessary to Work Together* (8 September 1988).

Fabian Society, *A New Social Europe* (2007).

Government of the Netherlands, *Testing European Legislation for Subsidiarity and Proportionality – Dutch List of Points for Action* (2013).

House of Lords, European Union Committee Report, *Impact Assessments in the EU: room for improvement?* (2010).

House of Lords, European Union Committee Report, *The Single Market: Wallflower or Dancing Partner?* (2008).

House of Lords, European Union Committee Report, *Working Time and Temporary Agency Workers: towards EU agreement* (2008).

Institute of Directors, *The Midas Touch: Gold-Plating of EU Employment Directives in UK Law* (2013).

Miller Vaughne, How Much Legislation Comes from Europe? – *Commons Library, Research Paper* 10/62 (2010).

Open Europe, *Beyond the European Social Model* (2006).

Open Europe, *Still Out of Control? Measuring 11 Years of EU Regulation* (2010).

Open Europe, *Top 100 EU Regulations – Briefing Note* (2013).

Regents University, *UK and Europe: Costs, Benefits and Options; Social and Employment Dimensions* (2013).