THE EMPLOYMENT LAWYERS ASSOCIATION'S RESPONSE TO THE UK DEPARTMENT FOR BUSINESS INNOVATION & SKILLS' CALL FOR EVIDENCE ON EU PROPOSALS FOR A POSTING OF WORKERS ENFORCEMENT DIRECTIVE

This Response is set out as follows:

1. INTRODUCTION (INCLUDING DEFINITIONS)

1.1 Introduction

The Employment Lawyers Association is an apolitical group of specialist employment lawyers and includes those who advise and represent in Courts and Employment Tribunals both employees and employers. ELA has approximately 5,900 members. 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.

A working party was set up by the International Committee of ELA under the chairmanship of Juliet Carp of Speechly Bircham LLP to consider and comment on the Department for Business Innovation & Skills' call for evidence on European Commission proposals for a Posting of Workers Enforcement Directive. ELA's Response is set out below. A full list of the members of the working party is annexed to this Response.

This Response is set out in the order of the questions set out in Annex C of the Call for Evidence and those questions have been re-stated in the first sub-paragraph of each of paragraphs 4 to 13, below for convenience. For the reasons set out below, ELA has first (at paragraph 3) offered some brief legal commentary on the way that the Posted Workers Directive is currently implemented in the UK with a view to putting the Proposed Directive into context and, in particular, to highlight the legal significance of the Proposed Directive for UK laws.

1.2 **Definitions**

For convenience, the following definitions have been used in this Response:

"Call for Evidence"	The UK Department for Business Innovation & Skills' call for evidence in relation to the Proposed Directive.
"*Duncombe*"	*Duncombe & Ors v Secretary of State for Children, Schools and Families (No 1) [2011] UKSC 14, Duncombe and Others v Secretary of State for Children, Schools and Families (No 2) [2011] UKSC 36.*
"ECJ"	European Court of Justice.
"Home" and "Host"	The Member State from which an employee is posted, and to which the employee is expected to return at the end of the posting, is referred to as the "Home" Member State. The Member State to which an employee is posted, and where he will work during the posting, is referred to as the "Host" Member State. Reference to "Home" and "Host" is consistent with terminology normally used by international businesses with mobile staff and global mobility advisers, who might also for example refer to a "Home" country employer or "Home" or "Host" company.
"*Luxembourg*"	ECJ decision *Commission v Luxembourg C-319/06*.
"Member States"	The Member States of the European Economic Area.
"Proposed Directive"	The proposed Posted Workers Enforcement Directive, subject of the Call for Evidence.
"PWD"	The current Posted Workers Directive 96/71/EC.
"Response"	This Response of ELA to the Call for Evidence.
"*Serco*"	*Serco Limited v Lawson [2006] UKHL 3.*
"SME"	Small and medium-sized enterprises/businesses.
"*Ravat*"	*Ravat v Halliburton Manufacturing and Services Limited [2012] UKSC1.*

2. EXECUTIVE SUMMARY

2.1 Benefits of clarity and consistency

Clear laws are particularly important in the context of international assignments because the costs of seeking legal advice and litigation are often disproportionately high where more than one jurisdiction is involved. Even where legal expense is not a significant constraint it can be difficult to source or give clear practical legal advice quickly where laws are ambiguous and/or only accessible via lawyers in another jurisdiction. It is ELA's view that these difficulties present a barrier to mobility within the EU and contribute to inconsistencies and gaps in the level of employee protection offered through the EU. ELA considers that the introduction of a new directive to clarify the way that the PWD applies could provide clarity in some areas, in particular to help employees, employers, enforcement agencies, Courts and advisers correctly identify employees who are covered by the PWD. It would be helpful if definitions could be applied consistently in other international legal contexts, e.g. pensions, tax, social security etc and in domestic legislation and it would be sensible to consult with specialists in those areas before any text is finalised. (See paragraph 4 below.)

2.2 *Luxembourg*, Articles 3(1) and 3(10) PWD and UK employment rights

ELA would like to draw attention to *Luxembourg* and to Articles 3(1) and 3(10) of the PWD which may currently be misunderstood in the UK. The correct interpretation of these Articles is important as if it becomes clear that a) the UK is not permitted to provide employment protection beyond the matters listed in Article 3(1) (particularly protection on dismissal) to employees who are posted *to* the UK and b) the UK is required to offer termination-related protection to those who are posted *from* the UK, then the criteria for determining whether a worker is "posted" could in future become very significant for a large number of employees who work in the UK or who are posted abroad by UK businesses. (See paragraph 3 below.)

2.3 Information on employment laws

ELA's view is that proposals to make information on applicable mandatory employment laws more readily accessible would assist employers, employees and advisers in containing costs and reduce delays, mistakes and unnecessary disputes, i.e. reduce barriers to mobility and ensure more consistent treatment of employees. The information should ideally cover each Member State's employment laws in a similar format in English and the information should be easily located in one place on the internet, perhaps by a collection of links to information posted on national sites. (See paragraph 5 below.)

2.4 **Limits on Home country employer registration requirements etc and information on postings**

ELA's view is that limits on such requirements are likely to assist businesses wishing to invest in a new Member State.

By contrast businesses might consider compulsory minimum administrative arrangements along these lines in Member States unhelpful. Including any minimum requirements in legislation might also introduce a degree of inflexibility i.e. this might be an area where the principle of subsidiarity should be applied. Those representing employers and employees may take different views in that regard.

Requirements for Home and Host country returns to public authorities on postings would be onerous for business and the benefits for employees are currently unclear, save that arrangements of this sort will be necessary if labour authorities are to monitor postings more broadly. (See paragraph 6 below.)

2.5 **Joint and several liability**

ELA considers that it does not, without consulting the wider ELA membership, have sufficient direct experience of challenges faced by the construction sector to comment with any precision on the practical impact of proposals for joint and several liability for that sector. ELA has, however, commented on some of the related technical legal issues, for example the practical reality of making and defending employment claims where there is more than one relevant jurisdiction. (See paragraphs 7 and 8 below.)

2.6 **Labour inspections**

ELA has highlighted additional practical burdens that will fall on UK authorities and UK businesses that post employees abroad if proposals for *broad* labour inspections are implemented. The proposals may have a heavier impact in the UK than in some other Member States, given that the UK currently does not have provision for broad employment inspections. Burdens could be reduced if focus were restricted to health & safety and national minimum wage compliance. However, the desirability of inspections is essentially a political matter on which ELA is unable to comment and employer and employee perspectives are likely to differ. (See paragraph 9,10 and 11 below.)

3. **LEGAL CONTEXT: *LUXEMBOURG* AND ARTICLES 3(1) AND 3(10) PWD**

3.1 **Regulations on governing laws and jurisdiction**

As a general observation, European regulations relating to governing laws and jurisdiction are relatively clear and are generally helpful and workable from an

employment law perspective. The regime relating to mandatory laws is in contrast very difficult to navigate - even for lawyers - and ELA supports efforts to make the European (and wider) legal framework more effective. It is, of course, the application of mandatory employment laws that is most relevant to individual employees and their employers.

3.2 Why UK lawyers assume PWD provides a floor not a ceiling on protection

The PWD was implemented in the UK in 1996 by way of repeal to various clauses in legislation that had clarified the way that our employment laws apply to employees who work overseas.

At the time the PWD was implemented it was almost universally assumed by lawyers that employees who are posted to the UK from overseas would be subject to our employment laws in the same way as our laws apply to employees who are recruited here in the ordinary way, i.e. employees who work here regardless of origin are subject to our employment laws. Generally, this assumption is still made and ELA is not aware of any existing UK case law that suggests that this assumption is incorrect.

It is worth bearing in mind that at the time the PWD came into force in many cases a "level playing field" did not apply to posted workers (or indeed employees in different circumstances) in other Member States. So, for example, some countries implement mandatory employment protection via mandatory collective agreements that apply only to particular groups of employees, e.g. based on role, geography, sector etc. There may be more potential for posted workers working in those Member States to fall outside the net. The assumption amongst most UK employment lawyers at the time the PWD was introduced was that, as our legislation already applied consistently to employees posted to the UK, little was required here in order to implement the PWD.

3.3 UK case law has not yet addressed *Luxembourg*

Since repeal of the relevant pieces of clarifying legislation there have been a number of legal decisions, including at House of Lords and Supreme Court level, that seek to address the question of when employees who work abroad are covered by British employment laws, and some related technical issues, the key decisions being *Serco, Duncombe* and *Ravat.* Analysis of those cases is beyond the scope of this Response. However, it should be noted that, possibly due to the particular facts of cases that have arisen, so far as ELA is aware, no significant UK Court has addressed the question of how *Luxembourg* should be applied to employees posted to or from the UK. It is noted that UK Courts are required to take account of ECJ decisions.

3.4 **Article 3(1) standards held to be "*exhaustive*"**

In *Luxembourg* the ECJ held that the Article 3(1) PWD list of standards to be applied consistently to posted workers was "*exhaustive*". Article 3(1) lists areas where posted workers are to be treated in the same way as Host country workers, including in relation to things such as working time, minimum pay, holiday, health and safety, maternity etc. By way of context this list (which ELA understands is not the subject of renegotiation between the Member States) has some logic as it covers specific areas where posted workers might undercut local employees (i.e., where there may be an employer cost impact) leaving other matters such as dismissal laws to the Home country.

The ECJ confirmed that Article 3(10) PWD allows Member States to provide <u>more</u> protection to employees by way of "*derogation*" only where the derogation is applied in a non-discriminatory manner and where there are "*public policy*" grounds for doing so. The meaning of "*public policy*" is not clarified in the PWD though in *Luxembourg* the ECJ indicated that this must be interpreted strictly, i.e. only applying to serious things like slavery. (It would be possible for the Proposed Directive to offer some clarity there.)

3.5 **Examples - postings to the UK**

The following are offered by way of practical examples to illustrate the potential impact of the application of *Luxembourg* in the UK:

3.5.1 Suppose an employee is posted temporarily from Paris to London for two years. ELA would expect the PWD to apply. Does this mean that the employee cannot claim unfair dismissal in England if he is dismissed during the posting? *Luxembourg* suggests that the employee should be covered by a) French dismissal laws and b) English Article 3(1) PWD protection (i.e. English minimum wage, health & safety laws etc.) but not English dismissal laws or French Article 3(1) PWD protection.

3.5.2 Suppose an employee is posted temporarily from New York to London for one year. Should the US Home employer be treated in the same way as the French Home employer above? Does this mean that the American employee can be employed "*at will*" in the UK during that year?

3.5.3 Currently, most UK employment lawyers would assume that both the US and French employee above can make unfair dismissal complaints here because they work here. Any severance negotiations/terms would generally take that risk into account, along with the risk that claims may also or instead be made in other countries, i.e. we would naturally assume that the individuals enjoyed "the best of both worlds" rather than that

only one country's laws apply to them. This may not be correct in the light of *Luxembourg*.

3.5.4 Note that earlier service in the Home country with the Home employer can count towards the qualifying period for unfair dismissal so that reducing the period during which a posting might be considered temporary will not remove this problem.

3.6 Postings from the UK

Serco does acknowledge (*obiter dicta*) and *Ravat* confirms that an employee "*posted*" from Britain to work abroad for the purposes of the employer's business can be covered by British employment laws on termination of employment. The way that this has been interpreted is not entirely consistent with the Commission's proposed clarification of "posting" for PWD purposes. Most of the key UK cases concern employees who were posted/performed duties *outside the EEA* so facts were not directly within scope of the PWD. However, the relevance of the PWD was acknowledged in those, and other, cases and it would be helpful if UK legislation and case law applied a consistent definition of "*posting*" regardless of the Host country. This could easily be dealt with by the UK authorities if and when the Proposed Directive is implemented in the UK but the appropriate form of that clarity will depend on the wording of the Proposed Directive. There is currently little helpful ECJ case law to guide us.

3.7 Clarity and the Proposed Directive

The current state of uncertainty regarding who can and cannot make employment claims (particularly dismissal-related claims) in British Employment Tribunals and Courts is unhelpful for both employers and employees and leads to wasted time and expense for both parties before, during and after postings. Considerable time is also wasted by Employment Tribunals in considering preliminary jurisdictional points.

It is important to draw attention to the fact that limited litigation on these points does not mean that these are trivial issues or that problems do not often arise in practice. There are a huge number of international postings in and out of the UK and recent commercial surveys, for example those carried out by global mobility consultancies, point to increasing rather than decreasing volume. The focus on intra-EU migration also downplays the significance of postings for the UK as UK postings to and from other countries are very high in volume. Again this is more important if the UK must, or chooses to, operate consistent criteria for all Host/Home countries, including where they are not technically within scope of the PWD.

The costs of international litigation are very high compared to the costs of running domestic cases and it is only in exceptional cases that the parties are likely to litigate.

In practice, significant disputes are usually resolved through negotiation. The outcome is likely to depend on the willingness of an employer to "overpay" to make the problem "go away" or on how far the parties are prepared to push things. This is not a satisfactory or "fair" situation, particularly for employees with less bargaining power.

It would be difficult for the UK to pass effective legislation to deal with this uncertainty unilaterally as without reliable guidance on the meaning of the PWD there would be a risk that any definitions offered by the UK alone could fall out of line with European case law, which would create further (probably worse) uncertainty. The Proposed Directive offers a welcome opportunity to provide some clarity at a European level, though the question of whether the "whole package" is "worth it" is essentially a political one.

4. ELA'S RESPONSE TO QUESTION 1

Question 1: *Are the criteria in Article 3 (see Annex B) likely to bring more clarity to what classifies as a posting for your organisation / members? Are you able to provide examples of situations where such criteria would have been either helpful or unhelpful? Is there anything that should be added to the lists? Are there any criteria which cause you / your members concern?*

Criteria generally

4.1 ELA considers that from an employment law perspective it would be helpful to set out criteria.

4.2 As noted above, the criteria may also be relevant to other situations where a definition of posting is used. So, for example, this may be relevant to the application of cross-border pensions legislation.

Whether Home employer established in Member State

4.3 The first paragraph of Article 3 of the Proposed Directive seeks to help determine whether the Home employer is established in a Member State. This is important because the current PWD applies where there is a posting between one Member State and another and one of the indicators of whether a posting is covered by the PWD is the existence of a genuine link between the employer and the Member State from which the posting takes place.

4.4 The criteria proposed by the EU Commission require the competent authorities to look at whether the Home employer "*genuinely performs substantial activities other than purely internal management and/or administrative activities*" and then provides

a non-exhaustive list of relevant elements to consider. That approach is generally helpful.

4.5 None of the proposed criteria causes ELA particular concern, although it might be helpful to include additional criteria as follows.

4.5.1 The criteria do not mention internal management issues as being relevant to the above analysis. We consider that the existence in the Home country of:

(i) Home management responsible for hiring, managing and dismissing staff; and

(ii) a Home board of directors (or equivalent),

should be expressly included as indicators that the undertaking is genuinely established in the relevant Member State if such establishment is important.

4.5.2 Further additional criteria that might be included to demonstrate substantial activities in the Home Member State, might be:

(i) the degree of autonomy that local management has over issues such as the strategy of the undertaking and arrangements for disciplining staff;

(ii) whether the Home employer trains staff;

(iii) the existence of locally negotiated collective bargaining agreements, staff association agreements, employee representatives or similar; and

(iv) the existence of locally determined employment policies and procedures.

"Temporary" posting

4.6 The second paragraph of Article 3 of the Proposed Directive seeks to clarify the issue of whether the work being carried out by the posted worker is temporary. This is important because under Article 2(1) PWD, a posted worker is one who carries out such overseas work "*for a limited period*".

4.7 The EU Commission provides some helpful non-exclusive factors to assist in the determination of whether the work is "*for a limited period*". However, there are places where the text slips into generalities which then beg further questions and where more concrete guidance would be helpful. For example, the Proposed

Directive states that "*the work is carried out for a limited period of time in another Member State*" (Article 3, paragraph 2(a) of the Proposed Directive). ELA offers additional comment as follows.

4.7.1 Could a cap be put on the duration of an assignment after which it clearly ceases to be considered a posting? The cap might logically be set at two years, on the basis that this is consistent with social security rules. Practically, a two year cap might also work well. It would be sensible to consider the practical impact of a cap on the length of time the PWD might apply on employees whose PWD cover expires. Following expiry ELA would expect the employee to receive the normal Host country employment protection. Whether this might be significant for employees assigned to the UK will depend on the correct application of *Luxembourg*.

4.7.2 Although a rigid time limit might operate arbitrarily it would give more clarity. This would help willing employers (who will most likely be in the majority) comply and reduce the expense and uncertainty of securing appropriate advice for both parties where this is needed. Grey/ambiguous areas create difficulties for multi-national businesses, are a barrier to mobility and put employees (who are much less likely to have legal advice) at a disadvantage. In ELA's view, a degree of arbitrariness will usually be better for all parties in these situations than uncertainty.

4.7.3 ELA suggests that it would be better to link any cap on duration to the actual length of assignment rather than contract length or expectations regarding future assignment length. This would give the parties more legal certainty and it would be relatively easy for the start date for the period to be contained in relevant documents so that both parties' expectations regarding legal protection are clear from the outset.

4.7.4 Employees with more bargaining power can often secure contractual protection to offset loss of security but cannot easily push for this if they do not know what protection applies and for how long.

4.8 Article 3, paragraph 2(d) of the Proposed Directive refers to whether "*travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done*" However, business-related expenses may not have a bearing on the nature of the overseas posting. Whilst ELA agrees that the reimbursement of other travel, board and lodging expenses over the period of the assignment may potentially be relevant this will typically not be a clear indicator of posting. This is because in practice decisions regarding the structure of

remuneration, benefit and expense arrangements for posted workers are often tax-driven.

4.9 To a lawyer temporary "*activities*" as referred to in the PWD appears to mean something different from a temporary assignment. So for example, a series of temporary assignments may be undertaken to carry out permanent activities. This language is clearly deliberate although we are puzzled by why it would be appropriate to exclude a replacement posted worker from protection. Perhaps this is an attempt to mirror social security rules? Article 3, paragraph 2(e) of the Proposed Directive refers to "*any repeated previous periods during which the post was filled by the same or another (posted) worker*" Lack of detail could give rise to difficulties of interpretation. For example it may assist if:

4.9.1 gaps of a stipulated duration between postings, say 6 months, meant that the earlier posting could be ignored for the purpose of the assessment; and

4.9.2 clarity could be provided around the term "*repeated*" - for example could the Directive refer to one or two or more previous period(s).

Consistency

4.10 The National Minimum Wage Act 1998 operates differently from the Employment Rights Act 1996, in which as highlighted in paragraph 3 no explanation is given about how the Employment Rights Act might apply to posted workers. S1(2)(b) of that National Minimum Wage Act by contrast offers protection where a worker "*is working, or ordinarily works, in the United Kingdom, under his contract*". This terminology may also be relevant to new pensions auto-enrolment criteria which use similar wording to this legislation. Consistency in this area is something that the UK could address unilaterally regardless of whether the Proposed Directive is implemented.

4.11 As noted above, posting of employees abroad and the period of posting can be relevant to other technical matters such as pension, income tax and social security many of which are covered by both European and UK rules that refer specifically to "posting". ELA would strongly urge fuller consultation with specialists in these related areas and efforts to ensure consistency between these technical areas.

5. ELA'S RESPONSE TO QUESTION 2

Question 2: *What experiences have you / your members had in finding information on the terms and conditions applicable to posted workers in other Member States? Would you welcome making this information more easily accessible? Which*

languages and what form (online or leaflet) would be most appropriate for your organisation / members?

5.1 The information should ideally cover each Member State in a similar format in English in a way that allows easy location via the internet, perhaps with links on an EU site to sites maintained by each Member State. This would allow for easy updating and access from overseas and assist employees and businesses who prefer to check things on line. Leaflets would not be a useful resource for lawyers although they might be useful if used strategically to draw attention to employment rights, such as minimum wage or health and safety concerns, to vulnerable employees. It will not be possible to produce information that will be sufficient to guide employers for compliance purposes, but basic information will nonetheless help both parties.

5.2 This sort of information on employment protection in different Member States is currently accessible to lawyers from a variety of sources, most of which entail cost. The information typically varies in quality and requires some interpretation. Good quality basic free information would help raise standards, reduce costs, speed commercial decisions and help promote the use of consistent terminology and more focused questions for more complicated matters.

5.3 From an employee or business perspective basic information in an accessible language would help, even where advice is required subsequently.

5.4 In addition to the impact on UK employees, businesses and advisers, it is worth considering the benefits for those located in other non-EU countries, e.g. US and Asian investors.

5.5 ELA's International Committee is also concerned with the issue of accessibility and is currently working with a number of national employment lawyers associations, including the American Bar Association, on a project to share employment law-related information via the internet with employment lawyers and others internationally. ELA considers that these initiatives are complementary.

6. ELA'S RESPONSE TO QUESTION 3

Question 3: *What experiences have you had of administrative requirements and / or notification systems when posting workers from the UK to other Members States? What impact would this article have on UK businesses looking to post workers to other Member States or on posted workers themselves?*

Employer registration requirements

6.1 ELA's view is that limits on such requirements are likely to assist businesses wishing to invest in a new Member State.

6.2 By contrast businesses might consider compulsory minimum administrative arrangements along these lines in Member States unhelpful. Including any minimum requirements in legislation might also introduce a degree of inflexibility i.e. this might be an area where the principle of subsidiarity should be applied. Those representing employers and employees may take different views in that regard.

Information on posted workers

6.3 ELA is aware that in some other Member States, there is already an operating system for notifying information on posted workers. The Proposed Directive would place a greater administrative burden in the UK in this regard where such arrangements are not already in place.

6.4 ELA is not able to comment on the specific requirements of other Member States. However, Article 9 of the Proposed Directive would affect UK employers where they post employees to Host countries with significant notification requirements as they would then have to comply with the requirement to notify information relating to the posted workers.

6.5 The impact of the requirements regarding information contained in the Proposed Directive may, however, have less effect. ELA is not competent to advise on statistics but the following may be worth investigating:

6.5.1 In the main Member States to/from which a high volume of employees are posted to/from the UK (e.g. France) appear to already operate procedures providing for notification of information related to posted workers and these requirements may already go further than the proposals set out in the Proposed Directive.

6.5.2 It appears that typically Member States where such a system is not currently operated appear to be countries with which the UK does not exchange a high volume of posted workers so the introduction of new systems may not have a very great impact.

7. ELA'S RESPONSE TO QUESTION 4

Question 4: *What evidence is available on existing problems for posted workers in the UK construction sector? What evidence is available to demonstrate that a joint and several liability provision would address compliance and enforcement problems?*

7.1 Working Party members can offer only the following general comments from a legal perspective.

7.2 Building workers who work for small sub-contractors are generally at risk of abuse and many individuals who are not posted may not be working in their Home country either. It is not clear why posted workers should be given favourable treatment.

7.3 If the concern is about enforcement/potential sub contractor insolvency, another option might be to require sub contractors in vulnerable sectors where insolvency is common to take out insurance cover in relation to core employment claims but the costs of this may be prohibitive. Some protection is already offered in the UK from public funds in relation to wages etc on employer insolvency.

7.4 If joint and several liability is an option most lawyers would advise an individual to claim against both parties. This may lead to some duplication in legal costs, for example it may not be appropriate for client and contractor to use the same lawyers. Apportioning liability will also have cost implications.

7.5 A simple practical example might be a worker posted to Britain from another Member State who seeks to enforce national minimum wage legislation. In practice, most sensible advisers would suggest he makes complaints against both parties to a British Employment Tribunal. A Home country court is unlikely to be able to easily determine a claim relating to British legislation

7.6 Factually complicated situations may arise where there are chains of contractors and sub-contractors, creating the prospect of further uncertainty and litigation.

7.7 Commercially, where a contractor is engaged on a project the contractor's client (assuming he is aware of these issues and advised) is likely to consider whether to seek protection from the contractor in respect of potential claims. This might take the form of an indemnity, i.e. the contractor might agree in the commercial contract that it will compensate the client if the client is held liable for the contractor's default. Compliance might be made a condition of the contract. The arrangements would inevitably create more paperwork, inconvenience, insurance issues etc for business but the net effect may be that the client company pushes for better contractor compliance, in a similar way to the way public sector procurement terms influence contractor behaviour. ELA considers that this may have benefits in terms

of increased Home employer/contractor compliance as well as offering an additional opportunity for remedy, e.g. where the contractor is insolvent or cannot be found. Whether those benefits outweigh the downsides is a political matter on which ELA does not consider it appropriate to comment.

7.8 It is noteworthy that some Member States already have a system of joint and several liability and their experiences must be relevant.

7.9 ELA's practical concerns include the following:

7.9.1 How will joint and several liability operate in practice? (ELA has not analysed how this operates in practice in those countries where joint and several liability already applies.)

7.9.2 How do the jurisdictions compare in terms of equality of remedy and proceedings? For example, what are the requirements for proof/evidence and is there any judicial discretion as to apportionment of joint and several liability?

7.9.3 Would different enforcement processes apply?

7.10 In many cases the consultation paper appears to refer to anecdotal evidence to support findings. For example, the Commission's Impact Assessment states at paragraph 3.2.1.5 that "*anecdotal evidence indicates that posted workers are not adequately protected in disputes concerning individual employment conditions*". At 3.2.1.5 reference is made to *"a lack of enforcement of posted workers' rights*" with conclusions that this "*may*" contribute to deteriorating work conditions and "*may*" lead to unfair competition. ELA has some concerns about the quantitative and qualitative data on which various premises are being advanced. The impact assessment states "*a system of joint and several liability seems to be an effective and appropriate tool…*". The basis for this conclusion is unclear.

8. ELA'S RESPONSE TO QUESTION 5

Question 5: *What are likely to be the practical implications of the introduction of joint and several liability in respect of the rights of posted workers in the UK? What evidence is available to support your conclusions from the UK and other Member States? The proposal focuses on the construction sector but evidence related to other sectors would also be helpful to us in understanding the implications of the proposal.*

8.1 ELA notes that joint and several liability may have an impact on jurisdiction as well as which party is subject to legal action and re-iterates comments made elsewhere in this Response regarding the impracticality of a Court or Tribunal seeking to apply another country's employment laws.

8.2 Extension of joint and several liability to other sectors would naturally raise similar issues in practical terms about different rules of court, limitation, insurance etc as for the construction sector.

8.3 Joint and several liability will inevitably create more "work" overall, particularly for lawyers, and raise employer costs, and possibly employee costs too. ELA would urge careful consideration of expected benefits before decisions are made in this regard.

8.4 One option might be to focus on the sector identified as having real issues (i.e. construction) first and review the outcome before researching and considering extension to other sectors where there may not currently be a significant problem to be addressed.

9. ELA'S RESPONSE TO QUESTION 6

Question 6: *What is your view of the due diligence provisions in Article 12? Are the Commission's suggestions for due diligence appropriate and proportionate for what it aims to achieve?*

9.1 This seems a reasonable proposal subject to some practical considerations. As it would excuse liability, it would be best to understand to what extent there would need to be objective or subjective knowledge arising from the due diligence i.e.:

9.1.1 Would it be a reasonable opinion of the person undertaking the due diligence or an objective standard that there was no issue?

9.1.2 What is the extent of the search that is expected?

9.1.3 What are the areas of concern to show it was a reasonable and proportionate search?

There is a suggestion in the Impact Assessment that this may encourage companies to adopt preventative measures aimed at a risk selection of sub contractors. ELA is not entirely clear on how this would work in practice.

9.2 On a more mundane level:

9.2.1 What will the nature of due diligence be?

9.2.2 Are there typical issues it should look for?

9.2.3 To what extent will the authorities lend support to any due diligence enquiry?

9.2.4 Would any materials be determinative/conclusive?

9.2.5 What happens if knowledge arises thereafter once the exercise has been undertaken?

9.3 There appear to be a considerable number of practical questions raised by the suggestions. The consultation papers also raise concern about apparent lack of concrete evidence.

10. ELA'S RESPONSE TO QUESTION 7

Question 7: *Overall, how will your organisation / members be affected by the proposal? Please explain and specify the impacts, giving indications of the likely costs / benefits involved and providing as much detail and evidence as possible. If impacts cannot be monetised, please try to quantify in other terms (e.g. the amount of business time spent dealing with administrative requirements).*

10.1 The Proposed Directive will have an impact on work for employment lawyers. In some respects it may create more work for employment lawyers, in others less. For example:

10.1.1 Clarification of the meaning of wording used in the directive should help reduce the costs of legal advice.

10.1.2 Making clear up to date employment protection information available in an accessible format is likely to reduce work for employment lawyers (and costs for clients).

10.1.3 Information and notification requirements and proposals for labour inspections will create more need for advice for businesses who wish to comply with their obligations.

10.1.4 Proposals for joint and several liability are likely to lead to businesses in the construction industry requiring more advice.

11. ELA'S RESPONSE TO QUESTION 8

Question 8: *Do you agree with the European Commission's assertion that the Enforcement Directive will have a "positive impact on the competitiveness of SMEs [small and medium-sized businesses] and micro-SMEs"? Has the Commission adequately taken into account the needs and circumstances of SMEs in the UK?*

11.1 No, save that free information which makes it easier for businesses to understand the way that they must operate when they operate elsewhere in the EEA will help. However, this is not likely to have significant impact on competitiveness.

11.2 The work/cost/time saved because more free information is made available is likely to be dwarfed by the greater administrative burden imposed as Member States formalise their information gathering duties and engage in policing companies with a view to imposing fines.

11.3 The possibility of the introduction of fines seems disproportionate and a disincentive to cross-border activity.

11.4 A positive impact on the competitiveness of SMEs and micro-SMEs might be expected if an improved and clear regulatory environment can be created to improve the predictability of the business environment. SMEs are in particular affected by the lack of transparent information regarding the applicable working and employment conditions in the Host Member State since they have little capacity to investigate the applicable rules themselves. Thus, companies should have lower costs of investigating applicable working and employment conditions in the Host Member State, and will benefit from the ability of SMEs and micro-SMEs to exploit the possibility of providing services in new markets. Since SMEs and micro-SMEs are especially affected by any kind of administrative requirements that create excessively onerous obligations for foreign undertakings they will benefit from package B which will limit Member States' opportunities to impose such measures. Package B provides guidance for Member States with regard to inspections. SMEs and micro-SMEs with a good record will benefit from inspections based on a risk assessment.

11.5 Effective inspections, improved administrative cooperation, cross-border execution of fines and joint and several liability may contribute to fairer competition and a more level playing field. Since SMEs and micro-SMEs are in particular sensitive to unfair competition they may benefit indirectly from these provisions.

11.6 Overall ELA does not agree that the Commission has adequately taken the situation of SMEs and micro-SMEs into account. Given the economic context the additional burdens proposed appear disproportionate, though this is clearly a subjective assessment.

12. ELA'S RESPONSE TO QUESTION NINE

Question 9: *What are your views of the estimates the European Commission make in their Impact Assessment on the likely impacts on the UK (summarised in Annex A)? Are the estimates of the costs and benefits for the UK accurate?*

12.1 ELA considers that both the numbers of UK posted workers and likely implementation costs are higher than indicated.

13. ELA'S RESPONSE TO QUESTION TEN

Question 10: *Do you / your members have any comments or evidence about posting of workers relevant to the draft Directive, which have not been covered in the questions above?*

13.1 Luxembourg

We draw your attention again to the uncertainty created by the *Luxembourg* case. This is relevant to the application of individual employment laws (as well as the collective rights dealt with in the companion draft Directive that is not the subject of this Call for Evidence.)

13.2 Employees who work in more than one country

An increasing number of employees are working accross EEA borders, for example spending two or three days working for a Host company in London, and two or three days working remotely and the weekend at home in Paris. It may be helpful if some clarity could be given to their situation. The importance of this clarity would depend on the interpretation of *Luxembourg*. It is possible that poor wording might make these situations more, rather than lessm complicated to manage.

13.3 Sham Arrangements

In some places the consultation documents refer to "sham" arrangements where postings are doubted as being genuine. There are many situations in which being able to establish "posting" might offer benefits to employee or employer, e.g. in relation to tax or immigration. However, from an employment law perspective alone ELA struggles to understand the rationale in trying to establish a "sham" arrangement. It seems less likely that this sort of complicated arrangement would be established simply to avoid employment rights. If the concern about the impact of "sham" arrangements is wider it would be sensible not to consider developments from an employment law perspective in isolation.

13.4 Taking legal action in a Host country

A significant challenge for posted workers is the difficulty of taking and defending legal action in an unfamiliar country. Most employees (and employers) would feel more comfortable if they were able to litigate in their Home country. From a practical perspective though it is almost impossible to envisage an effective mechanism for enabling a Home court or Tribunal to make decisions on most Host employment laws. The systems are too diverse. Moreover, the scale of legal advice required from multiple jurisdictions would put employees at a disadvantage in that situation. Consider the situation of an English Tribunal trying to apply French

minimum wage laws without the help of both English and French lawyers. Who would need to pay those lawyers? ELA's view is that given the lack of an effective solution it would be better to leave this issue "as is". ELA does not, however, wish to downplay the advantages of facilitating *enforcement* in the Home country. If mechanisms for recovering debts can be improved that would be helpful.

14. BRIEF CONCLUSIONS

Although some clarification of the PWD would be helpful, it is likely that the Proposed Directive as it stands will also impose significant additional burdens to the UK authorities and UK businesses. Whether potential benefits offered by the current draft in terms of legal clarity are outweighed by potential disadvantages is a political matter on which ELA is not competent to comment.

We hope the above comments are helpful. Any queries in relation to this Response may be addressed to the ELA Working Party c/o juliet.carp@speechlys.com. Please copy any correspondence to ELA's Administrator lindseyw@elaweb.org.uk

Employment Lawyers Association, 26 July 2012

Annex

List of the ELA working party members

Juliet Carp of Speechly Bircham LLP (Chair of ELA's international Committee)

Duncan Bain of Morgan Cole LLP

Chris Bracebridge of Covington and Burling LLP

Alain-Christian Monkam of Monkam Solicitors

Henry Clinton-Davis of Arnold & Porter LLP

Jonathan Exten-Wright of DLA Piper