EEF response to Review of Balance of Competences: Social and Employment

Overview

1. EEF is the voice of UK manufacturing, representing over 6,000 business operating in a diverse and innovative sector. EEF operates throughout the UK and has a permanent and very active presence in Brussels. It recognises the importance of timely engagement with the European institutions at all levels, and that change within the Union can only be achieved by building consensus with like-minded member states.

2. EEF recently published its report, "Manufacturing: Our future in Europe"[1], in which we set out the clear benefits of membership of the EU and recognised that the EU must be clear on its economic priorities and relentless in seeking to achieve these. Unequivocally, we are in favour of the UK unconditionally remaining a member of the EU, but we also believe that the operation of the EU can and must be improved for the benefit of all its members.

3. With the possible exception of immigration regulation, the most controversial legislation to have its basis in European law is that which governs the labour market. Working time, redundancy consultation, the transfer of undertakings and equal treatment regulation have all had a significant impact upon the UK. But these changes have for the most part now been embedded in the workplace and can no longer be regarded as European-based rights. They are seen by workers as employment rights, irrespective of their origin, and employers have had to embrace these changes. Having done so, it is very unlikely that EEF members would, even if they could, wish to revert to an employment law landscape without the fundamental rights which are now accepted as the basis for employing workers in the UK. We do not therefore believe that there is any case for calling for Treaty change, and for the UK Parliament to again be solely responsible for regulating the UK labour market. We do not believe that this would result in significant change, either in law or practice, and would create significant uncertainty for employers. EEF members criticism of law-makers is that change is too frequent and often

[1] EEF, the manufacturers' organisation, 'Manufacturing: Our future in Europe" (2013)

uncoordinated. Once employers have embraced a new piece of legislation, become familiar with it and any uncertainty over its practical interpretation has been dealt with, further change becomes more problematic and costly than the status quo. If therefore there was a shift in the balance of competences between the UK and the EU in this area, employers are unlikely, except upon a limited number of points, to be supportive of fundamental change. Once rights have been granted to workers, removing them is a long and difficult process; some rights may over time become contractual, making change even harder.

4. We do not therefore believe that there is a compelling, evidence-based case, for fundamentally changing the balance of competences in the field of employment law. We do, however, believe that the way in which the UK labour market operates is fundamentally different from most other EU member states. It is clear from discussions with EEF's sister organisations throughout Europe that whilst they share some of our frustrations on the extent and manner in which legislation has been introduced, their ability to adapt EU law to their own domestic labour markets has been make significantly easier with a system of collective bargaining. We believe that in the past there has been an insufficient emphasis placed on the need for EU law to be flexible in a way which allows the UK, with its greater emphasis on individual rights, to adapt it to the particular traditions of the UK labour market.

5. With the EU now consisting of 29 member states, it is impracticable to develop rigid, binding and prescriptive regulation to apply to all of Europe diverse labour markets. The UK should therefore seek a consensus of Europe's of like-minded member states who share the UK's view that rigid and highly-regulated labour markets have exacerbated the economic crises, and that the EU needs to fundamentally change its outlook on its regulation of the workplace, freeing social partners of all sizes and types, including individual employers and individual workers, to agree flexible and appropriate working arrangements without over-prescriptive regulation intervening.

THE ARGUMENT FOR SOCIAL AND EMPLOYMENT COMPETENCE

Q1. To what extent is EU action in this area necessary for the operation of the single market?

6. There is a need for some proportionate legislation at an EU level in order to facilitate the operation of the single market. To allow businesses to compete on broadly similar terms, we support the imposition of a baseline of labour market regulation which prevents businesses from competing unfairly against each other. This should be a system of minimum standards. However, with the enlargement of the EU and emergence of highly-competitive global markets, the baseline for this regulation cannot be modelled upon the established labour markets of the longer-standing members of the EU, as has been the case in the past, particularly as these tended to be more tightly regulated. Southern EU member states in particular have responded to the economic crisis by reforming their domestic labour market regulation, and the EU must be mindful that increasingly

Europe's businesses are competing with other global businesses which do not have the costs and associated administrative burdens imposed in Europe.

While some EU health and safety regulations are imposed under the legal basis of 'social policy', others are imposed on the legal basis regulating the internal market. For example, the EU's REACH Regulations (Registration, Evaluation, Authorisation and Restriction of Chemicals), require manufacturers or importers of substances to register them with the central European Chemicals Agency (ECHA). If manufacturers fail to register their substances, then the data on them will not be available and, as a result, they will no longer be able to manufacture or supply them legally in the EU.

Although the aim of these regulations is to improve health and safety and aid environmental protection, they work on the principle of harmonising standards as a requirement to manufacture and market substances within the internal market. This is quite different from social or health and safety law that changes working practices, such as those regulating noise levels or exposure to asbestos, for example, which apply to a given workplace in a Member State. Leaving aside the particular merits of the REACH regulation, it would be difficult for the UK to opt out of such a regulation and maintain access to the single market.

7. We therefore believe that the approach of the UK Government should be to seek to set the operation of the single market, and the need for labour market regulation, firmly in the context of the need for Europe to improve its global competitiveness, and not adopt an inward looking view of the need for labour market regulation based upon historic norms.

Q2. To what extent are social and employment goals a desirable function of the EU in their own right?

8. The advancement of the social protection of workers in Europe is now established in European law, and embedded within the European institutions, particularly the CJEU and the European Parliament. This social dimension of Europe is perhaps the most difficult concept to translate into domestic UK law, and we believe that this has led to uncertainty and conflict at the heart of the EU. The Treaty, (Art.153, TFEU), provides a legal base for the EU to adopt minimum standards in the area of employment protection and health and safety. All too often we believe this has been exceeded, and EU law imposed higher standards of compliance than the minimum requires. The working time directive and the posting of workers directive are but two examples, where we question whether EU law has provided only the minimum protection required. It now seems likely that further measures will be adopted to enforce the posting of workers directive, which will considerably increase the burdens on employers, but just as importantly go far beyond conferring minimum rights upon workers.

9. In the case of Health and Safety we see that more recent Directives such as the EMF Directive are not evidence-based in respect of the risks involved. The Commission has put measures in place to deal with a hazard where the risk is very low and where the 'precautionary' principle has been adopted. This is not in line with the UK's domestic risk-based and evidence-based philosophy.

10. Our experience of working within Europe over many years is that the agenda in the area of employment and social affairs is driven by the Employment Committee of the European Parliament and the Commission. This agenda has always been solely focussed 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.

11. We believe that on balance most social and employment objectives are better dealt with at a national level, as member states are better placed to judge their own diverse labour markets and social structures. The EU should be concerned with minimum standards and the basic rights needed to safeguard the single market. However, 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.

Q3. What domestic legislation would the UK need in the absence of EU legislation?

12. Whilst not directly addressing the question of what legislation the UK would need, we do believe that the UK would retain most if not all, of the main legislative instruments if the UK had sole competence again in the area of employment law. We are not starting from a point where we have an unfettered choice to decide what legislation we need, rather we should examine what we already have, and what, given the choice, we might wish to change.

13. In the area of Health and Safety the EU model of an overarching health and safety at work Framework Directive, with subordinate directives mirrors the approach of the UK's Health and Safety at Work etc. Act 1974 and its underlying regulations. The resemblance between the developing EU law and the main domestic Act (the Health and Safety at Work etc. Act 1974119) has meant that there is little that comes from the EU that does not fit naturally within the existing domestic framework. Almost all the hazards which are legislated for in a EU context would still need to be legislated for in the UK in the absence of EU legislation and the vehicle for doing this would be the Health and Safety at Work Act.

14. Even without the intervention of EU legislation, it is very likely that the UK would have introduced much of the legislation which the EU has, although we would then have had the opportunity to do so in a way more appropriate to the UK. Some restrictions on working time are appropriate, and the UK has already exceeded the minimum leave requirements of both the working time directive and the pregnant workers directive. The UK's equality laws exceed those of most of our EU partners. It also seems very unlikely that the UK would not have introduced some protection for workers at the time of a business sale or transfer and for agency workers. However, we believe that in all these areas the UK would have addressed these areas differently, for example providing some greater flexibility to harmonise the terms of workers after a business transfer has taken

place, and in addition the UK would have not been bound by the interpretation of the CJEU which has frequently caused problems for employers.

IMPACT ON THE NATIONAL INTEREST

15. Many of the questions which are raised in this section of the consultation are of the social impact of EU legislation. These are issues which are outside the scope of EEF as an employer-led representation body. We do, however, have the following business related observations.

16. There is within manufacturing an acute skills shortage, and many of our members place considerable reliance upon skilled technicians and engineers from other EU member states. In addition, many EEF members operate sites in more than more member state, and export to the EU. The total benefit to the UK in social terms should therefore be broadly assessed, taking into account the significant negative impact upon businesses and jobs if the UK did not have the level of access to the single market that it currently enjoys.

17. In addition, it is very difficult to separate and measure independently the impact of EU and UK legislation upon business. For example, the UK grants to mothers maternity leave in excess of that required by EU law. The UK grants a minimum of 26 working days, whereas the EU minimum is 4 weeks. Within each area of legislation, it is very difficult to determine what the EU has required of the UK as a minimum and what the UK would have chosen to introduce left alone. Measuring the impact of these measures as EU or UK regulation, or knowing if the UK would have adopted different measures but for EU law is we believe very difficult at best.

18. In the area of health and safety, EU action in social policy can disadvantage the UK where a directive is adopted rather than a EU regulation. For traditional health and safety at work regulation, the Treaty only confers competence on the EU to adopt “minimum requirements” having regard to the conditions and technical rule in each of the Member States”. 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 principal of subsidiarity and proportionality by ensuring that regulation set above the national level is the minimum necessary but some have questioned whether this is what happens in practice. It is open to Member States to exceed these requirements if they wish. This often causes problems for companies who want to operate in many EU different Member States, but who find 28 different interpretation and implementation requirements for the same Directive. This also extends to Product Safety Directives.

FUTURE OPTIONS AND CHALLENGES

19. As stated above, we do not favour any attempt by the UK to claim back the exclusive competence for legislating in the area of employment and social affairs. We do favour the UK taking more action in the area of social policy.

20. The UK, with other members of the EU, must seek to rebalance the debate upon employment and social affairs protection from inside the EU. It should do this by building upon existing work streams which can be favourably used to support the UK's more restricted view of EU social policy. There is currently much good work which is being undertaken in the area of better regulation which the UK supports. The work from the Commission on 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. These processes we believe are far more likely to result in positive change than attempting any direct reform of the EU's social policy footprint. We believe, following our own private discussions with a range of Brussels based stakeholders, that any attempts to change the principle of EU social policy directly will be branded as an attempt to reduce the employment rights and social protection of workers, and will be likely to fail.

21. Whilst then we believe that a number of the major planks of EU employment and health and safety legislation are in urgent need of change, (the Working Time Directive, the Acquired Rights Directive, the Display Screen Directive, the Electromagnetic Fields Directive and the Artificial Optical Radiation Directive are such examples), this cannot be achieved by seeking to shrink the mandate of the EU institutions, which in any event would require Treaty change. We believe that change is far more likely to be achieved in a shorter space of time by utilising the current pro-growth initiatives which already exist, and then embedding these within the EU. For example, the European Commission will shortly publish its position on industrial policy. This is likely to focus upon fostering growth, developing a fertile business environment and encouraging investment. This agenda then allows the UK to seek a rebalancing of the competing EU priorities away from a focus on social and employment protection and towards less costly and burdensome regulation, freeing business to expand, invest and create jobs.

22. In the longer term, the UK must use the tools currently available to it better, and ensure that the UK's labour market can more readily adapt to future EU law. Greater rigour in the pre-legislative process will bear fruit, particularly the need for greater transparency and robustness in the use of impact assessments. The pre-legislative process should also be used to question the need for any regulation at all, and the UK must at every opportunity seek greater adherence to the remit of the Treaty. Employment regulation

must set a minimum standard, it must be proportionate, and it should also be introduced only where it is clear that action at an EU level is needed.

23. We also believe that the UK must seek to close the implementation gap which has emerged between it and other Member States as a result of the greater use of social partner agreements in many other Member States. In many areas of employment regulation, our EU partners have not encountered the difficulties which we face in the UK. Agreements between employers and workers have allowed other Member States to be more flexible in their interpretation of the major pieces of legislation in the area of labour law. It is our impression that the Acquired Rights Directive (TUPE in the UK), causes employers far less concern where social partner agreements exist, and terms and conditions of employment are then standardised at the time that a new agreement is reached. In the UK, employers are frequently faced with the problem that they cannot harmonise terms of employment after a business transfer has occurred, even to the extent that pay dates cannot be brought into line.

24. We therefore believe that the UK should seek to ensure that all future regulation is drafted in a way that allows UK employers to enjoy the same flexibility as other European employers. It is usual to include a provision in a directive that allows social partners some flexibility in choosing how to implement EU law. UK employers should be able to, and should be encouraged to, take advantage of this flexibility in reaching local agreements with their employees as to how they can best implement EU labour market law. This can be achieved by ensuring that UK agreements between employers and their workers have the same status as European social partner agreements. We recognise that this may require a different legal approach that would allow UK employers the opportunity of agreeing pragmatic local arrangements, which the wide scope which EU law frequently allows, and which are available to businesses in other Member States.

25. In seeking the ability to reach pragmatic, local arrangements between employers and their workers, we do not advocate any introduction of collective bargaining, or anything similar to this. National and sectorial collective bargaining severely restricts the ability of individual employers to negotiate the terms of engagement with their staff, and this has during the crisis magnified the impact upon competitiveness of EU law. Portugal, for example, has taken the step of suspending collective agreements in the manufacturing sector in an attempt to improve competitiveness.

26. Whilst difficult to achieve, we would ultimately wish to see EU labour market law reformed to reduce uncertainty and reduce the burdens imposed upon business, whilst maintaining the overall level of protection afforded to workers. This has already been attempted, with little to show for it. Many UK employers find the application of the working time regulations confusing and costly. There continues to be uncertainty over the application of the directive to on-call workers, the basis for the payment of holiday pay remains in some doubt and there has been significant judicial gold-plating from the CJEU. UK manufacturers recognise the need to safeguard the health and safety of their workers, and do so, and the UK already has extensive health and safety laws requiring employers to provide safe workplaces and safe systems of work. The directive, however, specifies in detail, how member states should restrict the working time of their

employees in unnecessary detail, and employers fail to understand why a worker who has been absent from the workplace for a lengthy period continues to accrue their leave entitlement, returning to work with months of leave they then have to take. Resolving these issues around working time has proved intractable, with years of consultation and social partner negotiation failing to produce any way forward.

27. In the Health and Safety arena we need to see a smarter approach to EU regulation and simplification of existing legislation. Action in health and safety social policy could be undertaken differently by:-

    • a return to the original holistic approach of the Health and Safety Framework Directive and reverse the trend towards hazard-specific directives;

    • only introducing legislation if it addresses 'significant' health and safety risks;

    • putting a greater focus on developing practical guidelines, exchanges of best practice, and provision of information and practical tools to help companies understand and comply with legislation;

    • addressing unnecessary inconsistencies and overlaps in legislation. For example, the duplicated requirements on Risk Assessment, Medical Surveillance, Information, Instruction, Supervision and Training which appear in almost all worker protection directives and which could simply be covered as a common requirement within the Health and Safety Framework Directive;

    making the health and safety framework Directive more goal-setting, allowing the existing overlaps and duplication contained in the various daughter directives to be removed;

    • ensuring there is just one EU regulatory framework covering common hazards, e.g. exposure to Chemicals and Hazardous Substances;

    • avoiding management of societal, well-being, pyschosocial and public health issues through the implementation of worker protection legislation.

28. We believe that whilst the UK must continue to press for positive reform in these areas, there is a clear lesson that once a directive has been cast, future any change is very difficult, other than interpretational change which is in the unpredictable hands of the CJEU. Frequently then, the UK should seek to avoid situations of binding legal rules, which can only now be achieved with the support of other member states.