CALL FOR EVIDENCE: COLLECTIVE CONSULTATION RULES

Introduction

This response is submitted on behalf of the Legal and Technical Committee of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body and public body advocate for the private equity and venture capital industry in the UK. More than 430 firms make up the BVCA members, including over 200 private equity, mid market and venture capital firms, together with over 200 professional advisory firms. The BVCA Legal and Technical Committee includes amongst its objectives the shaping of policy and the implementation of policy to ensure that it accommodates the needs of the British venture capital and private equity community.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

Response

Q 12. Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them

The BVCA does not consider that there is any need for further clarification regarding the meaning of 'establishment'.

Q 15. What are the advantages or disadvantages of the current 90 day minimum consultation period work, in your experience (a) for employers (b) for employees? In particular, what is the relevance of employees' statutory or contractual notice periods?

The BVCA considers that the principal disadvantage of the 90 day rule for employers is that it is too long in the typical business cycle. Businesses need to be empowered to act more quickly to maintain their competitive edge.

Furthermore, the BVCA considers that employees do not welcome the 90 day rule as it prolongs the uncertainty for them. In most cases, the anecdotal evidence would suggest to the BVCA that the affected employees want the redundancies to proceed as quickly as possible so that they can receive their redundancy payment and move on, particularly where they have found another job. Indeed, in situations where the consultation lasts for 90 days, it is the BVCA's experience that cynicism tends to creep in on the part of many employees, who would prefer the employer to proceed with redundancies rather than prolong consultation unnecessarily.

Q 16. What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs?

The additional cost of a 90 day minimum time period is the cost of employing the employees for the extra 60 days. The situation is aggravated by the fact that, following European case law, it is no longer possible for the employer to serve notice to run in parallel with the collective consultation. In the BVCA's experience, this inability to serve notice can be used by the appropriate

representatives as a tactic to secure additional pay for employees by drawing out the collective consultation for the full 90 days, even when, in reality, there may be nothing left to consult about.

Q 17. If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used?

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The BVCA is doubtful that agreement would be reached on a voluntary basis.

Q 19. What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum time periods when 100 or more redundancies are proposed to 60, 45 or 30 days?

The BVCA is supportive of one fixed period of consultation of 30 days across the board for all redundancies where 20 or more dismissals are proposed.

The principal advantages of this approach are: (i) it will save employer's cost; (ii) it will enable employers and employees to achieve certainty more quickly than is currently the case; (iii) it will introduce consistency.

It will be noted that 30 days is the period laid down in the Directive and that the UK Government has, therefore, gold plated this element of the legislation. When the 90 day period was first introduced, it may have been a sensible timescale in view of the practical difficulties of organising the workforce to enable consultation to take place. However, the modern day workforce is geared up for instantaneous communication and therefore 90 days now seems to be excessive.
It is the BVCA's experience that in most consultation exercises the issues are well covered in the first 30 days and that, thereafter, the subsequent consultations are 'padding', which can result in unnecessary increased costs for the employer.

Furthermore, the modern day workforce is much more 'peripatetic' than previous generations and, in the BVCA's view, would welcome the opportunity to take their redundancy payment and leave.

Q 22. What would be the advantages or disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies?

The BVCA is not supportive of a graduated threshold as it would over-complicate matters and, in any event, longer periods of consultation are not considered to be attractive for either employers or employees.

Q 23. The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

The BVCA finds the question of how TUPE fits with the collective redundancy legislation very problematic.

In particular, where the transferee envisages 20 or more redundancies following the transfer, the current position appears to be that the transferee is not able to begin the collective consultation until he becomes the employer of the transferring employees (i.e. at the point of transfer).

Furthermore, the employer cannot serve notice to terminate the contracts of employment until the collective consultation is completed. The result is that an employer has to budget for 30 or 90 days' post-transfer consultation in addition to any termination costs, which can represent a significant barrier to acquisitions proceeding. Furthermore, because the potential redundancies will have been disclosed as part of the transferee's measures, and often consulted about informally, the post-transfer consultation has the tendency to come across as something of a sham exercise.

It seems to us that the solution is either: (i) to allow the transferee to commence the collective consultation pre-transfer; (ii) to enable the transferor to consult on the transferee's behalf and for the transferee to be given 'credit' for the transferor's consultation; or (iii) for the TUPE transfer to be a special circumstance entitling the transferee to foreshorten the collective consultation post-transfer. In the BVCA's view, allowing the transferee to commence collective consultation pre-transfer (and

penalising the transferor if he does not allow the transferee access to the employees) is the most sensible solution.
Do you have any other comments that might aid the consultation process as a whole?

Notwithstanding the minimum period of consultation, the BVCA considers that employers and individual employees should be permitted to negotiate a dismissal on agreed terms during the fixed period without the employer incurring liability. In this regard, we consider that it should be possible to compromise a claim for a protective award by means of a compromise agreement.
The BVCA would welcome clarity over whether the collective redundancy legislation is triggered when the employer 'proposes' to dismiss the affected employees (as per TULR(C)A), or when he 'contemplates' dismissing them (as per the Directive).

If the minimum period is reduced to 30 days in all cases, the maximum protective award should be reduced in line with the shorter consultation period.