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**EU Commission Consultation Paper on Consolidation of Information and
Consultation Directives**

Response from the Employment Lawyers Association

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Employment Lawyers Association

Response to EU Commission Consultation Paper on Consolidation of Information and Consultation Directives

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of ELA set up a sub-committee under the chairmanship of Fraser Younson of Squire Patton Boggs (UK) LLP to consider and comment on the **EU Commission Consultation Paper on Consolidation of Information and Consultation Directives**. Its report is set out below. A list of the members of the sub-committee is in Appendix 1 to this response.

General points

1. ELA does not consider it to be appropriate for the European Works Council Directive (No. 2009/38/EC) and the European Company Directive (No. 2001/86/EC) – “the Europe-wide I&C Directives” - to be consolidated with the other three information and consultation Directives (Nos. 98/59/EC, 2001/23/EC and 2002/14/EC) – “the Local I&C Directives”. We understand the EU Commission not to be considering consolidating all five information and consultation Directives, but only the three Local I&C Directives . However, in case we are wrong on that assumption, we consider it

inappropriate for the Europe-wide I&C Directives and the Local I&C Directives to be consolidated for the following reasons:-

- a) Contextually, the two groups of Directives face different issues. The Europe-wide I&C Directives focus on transnational macro employment issues concerning the undertaking (or group), such as cross border redundancy programmes. The Local I&C Directives focus on local, micro economic issues.
 - b) It is essential that the rights and prerogatives of local employee representative bodies (e.g. works council or trade unions) are not diminished or reduced in any way by European level information and consultation. The latter should supplement the local information and consultation processes, not substitute for them. Indeed the relationship between the two processes should be clarified to make this point.
2. Whilst the desire to create, in effect, a common code for information and consultation is laudable, care should be taken to ensure that the principle of subsidiarity is still applied to enable member States to adopt solutions which fit well within their (differing) industrial relations cultures/customs and legal frameworks. This might apply for , example, in respect of who are the appropriate employee representatives, remedies etc. There is a concern that, in an attempt to re-cast the three Local I&C Directives, there will be “mission creep” which, it might be perceived, may change the existing rights and obligations of the Social Partners under the individual Directives, whereas the purpose of the recast is to create a harmonised information and consultation code. ELA appreciates that the effect of such harmonisation will almost inevitably lead to an increase in the rights of employee representatives in some areas.

Application of the Local I&C Directives

3. ELA sees no reason to adjust the thresholds (upwards or downwards) for the application of the Local I&C Directives. In particular, in the UK, the relatively unenthusiastic take up by employees in small companies to request an information and consultation committee/council under Directive No 2002/14/EC, tends to confirm the EU Commission's view that in smaller organisations the environment for employee information and consultation on local issues is influenced more by the organisation's culture and leadership, than legal frameworks.
4. ELA agrees with the EU Commission's proposals to include seafarers within the scope of the Local I&C Directives.
5. ELA sees no reason why workers in the public administration sector should not be covered by the Local I&C Directives. In the UK, however, since the vast majority of the public administration sector are already covered by recognised trade unions, ELA does not consider that the information and consultation processes in that sector would necessarily be enhanced by including it within the scope of the Local I&C Directives. Of course, where there are areas within the public sector where there is no existing employee representation structure and, to that extent, such workers should be entitled to avail themselves of the benefit of the Local I&C Directives. ELA considers that, perhaps, there might be a derogation where the groups of workers concerned are already covered by collective bargaining arrangements with trade unions. If it is decided that the public administration sector should now be included within scope, the language should be consistent with that applicable for private sector employers.
6. At present there are varying employee thresholds across Europe for the Collective Redundancy Directive to be triggered (e.g. in the UK: 20+ employees over a 90 day period). There is no such threshold for Transfers

of Undertakings even if it involves a small number of employees (i.e. just one employee). ELA suggests that there should be a uniform employee threshold, and a common time frame (e.g. 30, 45 or 90 days) for the application of the information and consultation requirements in all three Local I&C Directives, where the context so permits.

Definition of “Information”

7. The definition of “information” in the Local I&C Directives are limited to a list of information items which must be given to the employee representatives in writing. The I&C Framework Directive expands upon the definition as *“data in order to enable [the employee representatives] to acquaint themselves with the subject-matter and to examine it”*. There appears to be no specific requirement for the employer to give information behind the business decision in question (e.g. redundancy/ transfer of undertaking/ substantive reorganisation etc). This gives rise to potential disputes about whether sufficient information has been given to enable meaningful consultation to take place.
8. The definition of information in the revised EWC Directive is more robust as it requires employers to give sufficient information, in terms of its timing, manner of delivery and content etc, to enable the employee representatives to make a detailed assessment of the employer’s proposal and so to enable meaningful consultations to take place. Although these words are somewhat vague, ELA recognises the practical difficulties in trying to be prescriptive. If it is the EU’s social policy that employee representatives should be consulted upon the business decision itself (and not just the employment related consequences of that decision), then it would follow that they should be given the relevant information to enable them to carry out such an assessment and, if appropriate, challenge the employer’s business decision or the business case underlying it.
9. However there is evidence of some cases where employee representatives have delayed the conclusion of the collective consultation process by

making disproportionate demands for more and more information and refusing to start consultation until they have received it all. The result of such a delay has been to undermine the business feasibility of the business decision and, in a couple of cases, resulted in the loss of the outsourcing contract. Although ELA suspects that there may be a difficulty in defining precisely what information must be given (since each case is different), ELA suggests that there should be some limit that the information requested must be **proportionate and relevant** to the proposal put forward by management.

10. If the EWC definition of “information” is adopted for the Local I&C Directives, ELA considers that one difficulty may be identifying how detailed an assessment should be made by the employee representatives. Again, ELA recognises the difficulties and impracticalities inherent in being too prescriptive, but there is a significant distinction between an assessment which:
 - responds to the consequences of management’s proposals; and one which
 - “second guesses” management’s fundamental business proposal – which would entail much more detailed information.
11. ELA supports the idea of a common definition of information – as, for example, in the EWC Directive, but considers it critical that more detailed rules for the types of information needs to be given by employers in the particular contexts of the three Local I&C Directives.

Definition of “Consultation”

12. The Collective Redundancy and Transfer of Undertakings Directives both define “consultation” as being “*with a view to reaching agreement*”. As the CJEU ruled in *Junk v Kuhnel C-188/03 (ECJ)*, “*consultation with a view to*

reaching agreement”, means a negotiation. The I&C Framework Directive creates three categories:

- information only;
- consultation (exchange of views and a dialogue); and
- consultation with a view to reaching agreement.

ELA considers that, if a consolidated I&C Directive is created, it would be add clarity for the new Directive to specify exactly what topics fall into which category. However a clear distinction needs to be drawn between measures proposed by management and a management report on the current state of the business and its projected future trends. For example, at present, the Collective Redundancy Directive requires employers to consult on the need for making the proposed redundancies (i.e. ways of avoiding redundancies), whereas the Transfer of Undertakings Directive only requires consultation on the measures envisaged by the relevant employers (not the actual decision to transfer the business). It needs to be decided whether, under a recast Directive, employer must consult on proposed transfers of undertakings. This illustrates some of the difficulties in codifying difference Directives which have been designed to deal with different situations.

13. The EWC definition of “consultation” embodies the right of employee representatives to give management their Opinion on the proposed measures. The Collective Redundancies and Transfer of Undertakings Directives do not expressly provide for this (the I&C Framework Directive does so), although obviously during the dialogue between management and employee representatives, the latter will disclose its views on management’s proposals. They provide for management to consider any representations made by the employee representatives and to respond to such representations. Again, a distinction needs to be drawn between a management proposal which has direct consequences on its employees, and a general exchange of views between management and employee

representatives. ELA considers that the requirement that management await (and reply to) the employee representatives' Opinion should only apply where it is proposing substantive measures directly affect its employees.

14. The dynamics of business decisions often necessitate that, subject to employee consultation, the "go" (trigger) button for the proposal is pressed within a defined period, or the delay may prejudice the effectiveness of the business proposal. ELA recommends that, following the Italian model, there should be a set period for consultation to take place, at the end of which management is permitted to treat the consultation process as exhausted. ELA believes this should be 30 or 45 days as a long stop, since it is not uncommon for the consultation process to have been completed within those timeframes. This will give businesses a definite time to prepare for whatever action they need to take, depending on the outcome of the collective consultation process. It will also end extensive drawn out consultation processes which themselves engender uncertainty.

Timing of consultation

15. There are three different criteria used in the Local I&C Directives for when the obligation to inform and consult is triggered, as follows:-
 - a) Collective redundancies: *"where an employer is **contemplating** collective redundancies.....in good time..."*
 - b) Transfers of Undertakings: *"in good time before the transfer is carried out"*
 - c) I&C Framework Directive: refers to the timing of the consultation being *"appropriate"* [one assumes for meaningful consultation to take place].
16. ELA believes that, in respect of measures proposed by management, there should be a clearer and more definite "trigger" point. The phrase *"in good time"*, whilst having the virtue of elasticity, sometimes creates confusion

over when consultation should start. ELA appreciates that, depending on the number of, and degree of controversy over, management proposals, the duration of consultation could be either relatively short or extended. Many trade unions and works councils believe the trigger point should be at the planning stage of a management proposal. In contrast, many businesses take the view that, until management has formulated a proposal, there is nothing to consult about and, indeed, it would be nonsensical to consult about something which might look very different when it reaches the stage of a firm proposal.

17. Due to differences in management decision-making processes and the lack of clarity on when management is "*contemplating*" taking action such as redundancies, ELA suggests that, rather than focussing on when consultation should start, it would be simpler and easier to operate if the requirement was that the consultation process must be concluded **before final decisions** are made by management on their proposals.

Consultation: Transfers of Undertakings

18. As presently drafted, the Transfer of Undertakings Directive does not entitle the employee representatives of the transferring employees to consult with the incoming transferee about the measures which it envisages taking in connection with the transferring employees. The outgoing transferor plainly cannot consult on the transferee's stated measures. ELA considers this to be a very significant lacuna in the information and consultation provisions of the Directive. ELA suggests that employee representatives for the transferring employees should be entitled to hold pre-transfer consultation meetings with the transferee on its proposed measures. At present this only occurs on a voluntary basis if both transferor and transferee are agreeable to it.

19. ELA also recommends that employers with a small number of employees impacted by the proposed transfer should be able to consult with those employees directly, without the need to have an election of employee representatives. ELA suggests that this should apply where the number of impacted employees is 10 or less.
20. One of the difficulties which transferors face is that they may end up picking up liabilities for the acts or omissions of the transferee which occur pre-transfer. Typically this might be where the incoming transferee says it wants to make material changes to terms and conditions of employment and as a result some employees exercise their right of objection and claim constructive dismissal. Since, in some countries, their employment would not have transferred to the transferee (due to the exercise of their right of objection), the liability for the transferee's acts stay with the transferor, even though the transferor has done nothing wrong. This seems wholly inequitable. By including the transferee in the pre-transfer consultation process (where it envisages taking measures), this would enable a bridge to be built in the legislation to ensure that liability is rightly placed with the "wrongdoer" – i.e where statements are made by the transferee during the consultation process.
21. If the Transfer of Undertakings Directive is to be combined into a single Directive, it might be a useful opportunity for greater clarity to be given in relation to shared liability between the transferor and transferee, when there has been insufficient information and consultation under the applicable Directive..

Collective Redundancies Directive

22. At present since the CJEU's recent decision in *USDAW and B. Wilson v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd Case (C-80/14)*, the Collective Redundancy Directive focusses collective consultation at the "establishment level", whereas the other two Local I&C Directives do not. There appears to be no logical reason why the situations should be treated

differently. For example, a transfer of undertakings might affect employees across a number of sites (in the same way as a collective redundancy might). Similarly a substantial organisational change (covered by the Framework I&C Directive) could well impact only at establishment level and not the entire undertaking. More clarity and consistency, subject to the context of the subject-matter to be consulted upon, is needed in this area if a recast Directive is to be adopted.

EWC and local consultation processes

23. The revised EWC Directive does allow the social partners to decide the interaction between EWC and local consultation on the same topic (e.g. cross border redundancies or organisational change) or that the respective consultation commence within a reasonable time of each other. Whilst ELA recognises the need for some degree of flexibility on this, we consider that greater structure should be given on the inter-relationship between the two consultation processes. The practical experience of ELA members who advise organisations on cross border issues indicates that there is some degree of confusion about what each process does and how they inter-relate to each other. This is particularly pronounced for those employee representatives whose main industrial relations interface with management is through a local works council structure. For example, even though the two processes start in close proximity, is there any requirement for the EWC process to be completed before the local consultation process can be signed off? In addition, it may be helpful for the recast Directive to declare that the decisions and actions of the EWC cannot diminish or restrict the rights and prerogatives of local employee representative bodies (e.g. trade unions and works councils).

Scope of the EU Commission's Consultation

24. ELA does agree that the EU Commission's description of the issues to be appropriate, subject to the points we have made above.

25. ELA suspects that, to achieve the EU Commission’s stated aims, a recast is probably inevitable; but care should be taken to ensure that workers’ rights are neither reduced nor extended to any material extent through “creep harmonisation”. This particularly applies to the category of information and consultation which applies to particular subject-matters, the timing of consultation and the extent of information which should be provided by management as part of the process. Exceptions to this would be the matters we have described in paragraphs 17 to 20 above.
26. If a recast Directive is to be drafted , there will need to be uniformity on certain other phrases since the various Directives use different terminology, including
- “worker” / “employee”
 - “information”
 - “consultation”
 - “employee representatives” / “workers’ representatives”
 - “establishment”
 - “undertaking”.
27. xx
28. ELA considers that it is appropriate to extend the current consultation process to national level stakeholders. The scope should be limited to what is meant by information and consultation and timing issues – as summarised above.
29. Although in some senses, it would be desirable for the EU Commission to initiate a dialogue between the social partners under art. 155 TFEU, ELA suspects that due to the fundamental difference between them on such a sensitive topic they are unlikely to reach a constructive agreement on some of the issues which need to be addressed.

Appendix 1

Members of ELA Sub-committee

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