Federation of Small Businesses
The UK's Leading Business Organisation

FSB response to the call for evidence on Balance of Competences Review: Social and Employment

January 2014

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By e-mail: balanceofcompetences@bis.gsi.gov.uk

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Dear Sir/ Madam,

RE: FSB response to call for evidence on the Balance of Competences Review: Social and Employment

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with around 200,000 members, it is also the largest organisation representing the self-employed, micro, small and medium sized businesses in the UK. We founded and work with the European Small Business Alliance (ESBA) to amplify our voice in Brussels.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute up to 50 per cent of GDP and employ over 59 per cent of the private-sector workforce.

This response sets out the FSB's position on EU employment and social policy. Minimum standards, agreed at EU level, can be helpful in levelling the playing field for businesses by reducing trade barriers and preventing undercutting and other uncompetitive practices. However, EU social legislation has too often been designed as 'one size fits all' and according to the precautionary principle, thereby placing disproportionate and unfair burdens on the smallest businesses. While the Commission is taking steps to address this, we believe there is much further to go before all EU policy-makers *Think Small First,* especially within the European Parliament, Council and the social dialogue. There should be absolute adherence to the principles of subsidiarity and proportionality, with national Parliaments exercising their powers appropriately.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours faithfully,

Federation of Small Businesses

Questions

A – The argument for social and employment competence

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

The Treaty on the Functioning of the European Union enables the EU to enact legislation in the field of employment and social affairs. Many of the Social Chapter's provisions are now an accepted and established part of UK law. We therefore cannot speculate on the laws that would have been introduced in the UK, had we signed up to the Social Chapter earlier, or not at all. It is impossible to know which provisions the UK would re-instate in the absence of EU regulation.

The internal market requires a common set of rules, but as evidenced by the Balance of Competences review on the internal market, views vary widely on the extent to which these rules should apply and whether there is a 'price' to be paid for access to the EU's single market. In the case of social and employment competence, it is almost impossible to separate out employment legislation from single market legislation.

Given the value of the EU's single market to the UK economy, the FSB believes small businesses would be worse off without easy access to an internal market of 500 million customers and 20 million businesses. One fifth of FSB members export, and the European market is the main destination for our exporting members (88 per cent trade within the EEA).[1] Other FSB members may form part of European supply chains or benefit from UK inward investment.

While the FSB is not in a position to speculate on the feasibility or desirability of opting out of EU competence in this area, we do believe small businesses suffer disproportionately from regulatory burdens, whether they arise at UK or EU level. We therefore believe the EU should drive forward an ambitious regulatory reform programme so laws are smart, proportionate and evidence-based and always 'Think Small First'. EU policies and regulation must stimulate growth, competitiveness and employment across the Member States.

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

As a condition of joining the EU, Member States have to subsume the 'acquis' into national law and meet existing EU standards, improving conditions for consumers and workers and providing greater legal certainty for business, particularly for those who trade cross-border.

Minimum standards in employment and social policy, decided at EU level, in line with the principles of proportionality and subsidiarity, can help level the playing field. However, given the variance in labour market models, cultures and approach to enforcement, it is not realistic to expect one-size laws to fit all, which has too often been the case with existing legislation and resulting judgments from the European Court of Justice. There should be reasonable flexibility for the Member States to achieve the minimum standards, agreed at EU level.

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

It is impossible to speculate on which laws would exist were the EU to have no competence in this area. Clearly, it is difficult to imagine the UK 'rolling back' existing rights to some of the most established provisions of EU employment

[1] FSB 'Voice of Small Business Survey Panel', September 2012.

law. Many of these rights are taken for granted by employees and form part of contracts, organisational policies and workplace culture, for example, the rights to paid maternity or annual leave.

In addition, in many of these areas, the UK has effectively set higher standards than the EU minimum requires – for example, on the amount of annual leave an employee is entitled to, or the new proposals on shared parental leave. Regarding the latter, from 2015 onwards eligible parents will be able to share up to 50 weeks of the mother's maternity entitlement. This goes beyond what is required under EU law as set out in the Pregnant Workers' Directive. The FSB supports the principle behind shared parental leave, as we believe added flexibility over parental leave has the potential to bring benefits to business. However, we have been concerned about the complexity of the proposals and the likely administrative burden on small firms – and are glad that the Government has taken steps to address these concerns.

In a survey of FSB members, almost a third said they found regulation and enforcement a barrier to their success[2]. While many small businesses do not know if the burdens arise at EU or UK level and it is very difficult to separate out costs, it is the accumulation of burdens and constantly changing requirements that they struggle with most.

Impact on the national interest

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

Employment and social policy, agreed at EU level, can be helpful for business as it levels the playing field within the single market. Businesses who operate cross border suffer when there is too much variation in regulation, as it increases uncertainty, compliance costs and administrative burdens. Minimum EU standards are also important for those smaller businesses which operate within a strictly regulated domestic market, as they are at risk of being undercut by firms operating out of a different country with less rigorous rules. For example, a manufacturer in Germany selling into the UK should have to meet broadly similar standards as a UK manufacturer.

The UK has always been seen as a country with good health and safety standards[3]. It is therefore not in the UK's interests to see a race to the bottom, where firms in other Member States can create competitive advantages by weakening protection for their employees, while the UK maintains its existing high standards.

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

A flourishing and confident micro and small business sector is essential for the health of the EU economy and to drive Europe's future employment and growth. Yet, as part of the recent Commission Top 10 consultation, SMEs across Europe ranked EU health and safety law as one of the most burdensome areas of legislation, together with the Working Time Directive and the Directive on Temporary Agency Work[4]. The FSB's detailed concerns on specific pieces of EU legislation can be read in our submission to the Prime Minister's Taskforce on EU Regulation[5]. In 2013 when FSB members were asked which EU areas of compliance were the most difficult to deal with, employment law and health and safety were cited as the top two.

While this could also be the case, were all social policy agreed at UK level, we believe EU legislation has too often been one-size-fits-all and failed to take into account the flexible nature of small and micro firms. EU policy-makers

[2] FSB 'Voice of Small Business' Member Survey, February 2012.
[3] European Comparisons summary of GB performance, HSE, http://www.hse.gov.uk/statistics/european/european-comparisons.pdf
[4] European Commission Top 10 most burdensome laws: http://europa.eu/rapid/press-release_IP-13-188_en.htm
[5] FSB submission to EU Taskforce 9attached to submission): http://www.fsb.org.uk/policy/assets/fsb%20response%20to%20eu%20business%20taskforce.pdf

should 'Think Small First' through the whole of the policy cycle. EU law is also not sufficiently risk and evidence-based, as it is designed according to the precautionary principle. Although the culture is improving, particularly since the creation of the Commission's Impact Assessment Board, we would like to see an independent body who could champion smart regulation and scrutinise the costs and benefits of proposals across all the EU institutions.

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. We have concerns over its operation at EU level, given the recent failure of the cross-industry social partners to make headway on the Working Time Directive. While the role of the social partners is enshrined in the Treaties, it is hard for UK small businesses to understand why they are subject to EU legislation, agreed as part of the social dialogue, over which their MEP has had no say, when the call is for more democracy at EU level. There is also a gap between UK business and representation at social partner level. For example, only one employer organisation in the UK has social partner representation in the EU's cross-industry dialogue which is not representative of the wider small and micro business community. As every UK business must apply any legislation stemming from different social partner agreements, we believe the process should be subject to smart regulation principles. For example, all agreements should be subject to stringent micro and SME tests and a rigorous impact assessment process, as would any legislative proposal.

We have also seen pressure at EU level to bring forward new legislation when better evaluation and enforcement of existing law, or even 'soft law' would be more effective. For example, the European Commission had proposed the Ergonomics Directive, as incidences of musculo-skeletetal disorders were increasing. However, incidence rates vary widely across the EU and the UK is performing well. New legislation would therefore have placed huge burdens on all UK businesses with few of the benefits. We therefore strongly support the Commission's 'evaluate first' policy, which means no new laws should come forward in any area, until existing law has been properly evaluated. We welcome the Commission's current evaluation of the health and safety 'acquis' and hope this will lead to more effective enforcement across Member States. More regulation does not necessarily result in better compliance and over-burdensome legislation will disadvantage the EU against our global competitors.

There must be sufficient flexibility at EU level to accommodate the different values and cultures that exist within the Member States. There are huge differences in labour market models, rates of collective bargaining and legal systems which all affect how laws are put into practice and are enforced. The EU must focus more on outcomes and not the means by which they are achieved, granting Member States more flexibility to achieve results in the way they best see fit.

Last, agreeing any laws at EU level between the Commission, MEPs and 28 Member States is a delicate negotiation process and there is always the potential that a deal on a law in one area is traded against something in another.

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

We have no particular comments or evidence to feed in here.

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

We believe there is a serious lack of evidence separating out the costs and benefits of membership. While thinktank Open Europe estimated that the costs to UK businesses and the public sector of EU social law was £8.6 billion a year[6], it is impossible to know which provisions the UK would re-instate in the absence of EU regulation.

We do not believe it is feasible to automatically exempt micro businesses from EU employment and social law, because it could create a two-tier labour market. Instead, every proposal must be designed with small businesses in mind, from the bottom up, with a rigorous micro and SME Test as part of every impact assessment (IA). Consideration must always be given for how legislation might be adapted for micro businesses, on a case by case basis, such as a longer lead-in time for small businesses, fewer inspections or lighter paperwork.

On very rare occasions, an absolute exemption may be needed – for example, if there were new regulations concerning collective representation. In this context current UK legislation on union recognition exempts employers with fewer than 20 employees.

Future options and challenges

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

Any future action must be in line with the principles of subsidiarity and proportionality. The UK should maximise its influence to ensure smart regulation, which is designed to suit the smallest businesses and is risk and evidence-based.

On health and safety in particular, as the review of the 'acquis' is ongoing, rather than introducing new legislation that will affect all Member States, EU action should focus on bringing up the performances of the 'worst' Member States to the best. This can be achieved by sharing best practice and encouraging national health and safety agencies to work together. We welcome the efforts the Commission is already making to share knowledge amongst labour inspectorates. If some Member States are performing poorly, then targeted intervention will be more successful than bringing in a new regulation for all 28 countries.

9. How might the UK benefit from the EU taking less action in social policy?

Although the single market requires common rules, regulation designed at Member State level is more likely to be a better 'fit' to national systems and cultures. The Working Time Directive is a key example, as it is unnecessarily complex and needs to be simplified to make it work better in all countries, not just the UK. It also contains numerous derogations, which the UK is less able to take advantage of, due to the lack of social dialogue, and the fact that its labour market is more flexible and fragmented than in many other Member States. For example, many EU countries have used social dialogue and collective agreements to extend the reference period to 12 months, so workers can go above 48 hours per week. As the UK has far less tradition of this, businesses have relied more on the individual 'opt-out' from the 48-hour week. Unless all EU employment law is sufficiently flexible to make up for varied traditions, UK businesses are at a competitive disadvantage.

Rulings from the European Court of Justice also extend the scope of Directives far beyond what was originally intended, increasing costs and uncertainty for business. For example, the Pereda ruling of 2009 has caused particular difficulties for small firms due to the cost and administrative burdens of employees accumulating annual leave whilst on long-term sick leave.

[6] Open Europe, Repatriating social policy, November 2011
http://www.openeurope.org.uk/Content/Documents/Pdfs/2011EUsocialpolicy.pdf

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

While the European Commission has made headway with its smart regulation agenda, there is much further to go in enshrining these principles across the EU institutions and in the Member States. The FSB has called for the following at EU level:

- Put micro and small enterprises at the forefront of EU policy-making and always 'Think Small First'.
- All legislative proposals should be proportionate to the problem and risk and evidence-based.
- No new proposals should come forward until existing law in that area has been evaluated.
- EU regulation must be easy to understand, simply to comply with and enforced properly in the Member States, otherwise it potentially distorts the single market.
- Robust, evidence-based impact assessments, with clear cost-benefit analysis, consultation-stage impact assessments, and greater independence for the Impact Assessment Board.

We believe the EU should move away from a precautionary or hazard-based approach to legislating on the basis of risk and outcomes. Too often, taking an overly prescriptive approach at EU level has been counterproductive. The most important thing is that the policy outcomes do not harm employment and lead to improvements in health and safety, while maintaining Europe's competitiveness. Any future legislative proposals in this field must therefore respect the diversity of the Member States, not only their different values, but the variation in health, social security and legal systems, and the Member States should be granted sufficient flexibility as to how they achieve the aims of the legislation.

When EU regulation is deemed necessary, legislators should always take into account the needs of micro and small businesses. We would like to see greater recognition of the important role small firms play in creating employment and that small and micro businesses need more flexibility.

EU policymakers should recognise that small firms do not have the resources that large firms might have to grasp and enforce complicated regulations. The small business owner has to be an expert across a wide variety of areas of compliance, or be prepared to 'buy in' potentially expensive consultants. A business with 50 employees is likely to employ a dedicated health and safety adviser, but it will be quite different for a business with three employees. Proportionately, complying with regulation will take more time and resources for a micro business compared to a large one. This consideration must therefore be central to its design. For this reason, we strongly support the Commission's commitment to consider how the smallest businesses are affected by a proposal and whether legislation can be adapted, as part of a rigorous micro and SME test in every impact assessment.

It is important that the resources of the Parliament's new Impact Assessment Directorate are focused on those proposals with the greatest impact on small business, and ensure that any substantive amendments by MEPs are properly assessed. Sometimes a Commission's initial proposal may place relatively few burdens on small businesses, yet the Parliamentary amendments transform the resulting burden.

We would like to see the Commission reach out to as wide a range of small businesses as possible when proposing and reviewing new and existing legislation in the field of employment and social affairs, and particularly to seek input from businesses and organisations not represented in the formal social partner process. For example, Commissioner Andor recently stated to the European Commission's High Level Group, chaired by Edmund Stoiber, that "the Commission consults SME organisations regularly via social partner consultations and through exchanges within the European social dialogue committees". We believe the Commission should go further and actively seek input for upcoming reviews of the Working Time Directive and other employment and social law from organisations

and businesses who are not represented in the formal social partner process. External consultants who provide intelligence for Commission impact assessments should also take heed of this.

We have particular concerns about the social sectoral dialogue process, as many partners do not represent the full scope of affected employers and employees across the Member States, yet they have the power to propose legislation which would have to be applied by a far wider range of employers in every Member State. There is a risk that sectoral proposals in particular lead to a patchwork of different provision and laws across different sectors. It is in everybody's interest that any legislation that does come forward from this process is as robust, evidence-based and proportionate as possible so it has the greatest possible legitimacy and does not unnecessarily burden businesses. The recently proposed hairdressing agreement was poorly written and its lack of clarity could have increased the fear of litigation. Rather than bringing forward a new legislative proposal, effort should have focused on enforcing existing legislation.

We believe the social dialogue should be brought into the smart regulation process. For example, there should be more clarity on which social partner consultations are taking place. The Commission should carry out a full cost-benefit analysis of any legislative action proposed by the social partners which is released publicly with the Impact Assessment Board's opinion (like a usual impact assessment). Greater effort should also be made to raise awareness and increase interest in and scrutiny of the social dialogue process within the UK, particularly in the Houses of Parliament.

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

The UK should take greater responsibility in overseeing the work of UK social partners at cross-sectoral and sectoral levels, and ensuring that any derogations set out in EU legislation are maximised in the UK's interests. Across the Member States, there are also very different traditions for consulting labour and management and when there is flexibility in the EU Directive for this (for example, the Agency Workers' Directive), then Member States should be free to decide who to consult.

While we accept that it may at time be in the UK's interests to 'gold-plate' EU law, we believe there should be absolute transparency around this and that the UK Government should always have to justify why it has occurred.

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

The UK must ensure that as governance structures for the Eurozone change, there is no impact on the functioning of the single market.

Appendix: FSB Response to Business Taskforce on EU Regulation