Balance of Competences Consultation Response

Social and Employment Policy

January 2014

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

Introduction

I. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.

II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £26.8bn to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.

III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to service the needs of their clients; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.

IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields, from commercial transactions, intellectual property and competition law to employment law, civil justice and dispute resolution.

V. It is for these reasons that the Law Society and the legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.

VI. The Law Society nevertheless accepts that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the other reviews of the balance of competences of most relevance to the legal profession.

The arguments for social and employment competence

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

1. The extent to which EU action in the field of employment and social policy is required for the operation of the Internal Market is difficult to determine in the abstract: it depends upon the specific factors and context where action is being considered. Where the cut is made in terms of the degree of coordination and the level of rights and protection will be determined both by what is needed for the smooth functioning of the single market and for what is perceived as politically desirable by the political majority at the given time of adoption of a concrete piece of legislation. It is not possible to give a single answer as to where the delineation lies between these two factors for all initiatives falling under the broad heading of social and employment policy.

2. In some cases action in such areas may be inextricably linked to the Internal Market freedoms, in particular as regards free movement of persons. In addition such minimum standards may also be needed to secure a level playing field within the internal market.

3. There are also related areas of EU law where matters of employment may need to be taken into account. This would for instance be the case where a company is exercising its freedom of establishment, for example by using the provision on cross border mergers, it is necessary to consider what effect, if any, this has on employees and any protections afforded to them by the law of their country of origin or destination. The Cross Border Merger Directive[1] and SE Regulation[2] therefore have provisions dealing with the treatment of employees.

4. One of the most important considerations is not whether the EU takes action in those areas where it has competence but whether those measures which are put in place in relation to the Internal Market are proportionate and fit for purpose. As the EU's competence is not exclusive in these areas, measures adopted must respect the principle of subsidiarity.

5. Certain pieces of legislation in the area of social and employment law go hand in hand with ensuring the free movement of persons, one of the founding freedoms of the Union. One of the key pieces of legislation to mention is the social security coordination regulation without which mobile workers would lose out on social rights accrued under national law when moving across borders. Further, a certain minimum level of protection may also be necessary to prevent distortion of competition.

6. Creating a level playing field in this area does not mean that the Member States should adopt identical social systems and labour market structures. Besides, there would be no legal basis in the treaties to go pursue this. Minimum standards in the employment and social policy sphere are intended to guard against social 'dumping' and to prevent distortion of competition, i.e. to prevent firms in less-regulated Member States from being given an advantage in attracting businesses because their costs are lower. However, not all companies

[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies
[2] Regulation 2157/2001 on the Statute for a European Company

will participate in a race to the bottom and worker protection is one of a range of cost and risk-related factors - such as transport networks, political stability and education levels - in assessing the best location for their business.

7. It is difficult to assess how great the risk of social dumping would be without such legislation.

8. Broadly speaking the current balance between the EU and Member States functions well, although as in other areas there is still room for improvement.

9. The principle of subsidiarity ensures that Member States retain a fair degree of discretion. The EU therefore plays a coordinating role and as national systems are so different, many of the directives specifically leave individual countries some leeway in relation to implementation.

10. The World Economic Forum's Global Competitiveness Report 2012-13[3] puts UK 8th out of 144 countries for overall competitiveness. The OECD report may also be instructive in this regard:[4] if EU regulation were considered too onerous, the OECD would not rank the UK as one of the least regulated developed economies. At the same time, if the single market was homogeneous and did not allow countries necessary flexibility, then organisations such as the World Economic Forum and OECD would not rank different EU countries at different levels.

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

11. The answer to this question depends on your political and economic perspective.

Points to note

12. A distinction should be drawn between legislation that coordinates (eg social security coordination or portability of pension rights) and that relating to a "level playing field" which includes regulating standards on e.g. maximum noise levels and exposure to electro-magnetic fields which would probably be addressed in national law, albeit at different levels, even if the Internal Market did not exist.

13. The same can be said for equal treatment or anti-discrimination which would almost certainly exist in some form or another in all the Member States.

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

14. The answer to this question depends on your political and economic perspective.

Points to note

15. If legislation at EU level were to be removed it is likely that all those areas currently governed by EU legislation would still need to be covered by UK legislation, although as discussed in response to question 2 above, the details

[3] http://www3.weforum.org/docs/CSI/2012-13/GCR_Rankings_2012-13.pdf
[4] See http://www.cipd.co.uk/binaries/5547_work_horizons.pdf at page 5

and approach of the legislation itself would be defined by the relevant policy makers. It might therefore grant different rights and protections, or levels thereof, and impose accompanying levels of obligations.

16. In reality it is sometimes difficult to differentiate between EU-induced and nationally induced changes to the law. The national government might have intended to implement legislation in areas in which the EU decides to act, or have legislated in anticipation of the adoption of an EU law. For example, provisions around the minimum amount of holiday are accepted by most stakeholders in the UK as being standard. The same could be said about much equality legislation.

17. In the absence of the EU the UK would also still have to ensure that it complied with its international obligations.

Impact on the national interest

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

18. The answer to this question depends on your political and economic perspective. The Law Society does not offer any evidence on this point.

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

19. The answer to this question depends on your political and economic perspective. The Law Society does not offer any evidence on this point.

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

20. As employment and social legislation is closely associated with cultural norms some of the EU objectives do not, at first, fit easily into every jurisdiction - albeit that this situation is probably unavoidable in any grouping which involves such a large number of countries. An example for the UK would be the requirement for organisations over a certain size to have work councils. This presents particular issues where a corporate group includes companies incorporated in different countries . Such rules can be problematic for individual Member States although the end-result is not always negative. Good practices can emerge from the EU, and sometimes a directive is needed to convince people to take it up.

21. The fundamental freedoms around which the Internal Market has been constructed are all interlinked. Workers throughout the EU have acquired a broad range of rights, in particular in Member States with a much lower level of social policy protection. Some domestic systems already offered higher standards of protection and in those cases the EU action in setting minimum standards would not have resulted in much of a change in those countries.

22. For those UK citizens seeking to exercise their right of free movement within the EU, action in the sphere of social policy provides them with guaranteed rights in relation to for example sickpay, holiday entitlements, and maternity benefits, which they might not otherwise have had in those Member States..

23. If people live and work, and therefore pay taxes, in a Member State they should have a right to also receive the benefits on an equal footing with nationals in the same position. A right to free movement but no coordination of social security and no portability rights means that persons do not, in fact, have genuine freedom of movement.[5]

24. The debate over "gold plating" is more complicated than is often presented. While individual companies and industries can justifiably point to areas of regulation that do not seem to make sense, more often than not the "gold plating" is clarifying the law so it works in the British jurisdiction. This removes uncertainty. This was discussed in the British government's 2006 Davidson Review.[6]

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?

25. It is almost impossible to offer a definitive answer to this question, not least because the impact of the EU on the UK can only really be looked at in the whole.

26. A certain EU action may be viewed by some as having a positive effect and by others as having a negative effect. The benefit of being a member of the EU is in being part of single market which gives access to 27 other national markets although the inter-governmental bargaining process will necessarily mean that some compromises have to be made.

27. Domestic legislation would be proposed by the Government of the day, thus it is impossible to predict what sort of domestic programme would exist in absence of the EU. However, it should be borne in mind that (as pointed out above) even in the absence of any EU legislation in these areas, it is likely that these matters would still be covered by UK legislation.

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[5] This is illustrated in the scenario below:

A person comes from country A where her parents pay taxes which paid for her healthcare, schooling etc. She then grows up and goes to study in country B for three years and at the same time works in the local coffee shop in the evening and weekends and pays taxes. She graduates and works there for five years until she is offered a new job in country C where she meets Y who is also from country A. They fall in love and start a family and after three years in country C decide they want to return to country A to live closer to their parents.

Without social security coordination she would have lost all her pension savings, any right to healthcare, and any right to unemployment benefit if she loses her new job in country A despite the fact that she has been a law-abiding taxpaying citizen for eleven years. Essentially no social security coordination would entail a barrier to free movement.

This is not to say that there are not difficulties to be overcome in ensuring coordination of social security. There may be variations in the different systems but this does not necessarily pose a problem as long as the system is fair and does not discriminate between nationals and other EU citizens. This issue, however, should be dealt with at a national level although Regulation 883/20045 regulation might still be improved.

[6] See http://www.bis.gov.uk/files/file44583.pdf

Future options and challenges

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

28. The answer to this question depends on your political and economic perspective.

Points to note

29. EU action in social policy is particularly important in areas ancillary to the free movement of persons and in particular in relation to the rights of free movement of workers throughout the union.

9. How might the UK benefit from the EU taking less action in social policy, or from more action being taken at the national rather than EU level?

30. The answer to this question depends on your political and economic perspective.

Points to note

31. Under Article 4.2(b) TFEU, certain aspects of social policy come within the shared competence of the EU on the one hand and the Member States on the other. As such proposals put forward in this sphere must comply with the principle of subsidiarity as a matter of law; the EU must be better placed to act than the Member States individually, and, in addition, the measure proposed must not go beyond what is needed in order to achieve the objectives of the EU Treaties.

32. Whether the UK might benefit from more action being taken at the national rather than EU level is essentially also a matter of policy and does not, strictly speaking, go to the heart of where responsibility for such matters should lie.

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 subsidarity and proportionality or the ways social partners are engaged?

33. The Law Society do not offer any view on how social policy might be undertaken differently.

34. However, it endorses careful consideration and scrutiny of EU action in this area to ensure that any legislation complies with the principles of subsidiarity and proportionality.

35. Specifically on social partners, it should be noted that in other jurisdictions social partners already play a greater role than might be the case in the UK because that is how employment law is dealt with at the national level in those jurisdictions. In such jurisdictions some EU social and employment law would also be implemented not via legislation but via collective agreements. Further, some legislation is in fact a result of framework agreement by social partners at

EU level, who then asked for it to be transposed into EU law, for instance parental leave.

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

36. The Law Society offers no evidence as to how the UK could implement its current obligations in this area.

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

37. Globalisation means that capital and employment can move quickly, and not just within the EU zone. EU obligations must be both culturally acceptable to Member States and outward facing to ensure that the EU can operate effectively and competitively in the increasingly global market.

Note on the Court of Justice of the European Union

38. As the single market has grown and developed the Court of Justice of the European Union (CJEU) has become more prominent, and the Court has on occasions been criticised for "judicial activism". Rulings that cause such a response have in many cases fallen within social and employment law and the Society therefore believes that a short note is merited in this consultation response.

39. 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 CJEU is therefore an essential part of the EU legal system.

40. While national courts/tribunals rightly have the authority to interpret directives, ultimately, there must be a supranational court that interprets the detailed application of the treaties and of legislation to ensure consistent application and interpretation of the law across the Member States.

41. In some cases the claim of judicial activism stems from national politicians who claim that a particular judgment is incorrect because it does not reflect what they understood they had agreed to when negotiating the directive in question. The Court is often asked to provide legal clarity where the text is ambiguous. In some instances this is a flaw of the original text itself: ensuring rigorous scrutiny during the drafting process is important to avoid creating such legal uncertainty. This viewpoint also runs the risk of going against the doctrine of the separation of powers which is seen in the UK as an important aspect of the rule of law. On some occasions, however, the ambiguity may be deliberate where the Member States could not agree on a specific point but nonetheless wished to retain scope for the Courts interpretation.

42. One case where some have accused the Court of extending a directive as in the case of *Stringer and others* v *HMRC*,[7] where it was decided that workers on sick

[7] http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/string-1.htm

leave continue to accrue annual leave. The Court ruled that "the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations…". In its judgment the Court stressed that the worker is entitled to "actual rest, with a view to ensuring effective protection of his health and safety." The judgment was met with some criticism in a number of countries, not solely the UK.[8]

43. There is anecdotal evidence that some common lawyers in England and Wales have expressed concerns that the Court instinctively operates in accordance with the culture in civil law countries which may be different to common law traditions. The Law Society does not offer a view as to whether these claims are substantiated or otherwise but emphasises that it is important to ensure that the Court operates in such a way as to respect the legal traditions of all the Member States.

44. In this context, further training may be required to ensure that the highest possible quality of judgments are produced. The Court of Justice of the EU (including General Court) therefore fulfils a key institutional function in ensuring the smooth functioning of the EU as a whole. In many cases the system works well but it is not wholly without problems. The Society is also aware that some thought needs to be given to the qualifications and competency requirements of Advocates General and judges in both the General Court and the Court of Justice in order to make those bodies efficient and practical courts

45. The capacity of the Court of Justice should be improved by the appointment of three new Advocates General in lines with the Lisbon Treaty. However, it may be constrained by the numbers of both judges and Advocates General who are required to deal with an increasing case load as the body of European law grows as and when the EU continues to expand. The Society takes the view that there is already an urgent need for additional judges to tackle the workload of the General Court. This issue would need to be looked at carefully again in the case of further enlargement.[9]

[8] The ruling also created a certain amount of confusion and uncertainty because it left a related matter undecided. This was not, however, the fault of the CJEU but rather resulted from the fact that it had not been asked to rule on this further matter under the terms of the question put forward in the preliminary reference.

[9] The statistics for the Luxemburg Courts are available here:
http://curia.europa.eu/jcms/jcms/Jo2_7032/ (Court of Justice)
http://curia.europa.eu/jcms/jcms/Jo2_7041/ (General Court).
See also concerned expressed in, for example, House of Lords European Union Committee, 14th Report of Session 2010–11, *The Workload of the Court of Justice of the European Union*, published 6 April 2011. See particularly appendix 5 page 58.
(http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/128.pdf)