**CBI response to the balance of competence call for evidence: social and employment review**

Membership of the EU's single market remains fundamental to the UK's economic future. Three quarters of CBI members of all sizes and sectors report that the creation of the Common Market – and the access it provides to the world's biggest single market of over 500 million people – has had a positive impact on their business.[1] Business is clear that, in order to effectively function, any Single Market needs some commonly agreed rules to allow full access to the market on equal terms. Removing non-tariff and regulatory barriers between member states is one of the most important features of the Single Market and, where EU rules are competitive and respected, they can help businesses to access markets and drive EU competitiveness.

A single, well designed, set of rules can help businesses by deepening market access and supporting integration and economies of scale. Common standards can also lower administrative costs by reducing the compliance burden of dealing with multiple sets of rules when trading across borders. By creating a level playing field common rules can boost fair competition by outlawing compromises on, for example, levels of safety. In addition in many cases the absence of EU rules would mean domestic regulation, either to maintain standards at home, allow access to international markets or to fulfil international obligations. In the case of the Working Time Directive, for example, a large proportion of the £2.6 billion per year cost to UK businesses is the result of employees being entitled to paid annual leave.[2] UK regulations go further, requiring 28 days paid annual leave rather than the 20 required by the Directive. With little domestic debate around reducing paid leave entitlements a large proportion of this cost would remain if these rules were set domestically rather than in Brussels. While there are frustrations, 52% of CBI member companies say they have benefitted directly from the introduction of common standards, with only 15% suggesting the impact had been negative.[3]

Despite the benefits of some commonly agreed rules, social policy remains one of the most controversial areas of EU competence. When asked to rank their priorities for reform of the EU, tackling the burden of some regulations, particularly employment law, was the top priority of CBI members. 49% of businesses report that attempts to create similar employment law across the EU has had a negative impact on their own business, compared with just 22% reporting a positive impact.[4] 52% of businesses believe that, were the UK to leave the EU, the overall burden of regulation on their business would fall.[5] The findings of our member survey should not come as a surprise, as the EU has a history of passing inappropriate social legislation that applies poorly in the UK's labour market, and which has then had its effect worsened by court judgements. Taken as a single issue, most businesses would prefer social issues to be dealt with at national level. This reflects the fact that labour markets across the EU are widely, and legitimately, divergent in structure and culture, based as they are on national employment law and industrial relations traditions. 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. The rest of this response deals with those reforms.

[1] CBI – Our Global Future: the business vision for a reformed EU, November 2013
[2] CBI – Jobs for the future, 2009
[3] CBI – Our Global Future: the business vision for a reformed EU, November 2013
[4] CBI/YouGov survey – September 2013
[5] CBI – Our Global Future: the business vision for a reformed EU, November 2013

For the EU to compete globally, grow and create jobs in Europe any social policy must be firmly focused on supporting the single market and covering cross-border employment issues that create a level playing field and consistent frameworks across Member States. The EU must ensure that all regulations – both existing and new – support growth in the UK and Europe, working in a global context and for businesses of all size.

If EU social policy is to be relevant for businesses it must meet three critical tests:

- employment regulation must support job creation
- regulations must apply evenly across Member States
- all policy must be evidence based and relevant

**Employment regulation must support job creation**

Against a backdrop of more than 26 million unemployed people across the EU it is essential that Europe is a competitive place to do business and employ people. All employment regulation reviewed or proposed, should be tested to ensure it supports job creation in Europe and is adequately assessed and evaluated to ensure delivery against this objective.

One of the easiest and quickest ways of boosting EU competitiveness is reducing regulatory burden as many businesses fear that EU social policy can stifle job creation. 45% of businesses see the impact of EU regulation as a threat to UK labour market competitiveness, rising to 54% who expect EU regulation to be a likely threat in five years' time.[6] European social policy is clearly an area to be reviewed in order to ensure that any legislation creates opportunities rather than costs for European businesses operating in an increasingly globally competitive world. Job creation for the unemployed rather than improvements for those in work must be the focus – too much of the policy of the past has supported insiders at the expense of outsiders. EU social policy must be refocused to ensure it helps Member States meet the challenges of today and tomorrow, supporting the necessary conditions for sustainable economic growth. In the longer term EU social policy must map out a positive path for tackling the serious challenges of global competitiveness and demographic change.

**Regulations must apply evenly across Member States**

A genuine respect for subsidiarity, where EU-wide legislative instruments are used only in cases where there is a genuine pan-European issue, is key to minimising unnecessary costs, bureaucracy and unintended outcomes given the variety of traditions and institutions within European labour markets. Creating a level playing field and consistent frameworks across Member States is a key argument in favour of common rules supporting the Single Market but the benefits of this approach are lost if central regulation across very different labour markets, legal models, and institutional frameworks, results in unnecessary costs and bureaucracy. Member States should look together at the application of subsidiarity, looking at how to halt mission creep in some areas through better application of the subsidiarity principle.

Ensuring that all countries in the EU implement rules evenly to create a level playing field in the single market is a key priority for reform for CBI members.[7] Too many directives affect businesses unevenly either by design or by application, with the one-size fits all approach increasing regulatory burden while failing to deliver tangible benefits. 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 process. Member States should be free to find the best means to achieve commonly agreed ends. Our view is that EU directives, where used, should set out broad principles for Member States to achieve within the context of their own labour markets in a way which is best suited for them. This includes protection from having national laws arbitrarily rewritten by the ECJ. For example, in contrast to the UK's risk-based, directional Health and Safety policy the topic-based approach of EU legislation leads to prescriptive regulations which create additional, burdensome duties for employers with little evidence of any benefit.

[6] On the UP: CBI/Accenture employment trends survey 2013

[7] CBI/YouGov survey – September 2013

**Prescriptive requirements undermining the principle of subsidiarity**

**Agency Workers Directive**

The Agency Workers Directive was introduced to remove unreasonable restrictions on the use of temporary workers that existed in some Member States and to ensure equal treatment for temporary workers in others. In the UK – where no unreasonable restrictions existed, and temporary workers were already paid 94% of the level of comparable employees – an EU wide solution has cost UK employers £1.9 billion per year, largely in compliance cost and red tape rather than from benefits flowing to workers.

**Working Time Directive**

Despite the majority of EU Member States now using the individual opt-out of the 48 hour cap on the number of hours that may be worked in a week, its future continues to paralyse attempts to reform the Directive. The demand of the European Parliament for the opt-out to be phased out caused the five year attempt to revise the Directive through co-decision between 2004 and 2009 to collapse and the same demand made by Trade Unions during the 2011/12 social partner negotiations prevented agreement. Continual speculation about how long it will remain a provision of the Directive and whether new conditions on its use will be imposed is disruptive. It is vital that the opt-out is retained as a permanent provision of the Directive.

**The Artificial Optical Radiation Directive**

The Artificial Optical Radiation Directive was transposed into UK law despite the HSE's recognition that 'the Directive is considered to bring no additional benefit to health and safety in the UK'. The effect for businesses has been to introduce an additional compliance burden through supplementary risk assessments – although the risk was already being controlled adequately via national law. It has also resulted in companies seeking costly advice on how they should comply, a consequence the HSE correctly identified at the time.

**Women on Boards**

Although the UK has seen good progress towards equality in the boardroom the threat of action at EU level remains due to lack of progress in some states on gender diversity. The procedural quotas, reporting requirements and sanctions outlined in the Commission's proposal and the European Parliament's position encourage a restrictive, compliance-driven approach to gender diversity and risk undermining genuine efforts by Member States to strengthen the talent pipeline. In line with the subsidiarity and proportionality principles, and given the different company law systems throughout the EU, Member States should take national approaches.

Different legal frameworks across Member States pose real challenges for legislating at EU level. A directive written for a civil law system is likely to entail gold plating when translated into UK common law, as the letter of the law seeks to provide the clarification that prevents judges interpreting legislation in unintended ways. Less specificity in directives, setting outcomes that member states should try to deliver, rather than processes by which to achieve them will help to reduce burdens and ensure that regulations are fit for purpose in all Member States. This approach will also help avoid the law-making by stealth that now takes place in the European Court of Justice where Court judgements have extended the scope of legislation beyond the original intentions of Member States. Improving the ability of Member States to address expansive judgements which change the law in that country would be welcome.

**Expansive interpretation**

**Working Time Directive**

Expansive interpretations of the Working Time Directive have allowed the European Court of Justice to redefine key concepts unchecked. Rulings on on-call time (*SiMAP* and *Jaeger*) and the interaction between annual leave and other types of leave (*Schultz-Hoff*, *Stringer* and *Pereda*) have had a significant impact on the effect of the Directive, causing real difficulties and uncertainties. Now the Court has started to expand the definition of holiday pay (see Advocate General opinion in *Lock v British Gas*). Finding compromises to fix the problems created by the Court and prevent further expansive interpretations is essential to making the Working Time Directive a regulation which is manageable for businesses.

**All regulation must be evidence based and relevant**

It is vital that EU policy is proportionate, risk-based and evidence-based but evidence for change is often not as substantial as it could be. Policy must be relevant to the front line of labour markets in member states. A stronger evidence base, reducing extraneous proposals and regulation, would help increase the legitimacy of relevant and justifiable regulations. Working at an EU level can help facilitate evidence gathering and best practice sharing, and provide opportunities for assessing and comparing policies, as well as space for policy experimentation to shape the best routes forward.

To improve the quality and legitimacy of the regulatory framework the Commission should:

- Strengthen the role of the Impact Assessment Board (IAB) by giving greater consideration to IAB opinions on Commission Impact Assessments before it adopts a proposal, and by making regular use of independent expert knowledge.
- Increase transparency by publishing Impact Assessments during the consultation stage instead of together with the proposal.
- Improve evaluation of proposals and existing legislative frameworks.

Proper scrutiny of the EU policymaking process by national parliaments is also plays an important part in informed decision making. The UK parliament should strengthen informal ties with like-minded national parliaments and seek to use the Yellow Card Procedure more frequently where EU level proposals infringe the principle of subsidiarity.

**Weak evidence base**

**Electromagnetic Fields Directive**

The Electromagnetic Fields Directive sets prescriptive action and exposure limit values instead of following a risk-based approach, targeted to cases where electromagnetic fields pose a real risk to workers' health and safety. In spite of the derogation, there is evidence that some welding processes (for example in the aerospace industry and some vehicle manufacturing) are likely to exceed the action values and/or the exposure limit values for health and safety requirements and would therefore no longer be possible. This is despite such processes not resulting in adverse health effects and there being no conclusive, substantial scientific evidence establishing a causal relation between long-term exposure to EMF and health effects in particular working environments.

**The Display Screen Equipment regulations**

Since the Display Screen Equipment regulations were written there have been widespread changes to technology and working practices. Extensive use of display screen technology in leisure time, as well as the rise in flexible working and desk sharing, renders the evidence behind prescriptive legislation out-dated. The directive also fails to recognise the multifaceted nature of many health problems which are affected not only by work, but also by lifestyle, unfairly placing the burden on the employer to take responsibility for the lifestyle choices of their employees.