



## ELA International Committee: Brussels update

JULIET CARP, MING HENDERSON, STEPHEN LEVINSON

*ELA's International Committee visited the European Commission on 3 June. This article is intended to share the insights gained during those meetings. Participants were the authors, Ming Henderson, Stephen Levinson and Juliet Carp.*

This article does not reflect the views of the committee or the European Commission, or any representative of either, and should not be relied on for giving advice to clients. It is intended for ELA members only and they are requested to treat the content with care given the spirit in which it was offered. For more information, please refer to [www.europa.eu](http://www.europa.eu).

### **Context**

The current Commission is near the end of its 'mandate'. Given pending elections and possible adjustments to the Commission's focus, new proposals are now unlikely to progress before the end of this year. In addition, economic difficulties, pressure for deregulation across Europe and lack of consensus between member states limit opportunities to progress existing proposals. This context has a significant impact on developments highlighted below.

### **Atypical workers**

The Commission is aware of concerns about 'zero hours' workers but currently has no proposals to deal with them. Discussions regarding agency workers continue.

### **Bankers' bonuses**

There was some discussion of imminent new regulations to cap the proportion of 'variable pay' by reference to 'fixed pay' for more broadly defined financial services 'code staff'. Comment was offered on issues still under consideration; for example, it is assumed that fixed pay will not be determined by reference to a rate applicable at a given time but by reference to pay over the bonus year.

### **'Burdens on business'**

The Commission (remarkably) is trying to reduce the 'burden' of regulation on business; for example, by identifying the 10

most burdensome pieces of law. Top candidates include: the Posted Workers Directive, the Agency Workers Directive and the Working Time Directive.

### **Data protection**

It is proposed that a new regulation (ie an instrument intended to be directly effective that member states do not need to transpose into national law) will replace the current Data Protection Directive. The proposed regulation is intended to promote consistency between member states and make things easier for business and not to create new law. There was concern over development of 'myths' about the new regulation. The Commission stressed that fines are intended to be proportionate and that a cap of €1 million on fines does not mean that maximum fines will apply to all businesses in all circumstances. The concept of 'expressed consent' is intended to clarify current requirements and promote legal certainty rather than impose an additional burden.

### **Equality and women on boards**

A draft directive has been proposed suggesting a 40% target for the proportion of non-executive directors from the under-represented sex on public company boards, often referred to as 'boardroom quotas'. Some explanation of the motivation for the current form of the draft directive was offered, particularly the intention to encourage a wider search for candidates. In reality this is not a proposal for a 'quota', although that term may have been used deliberately to spark debate and draw attention to the issue. The 40% figure has its roots in social research into the number of women required to have an effective impact on board decisions. In practice, the requirement would only be to choose a member of the under-represented sex in preference if candidates were equally suitable. It was acknowledged that the proposed directive has very limited teeth

*'insight offered by the Commission is useful to help us develop responses to UK Government consultations and explain European law to clients'*

and that, in reality, European law may constrain the potential scope of wider initiatives. The Commission does, nevertheless, expect the new directive to have a significant positive impact.

Little other development in equality laws is anticipated in the short term, given the political context. In particular, we understand that there are no proposals to:

- introduce concrete requirements for pay transparency;
- interfere with age discrimination case law currently allowing member states a wide 'margin of appreciation' in approach to justification (for example the recent UK *Seldon* decision);
- press for continued progress with the Pregnant Workers Directive; for example, to increase minimum maternity and paternity pay to 20 and two weeks' full pay respectively and introduce a European 'right to request flexible work' on return from leave;
- introduce a carers' directive; for example, to help employees care for elderly family members;
- offer additional protection to any new category of worker; for example, related to Roma or caste. There are no plans to extend boardroom 'quotas' to other protected categories.

Proposals to extend equality protection in access to goods and services are progressing but necessary evaluation processes take time and no new legislation is expected soon.

### **'Fitness check'**

The Commission has been conducting a 'fitness check' (review) of the effectiveness of the Posted Workers Directive, Working Time Directive and information and consultation obligations. Results are likely to be published in the next few weeks. The report is unlikely to include concrete proposals for change to 'hard law'.

### **Posted Workers Directive**

The current proposals for a new PWD are subject to discussion. Despite more than 800 amendment proposals to the draft enforcement directive, there appears to be broad consensus regarding content, including newly listed criteria for determining whether a worker is to be regarded as 'posted'. Two areas remain subject to more substantial debate:

- proposals for joint and several liability for contractors and sub-contractors in relation to posted workers in the construction sector; and
- whether the new list of member states' permitted administrative restrictions on posting workers to their

territory should be a 'closed' list (listing all restrictions) or an 'open' list (offering examples of permitted restrictions). There are currently no substantial restrictions of this type on posting to the UK. A closed list is likely to make it easier for UK businesses to post workers to other member states.

There appears to be no intention to align the PWD and social security rules; for example, regarding who qualifies as a 'posted worker', or to cap posting length.

### **Restructuring, redundancies and transfers of undertakings**

There did not appear to be concern about UK amendments to collective redundancy rules made in April 2013. Harmonisation of information and consultation rules in the short term appears unlikely given the context outlined above. However, there appeared to be some enthusiasm for introducing more formalised 'strategic analysis' requirements (for example, regarding longer-term industry impact) before implementation of collective redundancies. A paper is likely to be published shortly in this regard; given the context, hard law in this area seems unlikely in the short term.

### **Working time**

Negotiations between social partners ceased in February. Given the context highlighted above it is impractical for the Commission to make fresh proposals now. In the meantime, UK flexibility to opt out of the 48-hour average working time restriction continues.

### **Summing up**

Insight offered by the Commission is useful to help us develop responses to UK Government consultations and explain European law to clients. However, one objective of ELA's visits is to help develop stronger dialogue between the Commission and employment lawyers before directives are adopted. We recognise ELA's limited ability to influence law-making at a European level, given we do not represent any significant Europe-wide interest group. However, the committee is pleased to report that, in addition to discussions with ELA, the Commission is now also in dialogue with the European Employment Lawyers Association and the International Bar Association. It is hoped that those discussions, together with our own, will contribute more to effective law-making at a European level, as we hope ELA's responses to Government consultations and dialogue with BIS do at a national level.