EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS
CONSULTATION PAPER ON IMPLEMENTING THE EUROPEAN WORKS COUNCIL DIRECTIVE No 2009/38/EC

12 February 2010

Consultation on the implementation of the European Works Council Directive No 2009/38/EC

Introduction

A. The Employment Lawyers Association ("ELA") is an unaffiliated group of specialists in employment law that includes those who represent both employers and employees. It is not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's International Committee consists of barristers and solicitors (both private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new directives.

B. A Sub-committee was set up by ELA's International Committee under the co-chairmanship of Fraser Younson to consider and comment on the consultation on the implementation of the European Works Council Directive No 2009/38/EC. A full list of the members of the whole Sub-committee is annexed.

C. A note on our methodology. In order to collate a wide range of views we divided the topics amongst the members of the sub-Committee and then carried out a joint review. We believe as a result that our views represent opinion drawn from a wide spectrum of practitioners.

Question 1 : Is the Government's overall approach to implementing the Directive the correct one?

1 Our overall impression is that the Government's approach in implementing the Directive is broadly correct. In a number of areas the Government has (in our view, correctly) resisted the temptation to "cut and paste" its transposition of the new Directive. However, there are a number of further areas (indicated below) where we think that the Government should provide greater detail or guidance. We

believe there is scope for the Government to exercise a bit more subsidiarity in its transposition of the new Directive. We do agree that the publication of guidance would be very helpful.

2 Although it would have been more helpful if the amendments from the Directive were automatically incorporated into the text of the TICE Regs (so that there is only one text to read), we understand the practical reasons why this is not possible. We recognise that one of the reasons for this is that, for some EWC agreements, which have been reviewed or amended in the period between the adoption of the Directive and its implementation in the UK, some of the amendments to the TICE Regs will not be applicable. We see no easy way of getting around this and, probably, the format adopted by the Government is the most risk fee in terms of avoiding confusion.

Question 2: Will the Government's approach to the adaption clause cause practical problems when two ECW agreements are merged?

3 Art. 13 of the Directive envisages the situation where, following a structural change, the new group or undertaking has two EWC agreements (or one is operating under the subsidiary requirements) and they either do not deal with the EWC situation, or conflict with each other. Proposed Reg 19E tracks that possibility accurately, but there are a few problems relating to this. We highlight these below.

4 Reg 19E, like Art. 13 of the new Directive, does not address what amounts to a "*significant change*" or a "*conflict*". This, therefore, leaves scope for dispute as to whether Reg 19E is engaged in particular circumstances. We share the Government's view that the reference in Art. 13 to "*conflict*" is intended to deal with conflicting provisions on the structure of two existent EWC agreements. However, as currently worded, it could be interpreted more widely to cover almost any term of EWC agreements. The current wording may therefore trigger the very time consuming and expensive

exercise that renegotiating a new EWC agreement involves - when, all that probably should be covered, are matters such as the representation of employees within the combining groups of the newly merged businesses. We consider it would be most unfortunate if relatively minor, but conflicting, terms triggered a renegotiation of the whole of these EWC agreements. Nevertheless, in view of the wording of the Directive, we consider that the Government's decision to mirror the wording of Art. 13, rather than define "*conflict*", is sensible. We do also support the Government's proposal to issue guidance in this particularly problematic area.

5 Similarly, we recognise that it would be difficult to define "*significant structural change*" exhaustively. It would nonetheless be useful to include a non-exhaustive definition which refers to the most likely scenarios - for example by stating *"such as a merger or acquisition which significantly affects the representation of employees on the [EWC]".*

6 The way that Reg 19E is worded suggests that it will only be engaged where two existent EWC agreements (or where one is operating under the subsidiary requirements) come together in a combined wider group or undertaking. It does not appear to be triggered in a case of a sale of a business that has an EWC, because the EWC would normally stay with the retained part of the business, but the employee representation of the EWC may then become inappropriate to the reduced sized undertaking post-sale. This would appear to constitute a significant structural change as much as an acquisition of a business and the Government may consider whether it is appropriate for there to be a renegotiation of the entire EWC agreement in the light of that loss of part of the business covered by the EWC. We think that Reg 19E or the guidance should make it clear whether or not the sale, outsourcing or disposal of a business which had been covered by an EWC is in fact covered by the

adaption provisions. Our view is that, since the Directive refers to a conflict between *"agreements"* (plural), it would not cover a significant change caused by the disposal of part of an undertaking or group.

7 Reg 19E also does not appear to address the situation where a transnational business (which has an EWC agreement) is sold or outsourced and, following the structural change, those employees in that business cease to be covered by an EWC agreement. If the employer contracting party does not transfer with the business then the contractual commitment under the EWC agreement stays behind, and does not transfer with the business being sold or outsourced. We consider that the guidance or the TICE Regs should make it clear that such employees cease to be covered by their old agreement, but have the opportunity to trigger the SNB process afresh with the new owner of the business or the outsourcing transferee (subject of course, tot the other requirements for triggering the EWC process).

Question 3: Should the definitions of "information" and "consultation" be introduced as obligations in a new Regulation?

8 Where the social partners have agreed definitions of "information" and "consultation", we do not think it appropriate for the TICE Regs to seek to impose another definition upon them. This is consistent with the approach of the Directive and the Government's previous approach in letting the social partners agree and operate the type of EWC or I&C procedure with which they both feel comfortable and works for them.

Information

9 We agree that it is somewhat meaningless to try to define "data" or "information". We also agree that some direction needs to be given

to the social partners over the amount of detail and the timing of the delivery of the relevant information. Obviously, this will vary from case to case and we do not believe it is practicable (or sensible) to seek to impose a rigid definition of "information".

Existing EWC agreements

10 We do, however, think it would be helpful if the Guidance gave some idea of the level of detail of any information that normally will be provided but, at the same time, stressing that whether it is appropriate will depend on each particular situation.

11 Similarly, we believe that it should be left to the social partners to agree between themselves the meaning of "consultation" within the terms of their negotiated EWC agreement. In our experience, almost all agreements adopt the current definition of consultation: *"establishment of a dialogue and exchange of views".* We do not believe this needs to be changed. It has not, in our experience, given rise to any particular difficulties, and to do so could risk putting the EWC in conflict with the mandatory consultation or negotiation provisions required under national laws. For example, this might occur in the context of collective redundancies where there is, in the light of the "*Junk*" case an obligation to negotiate with the national/local works councils on collective redundancies.

EWCs operating under the subsidiary provisions

12 Where there is no negotiated EWC agreement or I&C procedure, we believe that the provisions of new Reg 5A should apply, but with the amendments which we explain in greater detail in paragraphs 12-22 below.

13 Reg 5A(1) specifies which levels of management should give the information spelt out elsewhere in Reg 5A. We think that it will be extremely problematic in the context of a EWC operating under the

subsidiary provisions. It will impose an obligation that management of every undertaking in the group within the EEA must provide the relevant information – even if it is not within its possession. We believe that the appropriate management body to be legally required to provide the information under the subsidiary requirements should be either central management or the representative agent. To impose an obligation on the management of each single country undertaking within a EEA wide group could result in 27 (or more) different local managements giving different information to the EWC. This would be a recipe for confusion and mixed messages and might be regarded as imposing a disproportionate burden on management.

14 Reg 5A(2) appears to be too widely drafted. It suggests that any employee within the EEA-wide undertaking or group or any of their representatives (including those at local level) must be given the relevant information. We believe that this is too onerous, not required by the Directive and wholly unnecessary. It could make it more difficult to prevent accidental disclosure of confidential information and may make employers seek to rely on their ability to withhold information to a greater extent, if they are required to disclose to any employee rather than a small group of employee representatives. Sub-paras (a) and (b) of Reg 5A(2) should be deleted and that the obligation to request the information should be either the members of the EWC or the I&C representatives in the context of an I&C procedure.

15 We are concerned that Reg 5A(3) gives rise to uncertainty as to what is required, and leaves scope for disputes and the risk of contains the possibility of some employee representatives seeking to delay a restructuring by make disproportionate requests for information. The Government will be aware that in some EEA countries, local works councils and other employ representative bodies are not required to start the local consultation until after an

opinion has been delivered by the EWC. To avoid possible abuse of this nature, we suggest:

(a) the guidance should explain that it is not the role of the EWC to "second guess" management but merely to give its views on management's proposals. This reflects the overall scheme of the Directive andwill give some context for the EWC's right to make an "*detailed study*" of management's proposals;

(b) sub-paragraph (b) states that the EWC is entitled to undertake "*a detailed study of its possible impact*" in relation to the information given to it by management. We believe that the word *"detailed"* may suggest that it is the role of the EWC to carry out a full assessment of all the possible (rather than probably) implications of the proposals put forward by management. It may be better to put the onus on management in relation to exceptional circumstances which trigger an exceptional meeting, to spell out in its report to the EWC what the probable impact is - in a similar way to what is required under the Acquired Rights Directive (viz. "legal, economic and social implications"). This will save considerable time and costs and thus making it unnecessary for the EWC to "reinvent the wheel".

16 Reg 5A(3)(c) suggests a negotiation process with central management. We recommend that the word *"negotiations"* should be deleted. It is clear from the Directive that the EWC level process is not a negotiation but an exchange of views and a dialogue. To retain the word *"negotiation"* is misleading and may invite considerable confusion as to the role of an EWC and its inter-relationship with local negotiating procedures.

17 We believe that it will be helpful for the Guidance to give some indication as to the type of information that management will be

expected to give to the EWC, although we appreciate this should be neither prescriptive, nor exhaustive.

18 Although the Government has so far declined to lay down timelines, we recommend that there should be some degree of prescription for timelines. We suggest that, for example, the written annual report be given to the EWC by management four weeks ahead of the annual meeting unless not reasonably practicable. This will give the EWC plenty of time to consider and discuss the annual report so that, at the annual meeting itself, they can ask relevant questions and make their views known to management. As regards "exceptional meetings" (for example to deal with transnational collective redundancies) we believe that the structure imposed by the TICE Regs should help move the process along rather than create a framework for delay. The Government will be aware that in many cases, there is a window of opportunity for restructuring and it would be most unfortunate if the restructuring had to be cancelled (with even greater risks to jobs) if the EWC was holding things up. The Government will know that, in the real world, the implementation of any restructuring occurs at local level. Our experience is that employees themselves are often extremely anxious to know what the implications are for them at a local level. Consequently the sooner those local level consultations start, the better for everyone, including minimising the uncertainty for employees. We, therefore, suggest that for "exceptional meetings" management should give its report to the EWC 14 days ahead of the exceptional meeting, unless it is not reasonably practicable to do so. This, again, will give the EWC sufficient time to consider the proposals and to prepare its questions and opinions. It is very costly to convene an EWC exceptional meeting and the aim should be for the consultation process to be completed by the end of that meeting. By this, we are not saying that this should be mandatory, but perhaps the Guidance should say

this should be the normal presumption, although there may be unusual circumstances where this is not reasonably practicable.

19 At the end of any exceptional meeting consultation, if, for good reason, the EWC is not able to give its opinion by the end of the exceptional meeting, they should be required to do so within two weeks of the end of that meeting again, unless there are exceptional reasons why this is not possible, in which case the opinion should be delivered within a further 2 weeks following the exceptional meeting.

20 We suggest that the Guidance could expand on Reg 5A(3) by stating that video and/or audio conferences may be appropriate for exceptional EWC meetings, but that the annual meetings should be physical meetings (unless the EWC and management agree otherwise). In our experience, for those multi-nationals that are operating in 20+ countries within the EEA, it is very difficult to arrange physical meetings on a day that everyone (including all of the employee representatives) can attend for an exceptional EWC meeting. Many companies are also operating under significant costs constraints The consultation process can happen faster and more dynamically if there is provision in the Guidance to allow for video or audio conferences.

21 Under Reg 5A(4)(a), we suggest that the Government adds in the words *"or select committee"* as being able to be informed or consulted by management, for exceptional meetings.

22 We believe that Reg. 5A(5) should be amended along the lines just referred to above (in paragraph 19) by being more prescriptive in timescale. It is important that there should be a presumption that the EWC's opinion will be given at the end of the meeting, unless it is not reasonably practicable to do so, in which event it should be delivered within 2 weeks of the exceptional meeting.

23 It is unclear from the TICE Regs. and the consultation paper whether the Government proposes for there to be follow up meetings between EWC and management at which management responds to the opinion of the EWC, or whether the Government intends to adopt the "French model", whereby the EWC simply delivers its opinion to management, but there is no obligation on management for there to be a further series of meetings to discuss the formal opinion by the EWC. This could either be covered in the TICE Regs or in the Guidance. In this context, we repeat our comment above relating to the considerable costs of having follow up meetings and this interruption to business. We consider that an interpretation of the meaning or "consultation" as enunciated by the High Court in the modified collieries closures cases (*R. V. British Coal Corporation ex partie Vardy and ex partie Price*) is not appropriate, and that the "French model" is more appropriate. This is not to suggest that there is not any consultation under the French model but, rather, this normally occurs during the meeting which is prior to the formal opinion being delivered to management In any event the Directive is not drafted on the basis that there will be further consultations on the opinion, but that the delivery of the opinion is the final act of the consultation process.

Question 4: Should the phrase "parties concerned" refer to the Special Negotiating Body"?

24 The reference Art. 4(3) of the Directive to *"parties concerned"* is slightly curious. If it were intended to mean the Special Negotiating Body (SNB) then it would have been simple to say so. We have given some thought as to whether this may, therefore, have been intended to refer to the social partners generally. However, given the large number of social partner organisations that exist, we do not think it sensible or feasible for management to be required to notify all of them. Further, we do not think that this is the intention of the

amendment in the Directive. Similarly, we do not think it appropriate for management should be required to select which work or organisation to inform. We have, therefore concluded that the most appropriate interpretation of the Directive is that the words "parties concerned" is, in fact, intended to mean just the SNB. If this is Government's intention it would be helpful for the TICE Regs to confirm this.

Question 5: Has the Government identified the correct point at which information must be provided and a suitable mechanism for ensuring that the information is provided in a timely manner?

25 Art. 4(3) appears to envisage that the information is given before the SNB negotiations commence. This is because this is information necessary to allow the SNB and central management to have the information relevant to decisions on the structure and composition of the EWC as part of their negotiations. Therefore, by definition, the TICE Regs should provide that such information must be provided at the latest by the commencement of the SNB negotiations. We think that Reg 16(4A) reflects this in its wording and we think it not necessary to include a strict time limit - it is inherent that this information must be provided before the negotiations begin.

26 However, our experience is that it requires a significant effort by companies to gather the relevant information and it will be most unfortunate if this held the start of the SNB negotiations. Therefore, if the Government does choose to include a more specific time limit, it will be sensible to specify that it should be provided in a reasonable time before the first meeting with the SNB but, if that is not reasonably practicable, it should be provided as soon as is reasonably practicable thereafter.

27 The combined effect of Regs 16(4A) and 21(A)(1) is that information must be provided "*at such time … to enable the recipient to conduct*

a detailed study". We consider that the reference in Reg 21(A)(1)(C) is inappropriate and not required by the Directive. In the context of information given to the SNB about average numbers of employees, is not necessary for the SNB to then take a detailed study of that information nor does the Directive require this. The reference should, therefore be only to Reg 16(4).

Question 6: Has the Government provided the correct enforcement mechanism? If not, how can this provision be enforced?

28 As the Government is aware, it is necessary that the TICE Regs provide an effective and a deterrent sanction. In the context of large multi-national restructuring where management fails to consult properly with its EWC, we do have some doubts as to whether the maximum fine of £75,000 now meets that test. In any event, in line with normal practice, we believe it should be up-rated to either £100,000 or £125,000.

29 We think the more effective remedy that the TICE Regs afford management is the obligation to comply with an order of the CAC. Since these orders have the same status as the order of the court (with contempt of court proceedings), we believe this is a very effective remedy.

30 However, the CAC has no power to force non-compliant companies to reverse actions, which they have already taken - e.g. a major divestment or closure etc. It may, therefore, encourages companies to effect restructurings extremely quickly and simply be prepared to pay the £75,000 as the "cost" of a rapid restructuring programme. We believe that the Government should consider the efficacy of the remedies where the "horse has already bolted", as is applicable in other jurisdictions.

31 We do not agree that the CAC is a better forum (than the EAT) for dealing with issues of compliance (or not) with a negotiated EWC agreement or the subsidiary requirements. In our experience, the EAT is more used to dealing with cases involving failure to consult properly than the CAC (an issue which the EAT frequently considers in the context of collective redundancy and TUPE consultation. In addition, if under the proposed scenario, an application is made to the EAT for a default penalty to be imposed, the EAT would have to hear all the relevant evidence again to decide whether it is appropriate to award a penalty and the size of that penalty. We, therefore, consider it to be more efficient (and less costly to all concerned) if the EAT dealt with both the issue of whether or not there has been a breach of an EWC agreement or the subsidiary requirements and whether or not a default penalty should be awarded.

Question 7: Is the Government's interpretation of the role or expert at SMB meetings correct?

32 We agree with the Government's proposals in paragraph 5.18 of the consultation paper. We consider that the Directive envisages that the SNB (and indeed the EWC itself) should be in direct communication with management and that the expert should provide a support or advisory role only to the EWC/SNB. In our experience, there has been a misunderstanding some experts as to their role and it would therefore be helpful to provide some guidance on this point.

33 We also recommend that the position of the expert as described in para 5.18 of the consultation paper should also be replicated for the purposes of the subsidiary requirements.

Question 8: The Government has suggested a flexible approach to the way in which national and transnational consultations are linked. Is this the most effective way to implement this provision? If not please suggest an alternative approach.

34 Whilst Reg 19D provides some structure to the relationship between EWC and local employee representative bodies, we believe it would be helpful (and indeed necessary) to address the more difficult central issue: whether the local consultation process must/can be delayed until the completion of the EWC process, or whether they can run concurrently? It is a question of timing. Since, under current laws, the local process may be one of negotiation (rather than consultation) - for example on collective redundancies - giving the EWC priority over the national/local employee representative bodies may create a difficulty for the commencement of those local/national consultations. We believe that the Government should make clear what the timing relationship should be. There are a number of possibilities:

(a) the national employee representatives processes cannot start until the EWC has given its opinion to central management;

(b) the national employee representative bodies can start their process ahead of the EWC consultation; or

(c) both EWC and national level consultations can start and run concurrently.

35 We believe that option (c) is preferable. This is because, under local laws, local management may be in breach of local laws for not starting consultation earlier once a proposal is put forward at the EWC level and, in reality, the reconciliation of interest (e.g. the need

to make redundancies at all) and the social plan are actually determined at local level. We recommend that it should be permissible for EWC and national level consultations to start at the same time and continue concurrently. We believe this creates the right balance in terms of timing and where the real substance of consultations on the restructuring really takes place at local level.

36 We think the use of the word *"national"* employee representatives is not appropriate in Reg 19D. On one interpretation, it could be said that this only applies where there is a national level body of employing representatives (as compared with a site or regional consultation body). It should be made clear that this reference includes site or divisional employee representative bodies as are appropriate.

37 The formulation of Reg. 19D suggests there need to be lines of communication between the EWC and the "national employee representative bodies". We believe that it would be clearer to specify that the relevant level of management at national/local level should consult on those matters that concern the local employee representative body.

38 Reg. 19D(1)(b) refers to the respective competencies of the employee representative bodies and which "relate to transnational matters". This is somewhat circular. For example, where a collective redundancy programme is announced across several countries, the positioning of the consultation at the EWC is dealt with from a transnational perspective, not a local perspective. Therefore, the local implementation of the matters which are the subject of discussion at local level are not for the EWC - but for the local employee representative bodies. Similarly, when the matter reaches the local employee representative bodies, the issues cease to be transnational because, they have now been localised. Therefore, the

consultation at local level should not relate to transnational matters, but to the local implementation or application of the matters that have been discussed at the EWC level and which apply to it being implemented at local level.

39 We also believe that Reg 19D should only apply to exceptional matters which are discussed at an exceptional EWC meeting. We do not believe that the matters discussed at an annual meeting should be covered by Reg. 19D, since the nature of the annual meeting is more in the shape of "state of the business" report rather than a proposal to effect substantial changes at work organisation or contractual relations.

40 We believe that the structure of the Government's flexible approach is correct. Namely, that it is left to the social partners to agree the degree of interaction between the EWC and local employee representative bodies. But in the event that it is not sufficiently covered, or the subsidiary requirements apply, then the default rules in 19D apply.

Question 9: Is the Government correct to require balanced representation only "so far as is reasonably practicable"

41 We do not believe that it should be mandatory for the "balance representation" to be comprised in the SNB or the EWC itself. We believe that there should only be a requirement for the social partners to have regard to it. Indeed, it is not management's place to tell the employee representatives in each country who they should nominate/elect to represent that country on the SNB/EWC. In addition, where a "first fly pass" of the representation balance of the SNB/EWC employee representatives shows an imbalance, whilst management can suggest to the relevant employee representatives that they should consider making adjustments to ensure a more balanced representation, management cannot enforce this. Local

laws generally gives power to local employee bodies or to employees to elect representatives, and management interference is prohibited. It is plainly impractical and inappropriate for central management (or even local management) to tell local works councils, trade unions or employees that they ought to change the person they have just elected or nominated. In addition, this could result in race or sex discrimination claims where the individual originally elected or appointed is forced to stand down. Since it is a matter purely within the scope and responsibilities of the employee representative bodies, this "obligation" should be imposed upon them and not upon management. In summary, we believe that the "reasonably practicable" test imposes a too high a burden on the social partners because, in reality to get gender equality on the SNB or EWC is not always practicable. We believe that this obligation should only require the social partners to *"have regard to"* the desirability of balanced representation.

42 Apart from those items which we have indicated in our Response (see paragraphs 43,45,51 and 55), we do not believe that new legislation is required on the scope of the requirements for a valid negotiated EWC agreement. The current process for negotiating EWC's and their contents seem to be working well - as is illustrated by the noticeable lack of litigation on this area.

Question 10: Do you have any further comments on the scope of EWCs and the Government's plans for implementing the requirements of a valid EWC agreement?

43 We agree with the Government's approach in limiting the definition of "transnational" in the way it has. If it had adopted the text in the Recital 16, this would have widened considerably the scope of EWCs to the extent that almost anything could be postulated as being "transnational".

Question 11: Is the Government correct to interpret the duty to represent collectively the interest of employees as a stand-alone obligation? If not please state how, if at all, this provision should be implemented.

44 This highlights a serious question which needs to be addressed. what exactly are the duties of EWC representatives? Whilst we appreciate that this provision in the Directive is probably aimed at reminding EWC representatives that they should act in the interests of all of the employees covered by the EWC and not just those in their own country or of the trade unions who are the bodies nominating them, as currently drafted, the wording of Reg. 19A seems potentially very wide. Reg. 19B(2) supports a wider role. We think it would be helpful if the guidance spelt out what are, at least for those EWCs operating under the subsidiary requirements, the duties of EWC member. In addition, it may be helpful that the matters to be covered by a negotiated EWC agreement should also specify the duties of EWC members. The Directive, whilst not explicit, appears to envisage that the role entails preparing for, attending and debriefing official EWC meetings with management and communicating with national employee representatives from their own countries. Whilst this issue was not contentious in the early periods of EWC, in the last five years, some EWC members and/or experts have suggested that EWC members have other ongoing duties between meetings - e.g to meet regularly. This is particularly the case in relation to select committees. Whilst it makes sense for the social partners to specify the duties of EWC members in a negotiated EWC agreement, it would be helpful if the guidance could do a similar role in relation to where the subsidiary requirements apply. In any event, the contents of the subsidiary requirements are often very influential in relation to the contents of a negotiated EWC agreement.

45 One interpretation of the combined effect of Regs 19A and 19B is that, since the EWC members have an obligation to represent the interests of all employees covered by the EWC, this means that they have the right to visit and meet with employees and employee representative bodies in countries other than their own - therefore widening the original perception of EWC activities. We do not consider that this is the intention behind the Directive, and indeed it would cut across the rights and responsibilities of the national employee representatives. In that regard we would point out that, while the EWC representatives are generally appointed by national employee representatives, that will not always be the case (eg where there are several local works councils or trade unions in different parts of the group within a country).

Question 12: Is the Government correct not to specify how the EWC should inform employees of the outcome of EWC discussions, taking into account the varied needs of different work places?

46 We suggest that it is best to let the social partners decide between themselves in negotiated EWC agreements how the workforce should be informed of the outcome of EWC meetings. This should be contained in the list of issues to be covered by a negotiated EWC agreement. For EWC's operating under the subsidiary requirements, we would support a flexible approach. However, there still needs to be a default rule - perhaps with the guidance recommending a joint communication or the absence of a joint communication putting responsibility on management to circulate a factual outcome of the EWC meeting to the workforce. The reason we recommend responsibility should be laid on management is to minimise a risk of accidental leakage of confidential information which has been given to the EWC. Once leaked, the damage has been done and it is difficult to be repaired. The Guidance could also recommend that in that situation for management sent out the factual summary, they should discuss this with the EWC select committee, prior to its dissemination to the workforce.

47 The guidance could also usefully indicate alternative methods of communication to the workforce - such as notice boards, bulletin boards, employee letters, intranet or meetings.

48 The TICE Regs. also need to provide for report back facilities to a local works council and other employee representative bodies who have an existing duty of confidentiality in respect of information provided by management. This could be dovetailed into the statutory duty protection for confidentiality in Reg 23.

49 Para 76 of the consultation paper says that the EWC issue should have the means to notify the workforce about its "activities". These

words are potentially very wide, and we suggest that since the EWC activities are centred around EWC meetings and their outcome, the report back role should only apply to the outcome of EWC meetings, and not general EWC activities. This is because, under the Directive, EWC activities are linked to meeting with management annually or to deal with a specific exceptional event, thus triggering an exceptional meeting.

Question 13: Is it correct to apply the duty to provide employees with feedback to EWC as a single entity, rather than to individual EWC members?

50 We recommend that the report back should be organised through the EWC as a whole. This is essential to minimise the risk of mixed messages on the outcome of EWC meetings and so avoid confusion. We also suggest that the Guidance might recommend that before the document is sent out, the EWC/select committee pass it by management to ensure that there is no accidental leakage of confidential information. The Guidance could also usefully state that such reports (whether by management or the EWC) should be within the spirit of the duty of cooperation required by the Directive and the Regulations, and therefore should be factual and not be inflammatory or defamatory.

Question 14:Is the Government correct in its interpretation of the "means required"?

51 The new Directive uses the words "*the members of the [EWC] shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of employees …"*. We think that these words are potentially very wide because different people will have different views on what are the "means required" and so there is scope for dispute. There should be an element of

proportionality or reasonableness - both of which we consider are appropriate in this context.

52 We recommend that the list of matters to be covered by a negotiated EWC agreement should include, the facilities and means required rather in terms of "what is reasonable". It would be helpful if the Guidance could give further details on what is covered. This will be particularly important for those undertakings operating under the subsidiary requirements.

53 Our comments above link back to those we have made in paragraph 43 in relation to the duties of EWC/SMB members.

54 We do, however, have some concern if management is required to fund an EWC to pursue litigation against it. Clearly it is important that the EWC should have the ability to enforce its rights if management is in breach of the EWC agreement or the subsidiary requirements. However in the current draft there is no cross limitation or restriction on the EWC in pursuing litigation where its case is very weak or vexatious. The current proposal would seem to cover full indemnity legal and other costs. We do not consider this to be a proportionate balancing of the interests between the social partners and could, in some cases, encourage unnecessary litigation because the EWC would have no risk in not being successful in that litigation. Fortunately, at present, in the UK at least, there is negligible litigation on EWCs - which suggests that most of them are working reasonably well. However, the proposed changes in the application of the obligations to inform or consult do raise with them an increased risk of litigation where the parties disagree over the extent of the information, the timing of the consultation, etc. We recommend that the Government consider some process for filtering the financial support for EWC claims so that only those, which have at least a reasonable prospect of success, are funded - particularly by the

employer. We suggest that one solution may be to require negotiated EWC agreements and subsidiary requirement EWCs to be supported by a policy of litigation insurance, paid for by the employer. The insurance companies will then provide some degree of filter for claims which have merely been used for industrial pressure or which are weak. The safeguard will be provided because the insurance company to be unwilling to cover those claims, unless an independent solicitor or counsel has advised that the have reasonable prospects of success. We believe that this is a more balanced position.

Question 15. The Government intends not to specify who is responsible for determining what training should be given to SNB and EWC members

55 We recommend that the TICE Regs should make clear that the provision of training is subject to the requirement that it is appropriate, proportionate and relevant to the duties of EWC members. It should also make clear who is to pay for the training - we assume this will be management.

56 For negotiated EWC agreements, the scope of the training should be left to the social partners to decide between themselves. For those undertakings operating under the subsidiary requirements, we recommend that the training should be appropriate, proportionate and relevant and the Guidance should recommend that it should be discussed between the social partners. The presumption could be similar to that which applies to the choice of the appropriate collective bargaining unit in the unit recognition claims under Schedule A1 of TULCA 1992 - i.e. if the training proposed by the EWC is regarded by the CAC as relevant, proportionate and appropriate, then although there may be other equally appropriate training, the proposal by the union should take priority. This will give some

greater degree of balance. Again, the guidance could usefully describe what should be the contents of the training although this does not need to be prescriptive.

Question 16: Is the current level of maximum fine effective and dissuasive?

57 Although there has in practice been very little litigation, our experience would suggests that in major cross border restructuring, £75,000 is not an effective deterrent and in many cases is not dissuasive. In some cases, it is less than the cost of calling an EWC meeting. If the appropriate figure in 1999 was £75,000, we consider that at the very least, it ought to be uprated to somewhere between £100,000 and £125,000. But we still wonder whether such a figure is really dissuasive when the financial implications of a restructure run into millions of pounds.

58 The Government may wish to consider whether it is worth imposing a daily fine which increases each day the failure continues after the ruling that there has been non-compliance (after, a fair period of time for the employer to get its "house in order"). Alternatively there may be an argument where (as in the Netherlands), it is appropriate to impose criminal sanctions for exceptionally severe and blatant breaches. However, one of the difficulties in applying criminal sanctions on management is deciding which individual is responsible. We think that in practice, a fine or default penalty on the central management legal entity is probably the only practical way forward, but we think that the level of fine should be substantially increased. This is particularly so where action has been taken by management which cannot be "undone" and perhaps, the appropriate way forward is to look at a two tier system: a basic penalty plus a daily fine in all cases, with an additional tier of a penalty where it is not possible or practicable to "wind back the clock" to make management go

through the proper consultation process that it should have done in the first place.

Question 17: What practical issues have you experienced in the operation of Europe Works Councils?

59 In some EWCs, we have noticed a mismatch of expectation of the role of EWC between its members and management. In many cases, the EWC members are already members of local work councils and, therefore, they see the EWC role as merely a European wide equivalent of their activities locally with their local works councils. Of course, the underlying statutory framework and roles of local works councils are different from the framework of the EWC. To some degree, this is a matter of education and the social partners reaching a common consensus as to how EWC's should operate. That should be encouraged. However, as per our comments in relation to paragraph 43 above, we think this stems from a misunderstanding of the duties and role of the EWC itself. The Guidance could play an important role in helping to educate both social partners on the role of the EWC and the duties of EWC members.

60 We think that a number of the current practical issues have been helpfully addressed by the Government's consultation paper. These include:

(a) the role of experts;

(b) the interaction between the EWC and local employee representative bodies - although as we indicated in paragraph 33-40, this does not go far enough;

(c) Independent research has indicated that EWC's tend to be seen by most workers as somewhat remote and irrelevant to their day to day working lives. This is partially addressed by the requirement of a relationship between the EWC and

employee representative bodies – for example, the consultation on those matters of organisational change and in contractual relations. But these issues would normally be addressed in consultation at local level anyway. To a large extent, our experience mirror independent research in that it suggests that most workers see EWC as irrelevant to them. We do not think it is possible to change this because their local works council or other employee representative bodies deal with matters affecting their daily lives. This is a perception issue, which is difficult to change without undermining the rights and prerogatives of local works councils or other employee representative bodies.

61 There is a view commonly held by employee representatives that, in the EWC process, management has already made up its mind to implement, for example, restructuring programme and that the EWC is merely a process of allowing employees to have their say, through their representatives. Although it is probably implicit in the legislation, we think that it may be helpful for the TICE Regs to state that, where this is reasonably practicable, the consultation and information process will take place before final decisions are made by management. The Guidance might also helpfully explain that, a recommendation or provisional decision by a Board of Directors, for example, to proceed with a transnational restructuring will not be regarded as a final decision, if it is stated to be subject to applicable consultation at EWC and local levels.

62 Many multinationals that have a parent company outside the EEA (e.g. the US) make corporate decisions on acquisitions and disposals etc at the non-EEA corporate head office level in which the European management have little or no say. We think that the TICE Regs should recognise this fact of life and make it clear that, although relevant information should be given to the EWC in relation to the

corporate HQ's decision regarding such activities (e.g. the fact of an acquisition or disposal), consultation on that decision is not applicable at the EWC. However, the local implementation and consequences of those global corporate decisions are a matter for consultation with the EWC.

63 The EWC Directive (and the TICE Regs) seem to be drafted on the basis of an old corporate organisational model - namely that there is a single company in each country and there is (sometimes) a European headquarter holding company. That latter company may well be a subsidiary of a global parent company. However, in the last seven years or so, multinationals have been organising themselves so their structure is not country based, but based on operational divisions and lines of business which span countries and in respect of which decisions are made globally - e.g. at the global headquarters of a division which would be located, often, outside the EEA. The EWC structure (particularly in the subsidiary requirements) does not fit this more dynamic organisational structure within most large multinationals - it is based on a country-by-country structure. Of course, where the parties are able to negotiate an EWC agreement, these lines of business structures can be reflected in that agreement. But in the absence of such an agreement, the current subsidiary requirements are not particularly helpful. This is because there may well be a dominant site or establishment in a particular country, which means smaller lines of business are not represented at all. Of course the Directive's reference to "balanced representation" may well seek to cover this but, in practice, only with the consent of the sitting employee representatives. Again, it may be helpful if the guidance can provide some assistance where a undertaking or group has a number of global lines of business operating within it, how each of these lines of business can be covered on the EWC. This is particularly difficult where there is a

dominant line of business and so, if the normal rules for the election or nomination of employee representatives are followed, a small division or business would never get anyone appointed or elected.

Question 18: Any other views on the way the regulations have been drafted?

64 We have nothing further to add to our comments elsewhere in this Response..

Question 19: Any comments on the impact assessment and annex G?

65 The only comment that we have is that, from our experience, the cost of running EWCs are considerably higher than contained in the impact assessment. The annual cost of running an EWC is, we believe, in the region of £400,000 and £500,000 per annum with individual meetings costing about £100,000. This, or course, excludes the value of management time to spent in organing, preparing for and attending such meetings.

Question 20: Is the central arbitration committee the correct court to hear all complaints under these regulations?

66 We believe that the EAT should retain its jurisdiction to hear cases concerning whether or not an EWC agreement or the subsidiary requirements have been triggered and for breaches of EWC agreements or the subsidiary requirements. We do not believe that the CAC has a relevant experience in dealing with failures to consult - whereas EAT clearly does in dealing with cases, a failure to consult under TUPE and section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. Since failure to consult in the EWC context will typically cover the same scenarios, we consider it would be extremely helpful to have the benefit of the EAT's experience in these cases. Further, in the event that an application for a default penalty

is made to the EAT, it would have to hear the evidence again to decide on whether it was appropriate to award any default penalty at all and the size of that penalty. We believe it would be more efficient and cheaper if these matters were heard together by the EAT. We can see no advantage of transferring EAT's current jurisdiction (apart from the awarding of default penalties) to the CAC and, indeed, believe that it would not be beneficial to do so.

Question 21: Is it appropriate to introduce a three month time limit for application to the CAC under Reg 21 TICE 1999 but not under Reg 20?

67 We see no reason not to apply the three month time limit for both Reg 20 and 21. In particular we see no reason why there should not be a time limit for dealing with applications under Reg 20. We believe that it should be fairly apparent to interested parties whether or not there is a breach of Reg. 20 has occurred. We recognise that there may in unusual cases, be exceptions, and therefore think that the appropriate approach should be a three-month time limit, with an "just and equitable" safeguard to deal with any new situations where it is appropriate to extend the time limit.

Question 22: Is the High Court the correct body to award penalties in Northern Ireland?

68 Yes.

12 February 2010

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