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HM Treasury Consultation
Restricting Exit Payments in the Public Sector:
Consultation on Implementation of Regulations

Response from the Employment Lawyers Association

3 July 2019

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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/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The 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.

A sub-committee, chaired by David Widdowson was set up by the Legislative and Policy Committee of ELA to respond to the consultation document issued by HM Treasury on draft regulations relating to the powers to cap exit payments in the public sector at £95,000 in the Small Business, Enterprise and Employment Act 2015. The consultation sets out the proposed method of implementing that cap, including which bodies should be in scope.

We have responded to the various questions raised and have also provided some observations on the draft regulations generally and the draft Mandatory Directions.

The ELA Working Party members are listed at the end of this paper.

Question 1

Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.

Question 2

Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

The category of employees covered by the regulations is defined as the existing and future employees working in the NHS, Civil Service, Teachers, Local Government, Police Officers and the Judiciary.

However, the public sector comprises a diverse range of organisations that extends beyond the major workforce identified by the government. These organisations can include arms-length bodies, such as Non-Departmental Public Bodies, 'Quangos', Executive Agencies and large public sector employers such as universities and colleges which are admitted bodies to e.g. the Local Government Pension Scheme and NHS pension schemes employing tens of thousands of public sector staff across the country.

In addition, increasingly public sector bodies are setting up their own wholly owned companies for service delivery – including Teckal companies which are recognised as effectively being under the same level of control as an in house department of the public sector bodies – with employees transferring from the public body to the company on their terms and conditions under TUPE and with protection for public sector occupational pension rights. But it is understood that the Regulations would not cover such employers. This has the potential to cause anomalies particularly when coupled with the mandatory exemption for TUPE.

It may be hard to justify excluding large public sector employers such as the BBC, universities and colleges from the scope of the proposed regulation. Doing so will mean that the objective of the legislation will to an extent be undermined as tens of thousands of public sector staff who are amongst the best paid in that sector will not be subject to the cap. It is noteworthy that the perceived egregious payments reported in recent times were made by the BBC and by universities such as Bath Spa, for example, who paid nearly half a million pounds to their departing Vice Chancellor as compensation for loss of office yet these would be outside the proposed legislation.

Moreover, employment arrangements within the public sector can sometimes be complex. For example, clinical academics are engaged by their substantive employing NHS Trusts but are also employees of medical schools following the Follett Principles. A practical question may arise as to how much of a departing consultant academic's exit payment should be capped given the complex and overlapping nature of clinical academic employment straddling two employers. It is not inconceivable that senior staff might "game" the system by moving off an employing NHS Trust's books onto a medical school to circumvent the cap.

Question 3

Do you agree with the exemptions outlined? If not, please provide evidence.

We assume that the reference to "a service payment" in Regulation 7(e) is meant to cover a payment in lieu of accrued but untaken annual leave as permitted under the Working Time Regulations 1998. This could be clarified.

Question 4:

Does the guidance adequately support employers and individuals to apply the draft regulations as they stand? If not, please provide information on how the guidance could be enhanced.

Headings used below are headings from the draft guidance.

We consider that the guidance would benefit from worked examples to illustrate the following points:

- Payments that are in scope and payments that are not. This could cover the interplay between draft regulation 6(1)(g) and 7(g), as well as injury to feelings payments (see our separate comments on the draft regulations in this regard).
- How to calculate salary.
- How to calculate the cap.
- The order in which to deal with multiple exit payments, both in a single public sector exit scenario and a multiple public sector exit scenario in particular in relation to regulation 8(2).

1. Introduction

The guidance uses a slightly different name for the draft regulations: "the Public Sector Exit Payment Cap Regulations".

3.1 Payments in scope of the regulations

A) The guidance states "an exit payment is subject to the cap if it … is made in consequence of termination of employment or office **whether or not a contract of employment applied**." The use of the word "applied" creates a meaning that is not in the regulations and is arguably contradictory, as explained below.

The part highlighted in bold, above, could suggest that the regulations also apply to contracts for services (including workers within the meaning of s230(3)(b) of the Employment Rights Act 1996). However, this would contradict the preceding words "termination of employment", as it is implicit in the term employment that there is a contract of employment (whether oral or written).

S.153A of SBEEA 2015 only applies to employment relationships, or holders of a public office. There is no extended definition of employment that would include a worker within the meaning of s.230(3)(b) of the ERA 1996 (such as is found in the Equality Act 2010). The draft regulations similarly only purport to apply to an employment relationship (or to holders of a public office) - Regulation 3 defines a “relevant public sector exit” as applying to situations where “…an employee leaves the employment of a public sector authority…”. Without further definition of “employee” or ”employment” it can only sensibly be taken as a reference to working under a contract of employment rather than any wider sense of the terms so would, for example not include workers or self employed.

At first glance, draft regulation 6(1)(i), says something similar to this part of the draft guidance: *"any other payment made, whether under a contract of employment or otherwise, in consequence of termination of employment or loss of office"*. However, this formulation is clear that there must be an employment relationship; the reference to "contract of employment or otherwise" simply refers to the source of the agreement to make the payment.

We perceive the possibility for avoidance here and consideration might be given to revising regulation 3 to make it consistent with the scope envisaged by the guidance. Otherwise we suggest that the guidance be amended to include words similar to those in the draft regulations.

B) The guidance's explanation of the defined term "salary" paraphrases the regulations. However, the regulations do not explain how to calculate the annual value of remuneration or benefits in kind. For the reasons stated in our comments on the regulations, we do not think that the answer is obvious.

The guidance should explain the government's intentions (and consider amending the regulations as well).

C) Guidance on what is covered by early retirement in regulation 6(1)(b) would be helpful (see our separate comments on this regulation). In particular, are ill-health early retirement pension strain payments within scope?

3.2 Calculating the capped amount

In short, the guidance advises employers and employees to use "normal processes" to calculate the cap. We respectfully suggest that this does not provide any true guidance. We do not know what is meant by this explanation.

3.3 Payments out of scope of the regulations

This section deals with pension payments, explaining what is and isn't within scope. It does not mention that, to be in scope, the pension payment must relate to early retirement. We are not certain that a "pension strain" payment will be universally understood as meaning a payment related to early retirement costs. In addition, as commented above, we have questioned whether all types of early retirement are intended to be within scope.

4.1 Public sector employers' responsibilities

A) In section 4.1 the guidance provides that:

"Where the total would exceed the exit payment cap, the regulations prescribe the sequence in which exit payments will have been paid for the purpose of applying the cap (reg 5) – see 'Multiple exit payments in section 4.2 below'".

We agree that regulation 5 of the draft Regulations sets out the sequence in which exit payments will have been paid for the purpose of applying the cap, where a person leaves two or more public sector employments within a period of 28 consecutive days. However, it does not deal with the situation where a person leaves only one public sector employment and the total exceeds the exit payment cap. The section of the guidance cited above appears to suggest that it does. We believe that this section should be corrected so that it specifies that regulation 5 is only about sequencing of payments where there are two or more relevant public sector exits.

B) The third paragraph of this guidance creates a potentially huge expectation. It is possible to introduce new contracts for new joiners, but amending existing contracts is a large and often complex undertaking and we question the practical feasibility of this. This expectation also links to our comments on enforceability (see our separate section on the draft regulations).

C) In the fourth paragraph of this section of the guidance (dealing with pension strain payments), it states that an authority **may** pay an equivalent cash sum. We believe this is incorrect as regulation 9 states that the authority **must** pay the equivalent cash sum in the circumstances covered by that regulation. Please also see our separate comments on regulation 9.

4.2 Multiple exit payments

A) Based on the current draft regulations, there should be two sections to the guidance: (1) multiple exit payments from one exit; (2) multiple exit payments arising from two or more exits.

B) The first paragraph of this section is incorrect. The 28 day point only features in the regulations in relation to multiple exits, i.e. the rules on multiple exits only apply if the two (or more) exits occur within 28 days of the other. There is nothing in the guidance that deals with the situation where there is only one relevant public sector exit, but there are multiple exit payments in relation to that public sector exit. For example, an employee who leaves their employment under a settlement agreement may have several exit payments – payment in lieu of notice, a redundancy payment, an ex-gratia payment, a compensation payment for injury to feelings etc. A settlement agreement may (and probably will) provide that a payment which is not a payment in lieu of notice is payable within a certain period of time after the settlement agreement is signed provided that the employee complies with the terms of the agreement (e.g. as to confidentiality or not instituting employment tribunal proceedings). If there are multiple payments a settlement agreement may provide that the payments are to be paid at different times. The Regulations appear to be silent on the sequence in which exit payments will have been paid for the purpose of applying the cap in this situation. It should be made clear that all payments relating to a person's exit by an employer must be taken into account to avoid any scope for avoidance.

(C) The guidance goes on to state:

"As such, the regulations provide that an individual can receive a statutory redundancy payment or, where appropriate, its equivalent from a second relevant authority. This is even where the total received by the individual from the first and second authority exceeds £95,000".

It is not clear where the regulations say this (although we note that regulation 8 contains a general rule that a statutory redundancy payment must always be paid). We suggest in all instances where the guidance refers to what the regulations provide, the guidance specify which particular regulation is being referred to.

In this instance, we assume that the guidance is referring to regulation 8 because this regulation is about statutory redundancy payments. However, it is not clear to us how regulation 8 has the effect described in the above extract from the guidance. Regulation 8(1) provides that where the total amount of exit payments in respect of a relevant public sector exit exceeds the cap and a person is entitled to receive a relevant redundancy payment, the relevant public sector authority must reduce one or more of the other exit payments, rather than reduce the relevant redundancy payment. This is clear. It follows that the only regulation that the above extract from the guidance can be referring to is regulation 8(2). However, regulation 8(2) does not refer to two or more relevant public sector authorities. It does not appear to have the effect described in the above extract. We therefore do not know to what part of the regulations the above extract is referring.

D) In the third paragraph (dealing with redundancy payments) we think the second sentence could be clearer, as the circumstances in which an individual should receive the equivalent of a statutory redundancy payment are very limited (i.e. those in s.159 of the ERA 1996). It could perhaps read instead as "*Some employment is treated as employment in a public office, which does not qualify for a statutory redundancy payment. This includes, for example, employment in the civil service. Nevertheless, where that rule applies, the authority of which the individual is an employee or office holder must ensure that the individual receives the equivalent of a statutory redundancy payment if they satisfy all of the other conditions for receiving one."*

E) As we have stated in our separate comments on regulation 5(b), the sequencing provisions there are unclear. The guidance does not materially assist.

4.4 Compliance

Please see our separate comments on enforceability. In addition, it would be helpful if the guidance explained in headline terms the legal basis for an action for civil repayment.

4.6 Individuals' responsibilities

"Relevant authorities" is not defined in the guidance. It might be simpler to state in full that this means "all other public sector bodies of which the individual is an employee or office holder."

Question 5

Is the Guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the Regulations, especially in the case of whistle-blowers?

The Purpose

The Guidance aims to clarify how relevant public sector employers are expected to implement the legislation and should be read in conjunction with the separate mandatory HM Treasury directions ("HMT Directions"). The Mandatory HMT Directions reiterate the type of cases where the relaxation can be applied but does not expand on the procedural steps required when applying the mandatory relaxation. The HMT directions therefore offer little by way of additional clarity on the process, practical or legal framework for applying the relaxation.

The Guidance confirms that, in the event of a discrepancy between the Regulations and the Guidance, the Regulations prevail. In particular, section 5 of the Guidance allows for relaxation of the cap in "*appropriate circumstances*" and emphasises that this safeguard is in place for use in "*exceptional situations*" including where applying the cap would cause "*genuine hardship*".

The Guidance is silent on any procedural requirements following receipt of an unfavourable decision (i.e. appeal/reconsideration rights).

The Guidance is otherwise clear on who will have the power to allow for relaxation of the restrictions (i.e. Minister of the Crown or a delegated authority (*see 5.1*)).

General Overview

In our view, the Guidance to the Regulations does not provide sufficient information on the application of either the mandatory or discretionary relaxation. Whilst the Guidance provides some examples of how the relaxation should be applied, it does not provide the sufficient level of detail one would expect to see in order to understand how the relaxation procedure is to be applied, against what criteria and within what timeframe. This is a concern when considered in the context of the stringent limitation timeframes for issuing Employment Tribunal proceedings and therefore the interplay between the Regulations and ET process.
Paragraph 5 of the Guidance, in general, is too vaguely drafted, lacks examples and fails to define what we consider to be key terms such as "*business case*" and "*exceptional circumstances*". Further the requirement for decisions to be made in a "*reasonable and timely fashion*" is unclear and vague. In our view it will be difficult to determine when a decision would be deemed to be unreasonable and untimely. Finally, terms such as "*genuine hardshi*p" are not defined and are therefore incapable of being assessed in an objective manner. We address our concerns in more detail below.

Analysis of the Mandatory/Discretionary relaxation provisions (Note: bold for emphasis)

1. We are concerned by the content of regulation 11 (relaxation of the restriction on exit payments) of the draft Regulations. Regulation 11 provides that:

   "11. the power in section 153C(1) of the Act (relaxation of restriction) is ***exercisable*** (our emphasis)*, in relation to exit payments made by -*

   (a) A devolved Welsh authority, by the Welsh Ministers instead of by a Minister of the

Crown;

(b) A local authority in England, by the full council of that local authority;

(c) A fire and rescue authority, by the fire and rescue authority; and

(d) the Greater London Authority, by the London Assembly."

The section 153C(1) power being referred to is that *"a Minister of the Crown may relax any restriction imposed by regulations made by the Treasury under section 153A"* (section 153C(1) of the Small Business, Enterprise and Employment Act 2015 ("SBEE 2015")).

Regulation 11 of the draft Regulations appears to be saying that the power to relax the restriction on public sector exit payments is only exercisable in relation to payments made by a devolved Welsh authority, a local authority in England, a fire and rescue authority or by the Greater London Authority.

It appears unlikely that this was in fact the intention. It would seem consistent with the overall policy direction that the restriction should apply to all bodies in Schedule 1. For example, it would be of considerable concern to NHS bodies if they were not permitted to request mandatory relaxation in relation to complaints of whistleblowing for instance given the propensity for high value whistleblowing complaints in the NHS compared with other public bodies. In relation to the guidance, it should contain a full explanation of the reasons for why the power to relax the restriction on exit payments does not apply to all bodies in Schedule 1.

If Regulation 11 is intended to give effect to section 153C(5) of the SBEE, which in summary provides that regulations may provide for the power to relax any restriction on public sector exit payments to be exercisable on behalf of a Minister of the Crown by a person specified in the same regulations then we would suggest that it be made clear that it is applicable to all the bodies in Schedule 1.

2. Paragraph 5.1 stipulates that the "*Departments are expected to put in place and comply with **relevant processes and procedures** in relation to relaxation of the cap. These processes are expected to ensure decisions are made in a **reasonable and timely fashion**. Local authorities will be expected to follow any relevant guidance issued by the Ministry of Housing, Communities and Local Government which puts in place such processes and procedures, and which will ensure accountability and transparency*".

   - This section lacks detail and clarity on what constitutes or what would be the benchmark to be met for "*relevant processes and procedures*". The detail around processes should be clearly set out in the Guidance so that one can immediately understand the various stages required in order not to fall foul of the Regulations.

   - It also is not clear what is meant by decisions will be made "*in a reasonable and timely fashion*". It would be useful if the Guidance could be clear on timeframes (i.e. 2, 4, 6 or 8 weeks). It also does not provide, for the eventuality, that there might be a delay in decisions being made and how this might be circumvented. The Guidance is also silent on how the requests will be allocated or dealt with (i.e. urgent requests given priority or will they be dealt with on a 'first come first serve' basis).

2. Paragraph 5.2 provides that ***"**Relaxation is expected to be granted only in **exceptional circumstances** which meet the **criteria** in this guidance. All decisions should be supported by **appropriate evidence**, with an explanation of the business interests and a value for money*

assessment, and should be disclosed in the organisation's annual accounts as in section 4 of this guidance".

- This section also lacks clarity on what is meant by or would amount to "*exceptional circumstances*", "*criteria*" and "*appropriate evidence*". This section is too widely drafted and is likely to cause a great deal of confusion for those looking to apply it or challenge it.

- Within the NHS, employers already need to seek Treasury approval in certain circumstances. However NHS approval (for instance) is not confined to merits alone but takes into account non-legal factors such as commercial considerations, reputational damage, value for money etc. It is unclear if the current guidelines will include non-legal considerations (see more below).

- This also indicates that the discretion may not be exercised as frequently as may be required (only in exceptional circumstances) and query whether this may inadvertently result in employees not pursuing claims for fear that they might not be adequately compensated in the event of a detriment suffered or dismissal following, for instance, a whistleblowing complaint. Arguably, this cap may also make settlement less attractive in high value cases.

3. Paragraph 5.3B further provides that where an individual makes a disclosure covered by whistleblowing law **and has subsequently made a "complaint**" that they have been dismissed or subjected to a detriment as a result of that disclosure, an employer must "*consider whether …it may be appropriate to enter into a settlement or conciliation agreement involving an exit payment with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour, then the power to relax the restrictions imposed by the regulations must be exercised if the amount payable under the settlement agreement would otherwise lead to the cap being breached*".

   - The Guidance does not adequately address what would amount to a "complaint" for the purposes of exercising the power to relax the restrictions. Is this limited to formal grievances only or can it also include informal grievances, verbal complaints, concerns raised as part of an appeal, a report made via a whistleblowing policy or to a whistleblowing 'champion'? Or is it intended that this should not arise until a formal legal claim is made in the courts or Employment Tribunal?

4. Paragraph 5.3B envisages that *"an **employer will make legal advice available** to the person exercising the power to relax the restrictions that demonstrates that, on the **balance of probabilities**, the individual has made a disclosure covered by whistleblowing law and that an employment tribunal would find that they had been dismissed or subjected to a detriment as a result of that disclosure".*

   - Is the "*balance of probabilities*" test the appropriate test for these purposes? As lawyers, we are well versed with the difficulties the application of this test will pose in practice as a great deal will depend on the facts (which will often be disputed by the parties).

   - The wording could be changed to "…that an employment tribunal would *be likely* to find…" As drafted it suggests a higher standard than balance of probabilities

- Further the merits of a claim are likely to be unclear in the early stages of a complaint/proceedings. Such issues are often resolved following disclosure. It is rare that an employer will "admit" liability at such an early stage.

- Will it be possible or indeed necessary to conduct a 'second assessment' later in the proceedings when more information is made available which would assist in the merits assessment necessary for exercising the relaxation?

- It is also uncertain how detailed or high level the "advice" will need to be in order for a decision to be made. Does the advice need to be supported by evidence? The Guidance could be clearer on what matters should be covered as part of the required advice.

- This section does not appear to take into account non-legal considerations. The advice appears to be restricted to the merits when deciding on whether or not to relax the restrictions. From experience many settlements are reached having considered the reputational risk, regulatory issues and other commercial considerations in conjunction with the merits of the claim.

- The Guidance is also silent on the process in the event that relaxation of the cap is refused by the Minister. Will there be an option to challenge the decision by way of appeal or reconsideration. Will there be a limitation date to abide by when exercising this right? What appeal process will be put in place?

5. Paragraph 5.4A stipulates that the Government believes that in rare instances the operation of the cap will lead **to genuine hardship**. It states that in such cases, where the person exercising the power to relax the cap is satisfied that there are **exceptional circumstances**, then it may be appropriate for the restrictions to be relaxed.

    - This section is not sufficiently clear on what would amount to "*exceptional circumstances*" and it would be beneficial for this to be expanded on in the Guidance. It may also be useful if the Guidance could provide some examples of what could constitute "*exceptional circumstances*" under this head.

    - The Regulations provide that the discretionary power to relax the cap can only be enacted with HM Treasury "consent" and only then in exceptional circumstances. Therefore the ability to exercise the discretion has not been given directly to the employer and may inadvertently lead to protracted/ delayed exit negotiations which inevitably will have cost consequences on all parties.

    - Further, it is not clear what specific criteria is required to meet the eligibility for relaxation to be granted in any given scenario or the timeframes involved for the relevant Minister to reach a decision or as stated above whether that decision can be challenged by an employer (i.e. by way of an appeal).

6. Paragraph 5.4A in respect of the "***genuine hardship***" argument, the circumstances that may be considered are "*not limited to the employee's own circumstances, and it may be appropriate to*

consider the position of family members. For example, where an individual is exiting the workforce and is not able to seek re-employment due to caring responsibilities".

- The key term "*genuine hardship*" is not sufficiently defined and so more examples should be provided to aid our understanding of when this option is likely to be engaged.

7. Paragraph 5.4B sets out that, "*the government [also] accepts that there may be instances where it is in the interests of **urgent workforce reform** to relax the restrictions imposed by the regulations. However, cases where it is appropriate to use the power in this way will be exceptional and a **detailed business case** will need to be prepared in support of any request for a relaxation on this basis*".

- Again, this section lacks clarity and detail of what would constitute an exceptional case and what information and topical issues need to be addressed or is required when preparing a "detailed business case".

- It also fails to specify what would be considered "*urgent*" workforce reforms.

Question 7

Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

We suggest the following needs consideration:

1. **Potential blocking effect on organisational change and restructuring**

NHS, local authority and other public sector organisations have been, and are likely in the future to be, subject to significant and large-scale structural changes. Exit payments are important to employers' abilities to implement workforce reforms and to respond to new circumstances. They provide important support for employees as they seek new employment particularly in circumstances where, as may be the case in the NHS and other public sector organisations, their skills and experience may be role or sector specific.

2. The effect on workplace relations and partnership working

Generally speaking, public sector employers prefer to work in partnership or constructively with staff side and union representatives to address change and update working arrangements and operational agreements. A combination of an increasing burden of new legislation and regulations on the one hand and diminishing benefits and protection on the other is likely to start to limit the future opportunities for working together locally and nationally, in partnership, to address organisational change and industrial relations issues. Strong concerns have been expressed by a number of public sector contacts over the potentially negative impact of what is perceived to be an increased reliance on legislation rather than agreement.

A number of public sector contacts have also expressed the view that the limits themselves and the process of introducing successive sets or new limits may contribute to a general deterioration in staff morale.

3. Parallel reduction in the value of voluntary arrangements

The consultation refers to voluntary redundancy arrangements that run alongside compulsory redundancy provisions. Such arrangements are in practice likely to be reduced alongside compulsory redundancy provision and/or there could be reduced take up of schemes with staff preferring to remain in employment and/or to await compulsory redundancy at the higher (albeit now reduced) rates. This may have the counter-intuitive effect of increasing the cost of reorganisations and headcount reductions by increasing the number of compulsory redundancies that are required.

4. Obstacles to future recruitment

In practice, recruitment in all sectors is based on the balance of the overall level of pay and benefits available. A reduction in the level of protection offered by exit payment arrangements may lead to a reduced pool of suitable applicants, their loss to the private sector or a corresponding upward pressure in relation to pay or notice periods.

5. TUPE transfer exemption

The monetary value of the exemption to employees may mean that more transfers are challenged in terms of whether TUPE applies or not.

It is also noted that TUPE transfers will be a mandatory exemption but there is no reference to other compulsory transfers where it is not clear that TUPE will also apply and/or COSOP is applied or there is a statutory order to transfer staff.

6. Pension strain cost

Consideration needs to be given to the position of pension schemes where partial reduction is not permitted and/or there is no option to defer pension benefits.

For example, although there are proposed changes to the Local Government Pension Scheme Regulations 2013 under paragraph 5 of Schedule 6 to the Enterprise Act 2016 to allow:

- partial reduction of a member's pension benefits where otherwise the exit payment cap would be breached; and
- a scheme member to pay a charge to buy out some or all of that reduction;

these changes are not yet enacted. Once enacted we understand that: if an exit payment includes pension strain cost and would exceed the cap, then the member's benefits would be reduced to such a level that the exit payment cap is not breached. The member would have the option of paying extra to buy-out some or all of the reduction as opposed to being forced to accept a fully reduced pension.

So, the effect of the exit payment Regulations on the LGPS is dependent on whether they are enacted before or after the LGPS regulations changes set out in the Enterprise Act come into force. An indication of whether that will happen would be welcome.

In addition, the proposed LGPS regulation changes do not allow the option to defer payment of pension benefits in the event of a member who is over age 55 being made redundant or leaving on the grounds of business efficiency. If that were possible, a member who exercises the option to defer could be paid the cash alternative to the pension strain cost (up to the maximum allowed by the exit payment cap).

Finally, the Regulations do not specify how to calculate the strain cost related to the early payment of a pension on an unreduced basis. The Guidance says that it 'may be the amount as calculated by the scheme

actuary', but the method of strain cost calculation is formulated locally by administering authorities based on the demographic make-up of the LGPS members in that area. So the options appear to be for:

- the calculations to continue to be done in this way, which has the advantage of ensuring that the calculations accurately reflect the actual cost to that Fund of paying the pension early but which means that the implications for the exit cap could differ for LGPS members in different locations; or
- There is a centralised standard method for calculating strain cost which would have the advantage of consistent application nationally but the risk of strain costs being over or under paid by councils in terms of true impact on the local Fund.

We anticipate that the Local Government Association will also be responding to the consultation and raising these issues in more detail.

Question 8

Are you able to provide information and data in relation to the impacts set out above*?*

- Redundancy and exit payments are a bridge for employees finding new employment and a financial cushion to offset the loss of employment and rights. There is no data to show how long it takes for a public sector employee to find new employment with another public sector employer.

- The policy underpinning the use of public sector exit payments needs to be consistent across the wider public sector. The data provided by the BBC reporting on the use of gagging orders, suggest that there were enhanced pay-outs totalling £226.7m from 2010-2015, but this report provided no insight into the circumstances of the leavers. Generally, exit payments are based on voluntary or compulsory redundancy, mutually agreed terms and retirement. Further intelligence is needed to breakdown the elements of public sector exit payments and the leaver's circumstances to further understand the social impacts on groups.

- It is noted that the government has given assurance in the consultation that pension schemes remain unaffected by the reforms and will not be in breach of the Public Service Pension Act 2013. ELA's experience suggests the limit on pension top ups may impact on pensions.

- The proposal to reduce pensions top ups in exit arrangements may impact succession planning for early retirement. There may be less of an incentive for older employees to move on to create room for the younger generation. Further data is required to consider whether the reduction in pension top ups will have this impact on succession planning. In addition, there should be more data surrounding the circumstances on the use of pension top ups to inform the strategy for succession planning.

- Our experience is that redundancy provisions vary significantly in the wider economy. Our experience is that many organisations (especially smaller organisations) apply statutory minimum redundancy terms only. For larger organisations which provide for more generous terms this tends to be based on the use of the statutory formula but with the actual week's pay rather than the capped week's pay. This may be as a result of the introduction of age discrimination legislation and the specific exemption for redundancy payments based on the statutory formula or a formula which mirrors the statutory formula. Our experience is that some organisations (especially those which were once public or quasi-public sector but have moved into the private sector – for example, the defence sector) have retained much more generous redundancy terms (up to 104 weeks' pay in

some cases) linked to pension arrangements. A point to note is that many private sector organisations which apply more generous redundancy terms do so on a discretionary basis and are careful to ensure that such enhanced terms do not become contractual. Some organisations use additional discretionary payments to encourage voluntary redundancy – these vary from increasing the number of weeks' pay for each year of service to providing a fixed additional lump sum.

Further Comment on the draft regulations

1. General observation

Some of the draft regulations have been mis-numbered. Regulation 10 is missing a (1) but has a (2). Other examples are the first paragraphs in regs 6, 8 and 9, which we believe should be numbered sub-sections.

2. Regulation 3 (Definitions)

Salary:

Is "annual value" intended to be the gross or net annual value?

In addition, whether gross or net, how is "annual value" calculated? In many cases, this is likely to be straightforward. However, there could be arguments as to whether to include particular types of remuneration. For example: forms of deferred remuneration or overtime (including voluntary overtime under bank working arrangements that exist alongside an employee's main employment, such as in the NHS). It might be simplest to use the week's pay definitions in the Employment Rights Act 1996, on the basis that this is a long-established method of calculation, albeit that it has generated litigation.

It is also unclear how the annual value of a benefit in kind should be calculated. Would this use a tax law based approach? If that is the case, would the simplest approach be for the regulation to use the last confirmed valuation for tax purposes (e.g. the last P11D)? There is a risk that public sector employers and employees could be become involved in complex calculations.

Exit payment cap:

The definition of "exit payment cap" in draft regulation 3 refers to the amount specified in section 153A(1) of the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015). That section states "Regulations may make provision to secure that the total amount of exit payments made to a person in respect of a relevant public sector exit does not exceed £95,000." It is unclear whether the "amount specified" simply means £95,000 or whether it also imports the wider wording of s.153A(1). As a consequence, there is an argument that regulation 4 does not achieve the purpose of applying the cap to the aggregate of all exit payments arising from a relevant public sector exit. We suggest that the draft regulations could be made clearer.

Alternatively, regulation 4(a) could remain as drafted and a further new sub-section could be added, stating "where a relevant public sector authority makes two or more exit payments to the same person in respect of a relevant public sector exit, the total amount of the exit payments must not exceed the exit payment cap."

A further alternative would be to adapt and incorporate the "aggregate exit payment" definition that featured in the draft Public Sector Exit Payment Regulations 2016.See comments under regulation 4.

Regulation 5

Draft regulation 5(b) is unclear. Assuming that one of the jobs from which the employee is leaving pays a higher salary, we think regulation 5(b) is trying to say that all exit payments related to the exit from that job will be treated as having been paid first. If that is the intention, we believe it could be expressed more clearly.

Regulation 6

Regulation 6(1)(b), pension payments top-up payments:

We note that this regulation mirrors the wording in s.153A(5)(c) of SBEEA 2015 (save that the regulation says "…in respect **to** …" rather than "… in respect of …", although we do not think this makes any substantive difference.) Nevertheless, ELA considers that clarification of what is meant by "early retirement" might be necessary, subject to the government's policy intentions. In particular, does "early retirement" include ill-health early retirement and early retirement connected with redundancy? (E.g. the current NHS option of early retirement in the interests of the efficiency of the service; see section 16 of Agenda for Change.) There is a distinct policy difference between these different types of early retirement.

If ill-health early retirement pension strain payments are intended to be excluded, we are not certain that regulation 7(b) is sufficient for that purpose.

Regulation 6(1)(e), shares or share options:

We note that this regulation mirrors the wording in s.153A(5)(h) of SBEEA 2015. The regulations are silent as to how to calculate the value of shares or share options. Would this be based on a tax law calculation?

Regulation 6(1)(g), Payments in lieu of notice:

The draft regulations are not clear on the interplay between regulation 6(1)(g) and 7(g). Exit payments include *"any payment in lieu of notice due under a contract of employment."* However, this does not apply if the payment falls within regulation 7, which includes at (g) *"a payment in lieu of notice due under a contract of employment that does not exceed one quarter of the relevant person's salary."* What is unclear is whether a payment in lieu of notice that exceeds this amount loses the exemption in regulation 7 entirely, or only in relation to the portion of the payment that exceeds the amount. We assume it is the latter but clarity would be desirable

In the phrase *"payment in lieu of notice due under a contract of employment"* in regulation 6(1)(g) it is unclear whether "due under a contract of employment" relates to the payment or the notice. We assume it is the latter, as there does not appear to be a policy reason to differentiate between a contractual PILON and non-contractual PILON in these circumstances. Doing so could lead to the anomalous situation where two employees negotiate the same exit package of, say, £100,000 but one of them is capped at £95,000 because their contract of employment does not contain a PILON provision whereas the other employee's contract does.

We suggest that the addition of the definite article could be sufficient to remove ambiguity: *"payment in lieu of the notice due under a contract of employment".*

Regulation 6(1)(c), (d), (f) and (h)

Settlement or severance payments, or payments on a voluntary exit, are often calculated by reference to multiple rights and obligations. In a case of alleged discrimination, for example, the settlement payment might include compensation for injury to feelings arising from discrimination that is unconnected to

termination, alongside compensation that is clearly connected to termination. The draft regulations do not expressly deal with this type of global payment.

Staying with the injury to feelings example, they are expressly excluded from the exemption in regulation 7(b). An injury to feelings payment that is paid in respect of a relevant public sector exit would therefore be subject to the cap (unless waived under the mandatory relaxation provisions). However, in addition, the regulations arguably capture a non-termination related injury to feelings payment if paid on termination or if lumped with a global payment. Regulation 6(1) could therefore be amended to expressly only include injury to feelings payments within the scope of "exit payments" when they are connected with termination (and / or regulation 7(b) could be amended to exempt injury to feelings payment that are unconnected with termination.)

ELA appreciates that parties with professional representation could avoid the above difficulties by separating out different types of payment (which they might also do for tax reasons) but parties without professional representation might fail to do so.

Regulation 7

For reasons explained under Regulation 8, we consider that statutory redundancy payments should be added to this list.

See our comments about 7(b) under *Regulation 6(1)(c), (d), (f) and (h)*, above.

Regulation 8

ELA considers that there is a simpler way of implementing what the regulation appears to be seeking to achieve. In short, a statutory redundancy payment cannot be reduced by reason of the cap. If it could then consequential repeals would be needed. So, what the regulation appears to be doing is requiring that in calculating the total amount of the exit payment account must be taken of the statutory redundancy payment and where, including the statutory redundancy payment, the threshold is reached then the other exit payments forming part of the overall package must be reduced.

If Reg. 7 carves out ‘a relevant redundancy payment’ as we suggest, then Reg. 8 can be simpler and need only specify that in computing the value of the total exit payment account must be taken of a relevant redundancy payment and any corresponding reduction made to the exit payment as though the relevant redundancy payment were not exempt.

Regulation 9

This regulation is difficult to understand and the draft Guidance is of limited assistance.

We believe (but are not sure) that the regulation addresses a situation where the rules of a pension scheme do not permit a partial pension top-up payment (or "pension strain" payment). Any such rule would clash with these regulations if the pension top-up payment required to be made to the fund exceeds the cap. We understand regulation 9 to direct the employer to instead make a cash payment directly to the employee, within the limits of the cap.

The draft regulation is potentially misleading as it is premised on the regulations preventing the top-up payment. It is arguably the pension scheme rules that cause the prohibition. It might therefore be better for the regulation to refer to the pension scheme instead, or as well.

The Guidance could also explain this further (see our response to consultation question 4).

Regulation 10

There is a "(1)" missing from the first sentence of this regulation.

We assume that the purpose behind draft regulation 10 is to facilitate compliance with the cap in a regulation 4(b) scenario. The effectiveness of regulation 10 in achieving this aim might be hampered by the short time periods involved. Regulation 4(b) only applies when another relevant public sector exit occurs within a 28 day period, but the employee's duty to notify the second authority about the exit payments from the first authority only arises once the first exit has occurred. This means that the second authority will have, at most, 4 weeks' notice before the second exit is due to occur, by which time it might already have committed as a matter of contract to make the relevant exit payments.

Regulation 11

Draft regulation 11(c) is arguably unclear: the second reference to fire and rescue authority, preceded by the definite article, could imply that this is a defined term, which it isn't. It might be clearer to say "a fire and rescue authority, by **that** fire and rescue authority."

Regulation 12

No comments.

Regulation 13

No comments.

Enforceability

ELA notes that the draft regulations do not contain a similar provision to the one that appeared in the 2016 draft regulations: *"an exit payee's entitlement to an exit payment is not enforceable other than to the extent that the payment* [does not exceed the cap]." (Previous draft regulation 4(1)(b).)

We assume that the previous draft regulation still reflects the government's intention for the way the cap operates. We therefore consider that it would be beneficial for the current draft regulations to include a similar provision, in order to avoid potential litigation. In the absence of such a provision, if a public sector employer entered into an agreement to make an exit payment exceeding the cap, the agreement might still be enforceable (see, for example, *Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678*; but see also *Mohamed v Alaga & Co [2000] 1 W.L.R. 1815*, which held that a contract was illegal as it was entered into in contravention of subordinate legislation).

This type of provision might also assist in relation to the retrospective nature of these regulations insofar as they apply to pre-existing contractual rights, although we note that SBEEA 2015 does not expressly authorise regulations curtailing such rights.

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