IoD response to BIS Call for Evidence: *Social and Employment Review*

The Institute of Directors (IoD) welcomes the opportunity to respond to the Call for evidence on *Social and Employment Review* published by the Department for Business Innovation & Skills in October 2013 as part of the Government review of the balance of competences between the UK and the EU.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 36,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. s. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

Among the IoD membership there is a broad range of views on EU membership, reflecting the country at large. For some, the free movement of goods and people within a single market is a triumph of our time. For others, the regulatory and financial burdens of membership raise questions about how well the system works - and for whom it is working. There are also many people who view the issue as a simple question of sovereignty. The financial crisis, combined with some very real concerns about the politics of Europe, has presented this country with an opportunity to examine the foundations of our EU membership.

A recent survey of members found that 57% support the Prime Minister's planned renegotiation. If a referendum were held 49% say they would vote for the UK to remain a member of the EU, with a third saying it would depend upon the renegotiation. Just 15% would vote for a British exit. 79% of IoD members have some form of business link with the EU, and 60% say that continued access to the Single Market is important to their organisation. However, there is a broad appetite for deep reform. Employment law is one of the top three areas (alongside home affairs and corporate governance) where IoD members say powers should be repatriated. This Call for Evidence on employment and social issues is therefore one of the most important for the IoD.

Responses to questions in the Call for Evidence

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 question asks, what EU social/employment action is necessary for the operation of the single market. We believe the answer is that very little, if any, is necessary. It is not necessary to have rules on working time, annual leave, working conditions for part-time, fixed-term or temporary agency workers, employee consultation, health and safety, pregnant workers or non-discrimination in order for the single market to function, or to function more effectively. The onus should be on the proponents of such laws to make the case why they are needed for the single market to function (as distinct from merely desirable from the proponents' perspective).

One area where EU action in this sphere has the potential to facilitate the single market is the free movement of workers. Businesses need to be able to employ the people they want, when they want them, and where they want them. If those people come from a different country - whether an EEA member state or a third country - or if the business is sending them to work in another member state, businesses need to be able to employ them with minimal additional costs or administrative burdens. Anything that the EU can do to facilitate the free movement of workers within the EEA, and into the EEA from third countries, will therefore be valuable for employers.

So, 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. Fewer differences between national rules can benefit business by reducing the costs and burdens of understanding and complying with multiple sets of rules (although a "one size fits all" approach to employment law is not helpful given deep differences between labour markets and cultural approach to employment issues amongst member states).

In practice, however, the EU has done little to restrict member state's regulatory excesses, or to reduce the differences between national employment laws. There are few, if any, directives in the employment arena that limit the rules and regulations member states are able to impose. Of those listed on pages 48-55 of the Call for Evidence (plus the working time, part-time work and parental leave directives which are omitted from the list), we are not aware of any provisions that limit member states' regulatory powers to any significant degree. The temporary agency work directive contains a clause requiring member states to review national restrictions on the use of temporary agency workers, and to justify such restrictions against specified criteria. But this has so far not led to the removal of any such national restrictions. The proposal for a posted workers enforcement directive also included a provision restricting member states' ability to impose obligations on firms posting

workers to their territory, but this has been greatly watered down during Council negotiations, and may well be watered down further by the European Parliament.

What the EU has primarily done in this area has been to impose minimum requirements that member states are free to go above and beyond. In virtually all areas where there is underpinning EU legislation, member states have legislated above and beyond the minimum requirements set out in the relevant directive. As a result, employers are faced with 31 different sets of national employment law. Rules on working time, annual leave, works councils, redundancy, retirement, temporary agency workers transfer of undertakings, and maternity leave all vary enormously across Europe. So we do not accept the claim (articulated at para 24 of the Call for Evidence) that EU action in this area has helped to harmonise national employment laws to the benefit of business. It is simply not true to any meaningful extent.

The EU has sought to limit member states' actions, or to harmonise rules across the EEA, in certain respects - the free movement of workers, rules on the mutual recognition of professional qualifications and the portability of pension entitlements between member states. But these are outside the scope of the present Call for Evidence.

It is sometimes argued that EU-level employment laws are needed to create a level playing field for businesses within Europe. The argument goes that minimum labour standards are needed to stop unscrupulous employers undercutting their competitors on the basis of cheap labour, and that minimum standards are needed to stop "social dumping" and a "race to the bottom". However, we do not accept these arguments because:

- 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;

- Imposing minimum labour standards in such areas as working time, annual leave, employee consultation and non-discrimination is an inefficient and largely ineffective way of creating a level playing field in terms of costs. For two reasons:

    - The biggest cost component of labour comprises wages and social security contributions, neither of which is regulated at the EU level. Many EEA countries have compulsory minimum wages, but these vary enormously across the EEA. According to Eurostat, in July 2013 minimum wages in EU Member States ranged from EUR 159 per month in Bulgaria to EUR 1,874 per month in Luxembourg – a ratio of 1:12. Even when adjusted for price differentials across countries, the disparity between EU Member States is 1:5 in purchasing power standard (PPS) terms, ranging from 313 PPS in Romania to 1,539 PPS in Luxembourg;

    - 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.

- competition based on efficient use of resources is good for customers and consumers. Conversely, increasing companies' costs by restricting the extent to which they can compete with each other is not good for customers and consumers.

Another argument that is sometimes used is that minimum labour standards ensure that an employer's workers will benefit from basic standards when being posted to work in other member states. But this argument is flawed. If an employer wants their employees to benefit from certain minimum standards, he is free to apply those standards to his employees wherever they are sent to work, even if the law in that country does not create a statutory obligation to do so.

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

It is 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. The normal means of drawing up and implementing goals of this type, and passing legislation to try to bring them about, is through a democratically-elected government and parliament. Governments pass legislation and are accountable to their electorates for what they do. What is abnormal is to give the proponents of social/employment goals and regulation, who have failed to achieve their objectives via the normal democratic process, a second chance via a supranational institution.

The situation is compounded by the fact that once the EU has passed a law, it is very difficult to change it to reflect changed circumstances. In normal circumstances, an outdated or unpopular law can be amended or revoked - by the same government that passed it, or by a new government. But it is far harder to change EU laws once passed.

The situation is further compounded by the fact that the European 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. An egregious example of this has been several decisions concerning accrual of annual leave during long-term absence, falling ill while on leave, and calculation of holiday pay. These decisions have been extremely favourable to employees, and conversely unfavourable to employers. But it has proved almost impossible to change the working time directive in order to reverse or alleviate the effect of these decisions. Meanwhile, the adverse decisions keep coming.

It is clear that the EU plays a valuable and essential role in facilitating trade between different countries by bringing down barriers, setting common standards, encouraging competition etc. This can only be achieved by a supra-national body that imposes common rules. But it is not clear why the EU also needs to set social and employment goals. Democratically-elected governments should be left to set their own goals and rules in the social and employment arena, and should be accountable to their own electorates for them.

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

This question is too big to be dealt with in a single consultation document like this Call for Evidence. It requires an in-depth public consultation and discussion in the context of an

actual, not hypothetical, situation where the UK was free to consider what domestic employment legislation it wanted without EU constraints.

In a number of areas in which the EU has legislated, domestic legislation would probably still be needed. For example, the principles behind much non-discrimination law enjoy widespread support, and it is highly unlikely they would be abolished. It would be very difficult politically to go back to the pre-1998 situation in which there was no statutory right to paid annual leave, or even to row back on the 8 further days of leave subsequently added. Other EU-derived rights have become well established and enjoy broad support, eg the right to receive certain information when starting a new job. In addition, the TUPE legislation has helped facilitate outsourcing by assuring service providers that they will not be left with large redundancy costs if they subsequently lose a contract, and its abolition would probably not be welcomed by many businesses.

However, the main point to be made here is that the absence of EU legislation would leave the UK free to set its own rules in this area, without constraint from EU legislation or its interpretation by the European Court. The UK would therefore be free to tailor laws to its own circumstances, and to change them as circumstances change. To take some examples from discrimination law, in the absence of EU legislation the UK would not be forced to adopt the reverse burden of proof for all discrimination strands, or to have all the discrimination strands contained in EU directives; it would not be prevented from limiting compensation in discrimination claims, or from seeking to limit the excessively wide scope of the "belief" discrimination strand. It could inject more certainty into what is meant by "religion or belief" and "disability" in a way that would help employers enormously.

<u>Impact on the national interest</u>

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

It has to be asked, advantages who? Employees? Business? The population generally?

It is obvious that EU action in this area advantages UK workers to the extent that it confers rights on them, such as the right to 20 days paid annual leave. But it is impossible to compare the effects of EU action with what would have happened without EU action, because it is impossible to say what would have happened. It would be trite to argue that "nothing would have happened" - the UK has introduced employment laws over the years without being forced to do so by the EU, eg laws on unfair dismissal, redundancy pay, notice periods, minimum wage, trade union rights, maternity pay, whistleblowing, flexible working etc. On the other hand, employment regulation could be seen to disadvantage employees by deterring businesses from employing more people, and by reducing what they can afford to pay them.

It is sometimes argued (including by Government) that employment regulation advantages employers by helping create a more committed, engaged and productive workforce. This is a completely empty argument. It is no doubt true that giving employees certain rights/entitlements helps create a more committed etc workforce. This is why many, if not all, employers give entitlements that statute does not confer (the most obvious example is paying people more than the National Minimum Wage, but others include benefits, pensions, enhanced maternity/paternity pay, annual leave of more than 28 days, paid time

off for emergencies, flexible working opportunities). But it does not follow that employers should therefore be forced – in their own interests - to give such entitlements, as though the State knows better than they how to run their business. If it is good for their business, employers should be able to decide that for themselves, and implement it, without having all the risks, uncertainties and costs of creating legal obligations. The rational for employment regulation is to counter abuse and to protect vulnerable workers, not the assertion that regulation is good for the employer.

It is not at all clear that EU action in social policy advantages the UK more widely. To the extent that it pushes up company costs – and it certainly does – it serves to push up prices, which disadvantages consumers/customers, and reduce money available for investment which disadvantages everyone. It probably also reduces tax receipts.

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

Employment and regulation regularly features as one of the top problems for IoD member, a barrier to growth, and especially a disincentive to employing people. Members will not always know whether a particular law derives from an EU directive, but it many cases it does of course.

The IoD surveyed its members in March 2013 on the UK's relationship with the EU, including the Government's review of EU competencies. The survey asked members the extent to which current EU interventions in 20 areas of EU competency are helpful to their organisation or not. The area that topped the list for unhelpfulness was employment and social affairs. It was the only area where a majority of the 1,300 survey respondents (57%) said it was unhelpful, and ranked last in terms of balance of helpfulness/unhelpfulness (minus 39%). This compares with a score of plus 35% for trade and plus 31% for the single market/free movement.

In October 2012 IoD surveyed its members on the key factors holding back the growth of their organisations, and the actions Government should take in response. This was to feed into the Downing Street Business Breakfast event on 4 October. A number of key issues came up repeatedly. Top of the list was regulation/employment law, and particularly complexity of employment law inhibiting recruitment, and difficulty in dismissing under-performing staff. The following are some quotes from members in response to the survey:

> *As usual, our main barrier to growth is employment law... The fear of putting a foot wrong when recruiting is always there. More so is the lack of flexibility to let people go when they're performing badly... Small businesses just don't have the time or resources to go through the long and painful processes of informal warnings, interviews, formal interviews, target setting, measurement, re-interviews, note taking, etc. We retain an employment law company for a couple of hundred of pounds a month but, even then, we still have to do all that."*

> *"The huge thicket of employment regulation makes taking on staff (especially those without any experience or track record) very risky. This is particularly difficult to manage in a small business where you cannot afford a full time (or even part time) HR person to ensure compliance. In my own new business, we have had to pull together an employee handbook that is 77 pages long to ensure we have all the guidelines in place to employ staff."*

"The growth of litigation and the 'health & safety culture' needs to be rolled back, because the pendulum has swung too far. Businesses are becoming scared of their own shadows and are becoming too risk-averse because of the fear of being sued, or because of the H&S hurdles they need to jump through. This is not to say that businesses should be cavalier in such matters, but it is time to apply some basic common sense."

"We are employing several people that no longer match our company's requirements but are highly protected by current regulations. These people are often moved sideways into holding jobs. If legislation made dealing with this less of a minefield, we would not employ any fewer people. In fact...being able to employ the right people for the job would undoubtedly lead to us employing more."

"The burden of employment law prevents us taking on new staff. It is impossible for a small business to run an operation and ensure that all aspects of employment law are understood and covered."

"Difficulty in getting rid of underperforming employees, especially where their underperformance is marginal, but at the same time has a big impact on their colleagues."

"[We are a small company with] 10 employees, and 65% of our business is exporting for UK plc. We would like to add 2 permanent staff, but are too scared of current legislation to take the risk."

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

The EU offers various financing schemes to assist employers and employees, such as the European Social Fund (ESF), the Globalisation Adjustment Fund (GAF), and most recently the Youth Guarantee Scheme. The UK must get its share of these funds. To date, no applications have been made from the UK for money from the GAF since it was set up in 2007. And the UK is in danger of missing YGS money by not having submitted its proposals for tackling youth unemployment by the Commission's deadline.

4. *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?*

In October 2013 Open Europe drew up a list of the 100 costliest EU regulations based on Government impact assessments. No.2 on the list was the Working Time Regulations at an estimated cost to the UK economy of £4.1bn a year. No.4 on the list was the Agency Workers Regulations at a cost of £2.1bn a year. Other regulations in the top 20 include the Working Time Regulations for the transport sector (£612m/year), the Control of Vibration at Work Regulations (£430m/year), the Fixed-term Employees Regulations (£339/year), and the Employment Equality (Age) Regulations (£309/year). These figures do not take account of benefits identified in impact assessments, although many of those benefits accrue to employees and so in fact constitute a "transfer payment" from employers to employees.

Open Europe's November 2011 report *Repatriating EU Social Policy* estimated that the annual cost to UK businesses and the public sector of EU social policy was £8.6bn a year, again based on Government impact assessments.

The costs identified by the Government in its impact assessments do not include costs resulting from European Court rulings which have the effect of extending or expanding the law. We are not aware of any assessment of the costs of European Court decisions on, for example, the accrual of annual leave during long-term absence or the inclusion of allowances etc in the calculation of holiday pay.

It is impossible to distinguish the impact of EU action from the impact of what would be needed in the absence of EU action. There is no consensus on what would be needed in the absence of EU action, it is subjective. Consequently, there can be no way of measuring what would be needed. For example, it is impossible to say what would be needed in terms of regulating working time and annual leave in the absence of the Working Time Directive, or to say what if any UK legislation regulating working time would have been brought in during the past 15 years if there had been no working time directive.

Future options and challenges

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

The UK could benefit from the EU taking more action to facilitate freedom of movement, and limiting member states' ability to impose new regulation. For example, it could require member states to remove unjustified restrictions and obligations on the use of agency workers in Continental Europe. This could help UK-based multinationals with operations in Europe to cut costs and create a more flexible workforce in Europe, and could help UK-based temporary agencies expand their business in Europe. The EU could also limit the regulatory requirements that member states impose on employers when posting workers between member states. This could help employers posting workers abroad by reducing their costs and admin burdens.

2. *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?*

As argued elsewhere in this response, the UK would benefit from the EU taking less action in social policy by leaving the government and parliament of the day free to set UK employment law suited to the UK labour market and cultural approach to employment regulation, and free to amend or abolish laws to take account of changed circumstances. This can be expected to lead to fewer costs and burdens on business, with consequent benefits for shareholders, employees, and taxpayers.

3. *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 social partners are engaged?*

The process for making EU legislation is unusual, possibly even unique, involving, as it does, the Commission, the Council, the European Parliament and, with employment legislation, the EU-level social partners. This creates a very complicated and opaque procedure which:

(a) Gives multiple lobbying opportunities for the various interest groups some of whom almost always have diametrically opposed views; and

(b) Forces compromises to be made which often results in vague or even conflicting legislation that is difficult to implement.

In practice, the process is very political. Increasingly, the Commission decides what new legislation it will propose based on an assessment of what the Council and the Parliament will be prepared to agree. This generally depends on the political balance within the Council and within the Parliament. If the Commission judges that legislation would not be passed, it may opt instead for guidelines, as with the recent "Quality Framework for anticipation of change and restructuring". For the past 10 years or so the centre-right has been the biggest force in the Council and the Parliament. Consequently, relatively little employment legislation has been passed during this period. In the past 10 years only two substantial pieces of employment legislation have been passed in Brussels – the Agency Workers Directive and the Recast European Works Council Directive. Both were agreed during the French Presidency of the Council in the second half of 2008. Other directive proposals have got stuck in the system (eg revision of the pregnant workers directive), or have so far failed to get off the ground (eg a restructuring directive, and the second attempt to revise the working time directive).

In deciding whether to propose new employment legislation, the Commission must also factor in the possibility that the social partners will be willing and able to reach an agreement on it. For their part, the social partners, or to be more precise BusinessEurope and the ETUC, will decide whether to enter negotiations for an autonomous agreement. on the basis of whether they think they can get a better result for their member organisations by negotiating with each other or by relying on the Council/Parliament co-decision procedure. In recent years the social partners have agreed very little. The only cross-sectoral agreement given legal force in the past 15 years was the one that made minor changes to the rules on parental leave. Negotiations on revising the working time directive continued on and off for a year without coming close to agreement. In a number of cases BusinessEurope has made clear it sees no need for EU legislation on an issue, eg corporate restructuring, transnational company agreements, consolidation/harmonisation of information and consultation directives.

We do not agree with those who argue that the social partners should be given a greater role in the process. Their ability to carry out this role depends on the skills of those involved in negotiations. This can place too much power in the hands of a few individuals, negotiations take place with almost no transparency, and the results can affect all employers in the UK and throughout Europe. It's a highly non-transparent process.

Given the above, it is not surprising that employers tell us they feel remote from the EU policy-making and law-making process. In their eyes, decisions get taken in Brussels in a way they know little about, and they are presented with the results.

Subsidiarity

We agree with the question that the EU institutions should demonstrate greater adherence to the principles of subsidiarity and proportionality. Too often, the institutions give little more than a nod to the concepts. But experience shows that the principle of subsidiarity as expressed in the EU Treaty is insufficient by itself.

To give an example, the recitals to the Agency Work Directive refer to subsidiarity and proportionality as follows:

> (23) Since the objective of this Directive, namely to establish a harmonised Community-level framework for protection for temporary agency workers, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level by introducing minimum requirements applicable throughout the Community, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

This reflects the wording of Article 5 of the EU Treaty, which says:

> "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

Of course it is true that a harmonised Community-level framework for protection of temporary agency workers cannot be sufficiently achieved by the member states acting independently. But that is different from saying that there is a need for a harmonised Community-level framework for protection of temporary agency workers. We do not believe there is. The supply of agency workers is overwhelmingly a national or even local phenomenon, and therefore should be regulated at the national level. If the EU is to act in this area, at the most it should confine itself to acting in respect of agency workers supplied across borders – and it already does this through the Posted Workers Directive.

To take another example, the German government in 2013 argued that the subject of gender quotas for company boards should be regulated at the national level, not at the EU level, on the grounds of subsidiarity. We agree. But the institutions could comply with Article 5 of the EU Treaty by stating that a harmonised Community level framework for balanced gender representation on company boards cannot be sufficiently achieved by Member States and can better be achieved through minimum requirements at EU level.

In both cases – regulation of agency work and board gender quotas – the critical question is whether there is a need for harmonised rules across the EU. The same could be said of working time and annual leave, of employee information and consultation, and most other areas of EU employment law.

On subsidiarity grounds, the EU should do much more to justify the need for harmonised rules in the area of employment law, not simply make the rather obvious point that harmonised rules can only be achieved through the EU. **The principle of subsidiarity**

contained in the EU Treaty needs to be amended to limit the competence of the EU to actions that require the harmonisation of member states laws to achieve the Treaty objectives.

This could be an issue on which the UK is able to make common cause with the German government.

Sunset clauses

In view of the point made earlier about the difficulty of changing EU directives to meet changing circumstances, we believe **all EU directives should contain a "sunset clause" which would cause the directive to expire after a period of time, eg 5 years.** At that point, the EU institutions could consider whether the directive should be renewed, or an amended version adopted, or whether there is no longer a need for EU legislation on the subject. In the latter case, member states would be free to continue with their own national laws on the subject, adapted as appropriate, or whether to revoke their laws. The normal EW law-making process would apply to the adoption of a new or revised directive.

An interesting example of a sunset clause is seen in the Commission's proposal for board gender quotas which if adopted would automatically expire at the end of 2028 (see Article 10). The recitals to the draft directive state that this clause is intended to respect the principle of proportionality, and that the directive should remain in force only until sustainable progress has been achieved in the gender composition of boards. This example should be followed in all EU directives, although we think the proposed timescale in the proposed gender quota directive is too long.

Small firm exemptions

Most EU employment directives apply to all employers, irrespective of their size. This is true of directives on working time, agency workers, TUPE transfers, parental leave, part-time/fixed-term work and others. This one-size-fits-all approach imposes disproportionate burdens on small firms who cannot afford the same level of legal and HR advice that larger firms can, and who are more seriously impacted by employment-related complaints and allegations at work. Moreover, if the rationale for EU-level employment laws is to underpin the Single Market and to help it work more effectively, or even to act as a *quid pro quo* for the liberalising effects of the Single Market, then these laws should not apply to companies that do not benefit from or participate in the Single Market. The overwhelming majority of these companies are small businesses.

The EU Commission's website states that it wants to put small businesses at the heart of EU policy, to maintain momentum towards a more entrepreneurial Europe, and to help SMEs achieve sustainable growth (see http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index_en.htm). It adopted the Single Business Act (SBA) with its "think small first" principle, the "SME Test" and the SBA Review. None of this stopped the EU from adopting new directives on agency workers and parental leave, and proposing changes to the pregnant workers directive, which apply in the same way to all firms, irrespective of size. More joined-up thinking is needed between the different elements of policy in Brussels. **If the Commission is serious about helping small firms**

to grow, its starting point should be an exemption from employment directives for small firms. It should justify the need for directives to apply to small firms, and if it believes they should, it should consider ways in which they should be adapted to apply to small firms.

Impact assessments

The EU institutions have been slow to adopt better regulation principles, and remain well behind best practice in this area. The Commission has introduced impact assessments when it proposes legislation. The three EU institutions agreed a "Common Approach to Impact Assessment" in November 2005, which included the European Parliament and the Council undertaking to assess the impacts of their own substantive amendments to the Commission's proposal. But there is little evidence that this actually happens. For example, one searches in vain for any impact assessment on the changes made to the Commission proposals on temporary agency work or European works councils during the co-decision process.

The European Council and the European Parliament should implement the commitment they made in 2005 by producing and publishing impact assessments on substantial changes they seek to make to Commission legislative proposals at the different stages of the law-making process. This would enhance transparency in the process, and would help the co-legislators make more informed decisions on proposed legislation.

Benchmarking national employment laws

One way in which the EU Commission could assist the Member States, as well as employers and other stakeholders, would be by co-ordinating the publication and exchange of information about national laws implementing EU directives, and indeed other employment laws not based on EU directives. In this way it could help Member State governments benchmark their laws against each other, with a view to improving them, exchanging ideas, and perhaps harmonising some laws to an extent where appropriate. For multinational employers it would help them identify differences between national laws and their legal obligations across Europe.

At present it can be very difficult to locate these national laws. Where information is available from the Commission it is often only partial, and sometimes misleading. An example of good practice in this area, which could be copied, is the information on the Commission website about national laws implementing the Recast European Works Council directive. Not only is this information brought together on one page, but much of it has also been translated into English, French and German. The Commission could provide a genuinely useful service to Member States and interested stakeholders by progressively extending this to cover other areas of employment law, such as working time, temporary agency workers, information & consultation, collective redundancies, TUPE transfers, non-discrimination, as well as dismissal laws, trade union recognition etc.

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

We would make three recommendations in response to this question:

(1) **Less "gold-plating" of EU directives.** In our report "The Midas touch: Gold-plating of EU employment directives in UK law" (available at www.iod.com/influencing/policy-papers/regulation-and-employment/the-midas-touch-goldplating-of-eu-employment-directives-in-uk-law) we identified numerous ways in which governments, past and present, have gold-plated EU employment directives, as well as plans to introduce further gold-plating in the coming months. These include the working time directive, the temporary agency workers directive, the parental leave directive, the European Works Council directive, and the various non-discrimination directives. The present Government has taken some limited action to remove gold-plating in response to our report, including through changes to the laws on collective redundancies and TUPE transfers. But it should go further, and fulfil its commitment made in the House of Lords in July 2010 to re-examine the implementation of all EU directives. It should start with employment directives, in particular the working time and agency workers directives.

(2) **The Government should adopt a less risk-averse approach to implementing EU directives in national law**. Too often, successive governments have implemented EU directives in a heavy-handed and excessive manner, for fear of being found to have under-implemented and therefore at risk of infraction proceedings by the EU Commission. Other Member States take a much less risk-averse approach, and produce simple, shorter and less burdensome implementing legislation than the UK. An example is provided by the definitions of "pay" in the UK and Irish legislation implementing the temporary agency work directive. The UK definition of "pay" starts with a very wide concept ("any sums payable… in connection with the worker's employment") and then carves out exceptions. It is very long and extremely complicated. The treatment of bonuses is particularly complex. When the rules were being drafted we were told by civil servants that the complexity was due to the need to correctly implement the directive requirement. By contrast, the Irish legislation simply states that pay includes basic pay, shift premium, piece work, overtime, and unsocial hours or Sunday work premium, and then specifically excludes sick pay, pensions and financial participation schemes. Unlike the UK definition, it does not include bonuses. This may or may not be strictly compliant with the directive – it remains to be seen whether the EU Commission will challenge it. But it illustrates the less risk averse approach taken by the Irish government in this case, compared with the UK. The Government should copy the Irish example, and be prepared to take more risks with implementing EU legislation, in order to keep it simple and less burdensome for employers. Even if that means more infraction proceedings are opened against it.

(3) Following on from the previous point, **the Government should make simpler, shorter legislation with more of the detail provided in guidance**. To go back to the UK and Irish legislation on temporary agency work, the UK definition of "pay" extends to 760 words, the Irish definition is 73. Similarly, the UK definition of "pay between assignments" contracts is 670 words compared with 160 words in the Irish law. Much of the UK definition could have been included in guidance rather than in statute. Guidance has the great merit that it can be written in plain English, rather than in incomprehensible legal language, and it can give practical examples of how the law applies to actual circumstances. Successive Governments have made a move in this direction in recent years, with changes to the law on disciplinary/grievance procedures and forthcoming changes to the law on flexible

working requests. In both cases the law has been considerably simplified, and more detailed provisions included in ACAS Codes of Practice. Both of these examples are taken from laws that do not have EU underpinning, but the principle would apply well to many employment laws, including those deriving from EU directives.

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

The UK faces on-going challenges in the area of EU-imposed employment laws, with no end in sight under present circumstances. There are proposals for new or revised legislation at various stages in the legislative pipeline, including:

(1) Revision of the pregnant workers directive which could significantly increase maternity pay, give new rights to request flexible working and to take time off for breastfeeding, and establish a reverse burden of proof.

(2) Revision of the working time directive, which could see further restrictions on the use of the individual opt out, or even its abolition.

(3) Possible revision of the agency work directive to tighten up rules around the use of "pay between assignments" contracts;

(4) A possible "recast" information & consultation directive which could impose further, more burdensome obligations on employers to consult with employee representatives over a range of issues.

(5) A possible corporate restructuring directive, which could impose major new obligations on firms planning redundancies in Europe.

(6) A possible EU directive on national minimum wages.

(7) A Commission proposal for a Data Protection Regulation which would impose significant new obligations, costs and burdens on employers in relation to their processing of data about their employees.

(8) The Commission proposal for a directive on board gender quotas.

In addition, there will doubtless be pressure over the coming months/years from trade unions, interest groups, some member state governments and some MEPs for EU-wide minimum standards on whistleblowing protections, zero-hours contracts, and various areas of health and safety.

There will also be more European Court rulings which have the effect of extending and expanding EU law to the disadvantage of UK business.

There is also a newly emerging risk in the so-called "social dimension" of Economic and Monetary Union, which could see Eurozone countries increasingly voting as a block on social/employment issues. Under the Lisbon Treaty, from 2016, the Eurogroup on its own will have sufficient votes to pass any employment legislation for the whole of the EU, with the UK unable to garner enough support to stop legislation which it does not want.

All of these areas present potential challenges to the UK in terms of further costs, burdens and risks for employers, with only limited potential for gains for business (potential gains could come if the working time directive were amended to reverse or ameliorate European Court decisions on on-call time and accrual of annual leave, or if the Data Protection Regulation had the undesirable regulatory elements stripped out, leaving a light touch regime that was the same throughout Europe).

The threat of further unhelpful EU employment legislation seems to have increased in recent weeks as a result of the new German coalition government. We fear the inclusion of the SPD party in the government, and especially with SPD ministers responsible for social/employment affairs and foreign affairs, could lead to something of a shift in the German government's approach to new EU employment legislation.

Thank you once again for inviting the Institute of Directors to participate in this call for evidence. We hope you find our contribution useful.

Yours sincerely

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