BIS | Department for Business Innovation & Skills

CONSULTATION

Implementation of the European Works Council Directive 2009/38/EC

NOVEMBER 2009

Contents

1. Implementation of the European Works Council Directive (2009/38/EC)

1.1 This Consultation is seeking your views on the Government's proposals for the implementation of the recast European Works Council (EWC) Directive (2009/38/EC). The Directive was published in the Official Journal of the European Union on 6 May 2009 and Member States have until the 5 June 2011 to implement it.

1.2 The Directive seeks to improve the efficiency and number of EWCs. The Government is keen to ensure that this is achieved in a way that balances the interests of employees and business. To this end the Government is seeking views on its proposed response to issues arising from the Directive including:

- how to approach EWC agreements that are excluded from the provisions of the Directive;
- how to deal with EWC agreements that are adapted following structural changes within the European undertaking or group of undertakings;
- how to handle new definitions within the Directive; and
- how to ensure that EWCs are provided with the "means required" to apply their rights stemming from the Directive.

1.3 The Government intends to create the Regulations as early as possible in order to allow those involved with EWCs or who may wish to set up an EWC to familiarise themselves with the new provisions. The Regulations will not come into force until 5 June 2011.

Your views

1.4 We particularly welcome views from employees, representatives and managers involved in large multinational companies that operate both in the UK and elsewhere in the European Economic Area (EEA). Organisations with their central management in the UK will have most interest but aspects of the Regulations will also apply to those with their central management elsewhere, including locations (e.g. the United States) outside the EEA.

How to take part

1.5 This Consultation document was issued on 19 November 2009 and will close on 12 February 2010.

1.6 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the Consultation Response form and, where applicable, how the views of members were assembled.

1.7 For your ease, you can reply to this Consultation online at http://tinyurl.com/y9hro6o

1.8 A copy of the Consultation Response form is enclosed, or available electronically at www.berr.gov.uk/files/file53670.doc . If you decide to respond this way, the form can be submitted by letter, fax or email to:

Celia Romain
Employment Relations Directorate
Department for Business, Innovation and Skills
Bay 462
1 Victoria Street,
London SW1H 0ET
Fax: 020 7215 6414
Email: EWC@bis.gsi.gov.uk

1.9 A list of those organisations and individuals consulted is in **Annex F**. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

1.10 You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845-015 0010
Fax: 0845-015 0020
Minicom: 0845-015 0030
www.bis.gov.uk/publications

1.11 An electronic version can be found at:
www.berr.gov.uk/files/file52969.pdf

1.12 Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality & Data Protection

1.13 Information provided in response to this Consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

1.14 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

1.15 Questions about the policy issues raised in the document can be addressed to:

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Bay 462
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A copy of the Code of Practice on Consultation is in **Annex E**.

Executive Summary

The Government believes that effective employee involvement is a key component of business success and good employment relations. Indeed, the recently published report *'Engaging for Success: enhancing performance through employee engagement'*[1] identifies strong employee voice as a key enabler of effective employee engagement. European Works Councils form a useful extra layer that helps to keep employees informed, at a European level, of developments in large multinational companies.

This Consultation document seeks your views on the UK's implementation of Council Directive 2009/38/EC on the establishment of a European Works Council (EWC) or a procedure in Community scale undertakings for the purposes of informing and consulting employees (the "2009 Directive"). The 2009 Directive is in fact a "recast" of an earlier Council Directive on EWCs (Directive 94/45/EC - the "1994 Directive"). The 2009 Directive makes a limited number of changes to the 1994 Directive, but it also imports many of its provisions intact. **Annex C** contains the text of the 2009 Directive and highlights the changes which it introduces.

The 1994 Directive was implemented in the UK by the Transnational Information and Consultation of Employees Regulations1999 ("TICE 1999"). The Government proposes to implement the 2009 Directive by bringing in a new set of TICE Regulations ("TICE 2010"). A copy of these Regulations in draft is enclosed at **Annex A**. Respondents should note that the TICE 1999 Regulations will not be repealed, and they will continue to apply, subject to amendments introduced by the 2010 Regulations. The extent to which the amendments will directly affect interested parties will depend on several factors, particularly the dates when any applicable EWC was established and measures taken by parties to revise their EWC arrangements in the two year window between 5 June 2009 (inclusive) and 4 June 2011 (inclusive).

In summary, in implementing the 2009 Directive, the Government proposes to:

- allow pre-existing agreements to continue outside the scope of TICE 1999 as amended by TICE 2010
- allow agreements created or revised between 5 June 2009 and 4 June 2011 to continue to operate under the unaltered TICE 1999 Regulations (subject to limited changes required by the Directive); and
- introduce amending Regulations (TICE 2010) to implement all the provisions of the 2009 Directive. These Regulations will apply to all EWCs established on or after 5 June 2011, and, in certain circumstances, they will also apply to EWCs established earlier

The 2009 Directive was heavily informed by joint advice submitted by the European Social Partners (BusinessEurope, the European Trade Union Confederation, CEEP and UEAPME) and, as a result, it represents a

[1] www.berr.gov.uk/files/file52215.pdf

compromise that balances the interests of business and employees. The Government intends to implement the Directive by ensuring that the new Regulations retain that balance.

The Regulations will apply throughout the United Kingdom.

The Agency Workers Directive (2008/104/EC) impacts on TICE 1999 in two respects:

1) it introduces a requirement on an undertaking to provide information on the use of agency workers whenever information is provided on the employment situation in that undertaking to bodies representing workers; and

2) it contains provision allowing for agency workers to count towards the threshold above which bodies representing workers are to be formed in the temporary work agency that has placed them.

These two aspects of the Agency Workers Directive are relevant to a number of provisions in TICE 1999, for example, where information in relation to the employment situation in an undertaking is disclosed under an EWC agreement or information and consultation procedure. They are also relevant to a number of new provisions introduced by the 2009 Directive, for example, the requirement on management to disclose information to employees or their representatives for the purposes of beginning negotiations to set up an EWC agreement or an information and consultation procedure.

The majority of the provisions of the Agency Workers Directive will be implemented through the Agency Workers Regulations 2010 (currently subject to public consultation)[2]. However, in the interests of legal clarity and ease of reference, the Government proposes that the required changes to TICE 1999 are enacted through TICE 2010.

In addition, the Government has identified certain improvements that can be made to the enforcement provisions within the existing TICE 1999 Regulations. It therefore makes sense to introduce those improvements at the same time as making the changes needed to implement the 2009 Directive. The changes are minor and are designed to improve the procedure for handling cases brought in front of the Central Arbitration Committee (CAC).

This Consultation will be of particular interest to employees, representatives and managers involved in large multinational companies that operate both in the UK and elsewhere in the European Economic Area (EEA). Organisations with their central management in the UK will have most interest but aspects of the Regulations will also apply to those with their central management elsewhere, including locations (e.g. the United States) outside the EEA.

The Government is seeking views on the draft Regulations by 12 February 2010. Responses to the Consultation will inform the final Regulations and will be used to form the basis of a Government's response document to be published in Spring 2010. When responding, please make clear if you

[2] www.berr.gov.uk/consultations/page53060.html

consider that all or part of your response should remain confidential. For more information on confidential responses, please see paragraph 1.13.

Q 1 – Is the Government's overall approach to implementing the Directive the correct one? Please give reasons, as appropriate.

Consultation Questions

Q1 – Is the Government's overall approach to implementing the Directive the correct one? Please give reasons, as appropriate.

Q2 – Will the Government's approach to the adaptation clause cause practical problems when two EWC agreements are merged? If yes, please describe the likely problems and any potential solutions.

Q3 – Should the definitions of "information" and "consultation" be introduced as obligations in a new Regulation? Please comment as appropriate.

Q4 – Should the phrase the "parties concerned" refer to the Special Negotiating Body?

Q5 – Has the Government identified the correct point at which information must be provided and a suitable mechanism for ensuring that information is provided in a timely manner? If not, please suggest an alternative approach.

Q6 – Has the Government identified the correct enforcement mechanism? If not, how can this provision be enforced more effectively?

Q7 – Is the Government's interpretation of the role of experts at SNB meetings correct? If not, please suggest an alternative approach.

Q8 – The Government has suggested a flexible approach to the way that in which national and transnational information and consultation are linked. Is this the most appropriate way to implement this provision? If not, please suggest an alternative approach.

Q9 – Is the Government correct to require balanced representation only "so far as reasonably practicable"? Please comment as appropriate.

Q10 – Do you have any further comments on the scope of EWCs and the Government's plans for implementing the requirements for a valid EWC agreement?

Q11 – Is the Government correct to interpret the duty to represent collectively the interests of employees as a stand-alone obligation? If not, please state how, if at all, this provision should be implemented.

Q12 – 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 workplaces?

Q13 – Is it correct to apply the duty to provide employees with feedback to the EWC as a single entity, rather than to the individual EWC members? If not, how should this duty be applied?

Q14 – Is the Government correct in its interpretation of the "means required"? Please comment specifically on the Government's consideration of what management may be liable for**.**

Q15 – The Government intends not to specify who is responsible for determining what training should be provided to SNB and EWC Members. Is this the right approach? Please comment as appropriate.

Q16 – Is the current level of maximum fine effective, proportionate and dissuasive? If, not, please suggest an appropriate maximum fine.

Q17 – What practical issues have you experienced in the operation of European Works Councils?

Q18 – Do you have any other views on the way the Regulations have been drafted? Please submit any drafting suggestions if you have them (please continue on a separate sheet if necessary).

Q19 – Do you have any comments on the Impact Assessment at Annex G?

Q20 – Is the Central Arbitration Committee the correct court to hear all complaints under these Regulations? If not, please state your reasons.

Q21 – Is it appropriate to introduce a three-month time-limit for applications to the Central Arbitration Committee under Regulation 21 TICE 1999 but not under Regulation 20? Please comment as appropriate.

Q22 – Is the High Court the correct body to award penalties in Northern Ireland?

2. The Proposals

2.1 This section aims to explain how the current requirements as established by TICE 1999 will be affected by the changes brought about by the 2009 Directive. It also describes how the Government proposes to implement each new provision in the Directive.

2.2 The draft TICE 2010 is attached at **Annex A**. Because these draft Regulations relate so closely to the existing TICE 1999 Regulations, a copy of those Regulations is also attached for respondents' convenience at **Annex B**.

3. Exempted EWC Agreements and the Adaptation Clause

3.1 The 2009 Directive introduced provisions that offer opportunities for existing EWC agreements to remain subject to the 1994 Directive (TICE 1999) whilst providing a mechanism for the negotiation of a new EWC agreement or information and consultation procedure where there are significant changes in the undertaking's structure.

Exempted EWC agreements

3.2 Whilst the new Directive seeks to improve the efficacy of EWCs, it does not seek to destabilise existing EWC agreements. The 2009 Directive contains provisions enabling these EWCs to continue to be subject to the same legal framework as now, save for the adaptation provisions concerning significant changes in the multinational undertaking or undertakings concerned. These arrangements apply to the following categories of EWC:

- a pre- existing EWC agreement (referred to in Regulations 44 and 45 of TICE 1999)[3]; or
- an existing EWC agreement created under regulation 17 TICE 1999 which has been revised between 5 (inclusive) June 2009 and 4 June 2011 (inclusive); or
- a new EWC agreement which is signed between 5 (inclusive) June 2009 and 4 June 2011 (inclusive).

3.3 Regulation 2 of TICE 2010 specifies that agreements that fall into the above categories are exempt from the provisions of TICE 2010, with the exception of the 'adaptation clause' (see below) and those Regulations relating to it.

3.4 This means that all pre-existing EWC agreements will operate outside the scope of both TICE 1999 and TICE 2010 (with the exception of the adaptation clause and related negotiation provisions), because these agreements were established before the 1994 Directive (or the 1997 Directive extending it to the UK) took effect.

3.5 All other EWC agreements which were established under TICE 1999 which were either:

- revised between 5 June 2009 and 5 June 2011: or
- signed between 5 June 2009 and 5 June 2011

[3] These pre-existing agreements are known, respectively, as "Article 3 agreements" and "Article 13 agreements". Under Article 13 of the 1994 Directive, agreements in force immediately before the 23 September 1996 are exempt from the provisions of that Directive. Directive 97/74/EC extended the 1994 Directive to the UK and Northern Ireland and under Article 3, agreements in force immediately before the 16 December 1999 are exempt from the provisions of the 1994 Directive.

will continue to be subject to the existing provisions of TICE 1999. (In other words, they will not be subject to the amendments to TICE 1999 which TICE 2010 introduces). However, they too will be covered by the adaptation clause in TICE 2010. It follows that other EWCs established before 5 June 2009, which are not revised in the two year window immediately prior to 5 June 2011, will be subject to the full provisions of TICE 2010.

3.6 For enforcement purposes, should a complaint be brought before the Central Arbitration Committee (CAC) for consideration it is the date that the agreement was signed or revised that will determine which regime the CAC will apply.

Adaptation Clause (Article 13 of the 2009 Directive)

3.7 Whilst the exemptions from the Directive allow certain existing EWC agreements to retain their current legal status, the adaptation clause aims to ensure that all employees are adequately represented in companies that undergo significant changes in their structure. Such changes could be triggered by mergers, acquisitions, de-mergers or sales of part of the business. Whatever the circumstances, the adaptation clause ensures that the composition of EWCs is adjusted to reflect significant changes in the distribution of the multinational's workforce across the EEA.

3.8 Most EWC agreements, particularly those which were concluded more recently, are thought already to include provisions which allow for the composition of the EWC to be adapted. Where such a clause does not exist, or there are conflicting provisions in more than one agreement, and there is a significant change in the company's structure, the EWC agreement may need to be renegotiated to ensure that all employees are adequately represented.

3.9 In order to trigger the "adaptation clause" each of three conditions must be met. These conditions are set out in amending Regulation 12 which inserts a new Regulation 19E into TICE 1999.

3.10 The adaptation clause applies only where:

- the change in organisational structure is significant; and
- there is no provision in the existing EWC agreement(s) to adapt the composition of the EWC or, where such provision(s) exist, there is conflict between them; and
- the employees make a valid request for a renegotiation or the central management initiates a renegotiation themselves.

3.11 The 2009 Directive does not stipulate what constitutes a "significant" change. The preamble to the Directive (at Recital 40) identifies a "significant" change as one brought about by mergers, acquisitions or divisions. However, as there are other situations that may bring about a significant change in the company's structure, the Government does not intend to restrict the adaptation clause by making specific reference to these circumstances in

these Regulations. The Government does intend to make reference to them in guidance.

3.12 The 2009 Directive also does not define what is meant by a ‘conflict’ between relevant provisions. The Government believes that this “conflict” refers to situations where there are conflicting provisions for the adjustment of an EWC's structure. The Government also intends to provide that, where the significant change only involves one EWC that does not have an adaptation provision, the requirement to re-negotiate the agreement is triggered.

3.13 Finally, should the first two conditions be met, the management is required to act to start negotiations only if they receive a valid employee request, though they may start negotiations on their own initiative. This condition is transposed through reference to Regulation 9 of TICE 1999 which sets out what constitutes a valid employee request for the establishment of an EWC. This regulation will also require renegotiations of an EWC agreement or information and consultation procedure to be conducted in accordance with Regulations 10 to 18 TICE 1999 as amended by TICE 2010.

3.14 Whilst the adaptation clause applies to all EWC agreements (including those excluded from other provisions of TICE 2010), it is the Government’s intention to ensure, wherever possible, that existing agreements maintain their status after renegotiation. So, a renegotiated agreement that is subject to TICE 1999 will continue to be subject to TICE 1999 and a pre-existing agreement will continue to operate outside of the scope of both TICE 1999 and TICE 2010. The Government proposes that this should be the case even where, after the conclusion of renegotiations, the provisions in the Subsidiary Requirements apply.

3.15 The situation is more complicated where restructuring involves two or more existing EWCs of different types (for example, an existing EWC agreement covered by TICE 1999 and a pre-existing EWC agreement which is covered by neither TICE 1999 nor TICE 2010). It is not clear in these circumstances what type of agreement should result from the renegotiation. Consequently, the Regulations, in line with the Directive, remain silent on the type of agreement that would result. It is therefore left to the parties in effect to decide what regime should apply to them, though such decisions would be potentially open to legal challenge. The Government understands that this is the approach which parties have adopted with some success under the existing law in the few cases where EWCs of different statuses have merged. The Government would welcome views on the treatment of these difficult, though exceptional, cases.

Q2 - Will the Government’s approach to the adaptation clause cause practical problems when two EWC agreements are merged? If yes, please describe the likely problems and any potential solutions.

4. Definitions of Information and Consultation

4.1 The 2009 Directive amends the definition of “consultation” and introduces a new definition of “information” in line with the joint advice received from the European Social Partners. On closer examination, these “definitions” do not really describe what is meant by the terms “information” and “consultation”, but rather, they create a requirement for the information and consultation to take place in a certain manner and within broad time constraints.

4.2 The Government therefore proposes to introduce a new requirement at amending Regulation 5, which inserts Regulation 5A into TICE 1999, that sets out how information and consultation should be conducted, rather than amend Regulation 2, which deals with definitions.

“Information”

4.3 The 2009 Directive defines “information” as “data”. The rest of the “definition” sets out who is to provide the information, to whom, how, with what content and for what purpose. The Government believes that it would not be particularly helpful to define “information” as “data” as per the definition in the Directive. As such the Government does not intend to introduce a definition of “information”; rather the Government intends to introduce a new obligation for the central management to provide information in the specified manner.

4.4 The Government proposes that Regulation 5A, paragraphs 1-3 create a new requirement that the central management provides information to employees or their representatives, as appropriate, at such a time and in such a way that allows the employees (or their representatives) to examine the subject matter, undertake a detailed study of its possible impact and, where appropriate, prepare for consultation or negotiations with the central management.

4.5 The Government believes that this will implement the intention of the Directive by allowing employees, their representatives, EWC members or information and consultation representatives to consider any information provided.

“Consultation”

4.6 Similarly, the 2009 Directive expands the definition of “consultation”. In implementing this definition the Government proposes that the general definition at Regulation 2 of TICE 1999, which explains what consultation is, is not changed. Rather, we propose that the new requirements setting out with whom consultation should take place and in what manner are included in Regulation 5A(4). This new provision introduces a right for representatives to offer an opinion on the consultation’s subject matter. In order to ensure that this right does not unduly delay the decision-making process, the Government proposes that Regulation 5A(5) requires that any opinion proffered by the EWC be delivered within a reasonable time.

4.7 Finally, regulation 5A(6) limits these definitions of “information” and “consultation” to transnational issues. A new definition of what constitutes a transnational issue is an important part of the 2009 Directive. This is discussed in more detail at paragraph 2.52.

4.8 The draft Regulations amend Regulations 8 and 21 of TICE 1999 to ensure that the new information and consultation requirements are enforceable. The new provisions state that, where information is not provided in line with the new requirements either under Regulation 7 of TICE 1999 or during the operation of the EWC, then the appropriate person may bring a case to the CAC to seek compliance. If the complaint relates to a failure of the operation of the EWC (under Regulation 21 TICE 1999, as amended) a penalty notice may be awarded under Regulation 22 TICE 1999. The Government also proposes that a new Regulation (21A) is introduced into TICE 1999 through amending Regulation 15 to allow for a complaint to be made to the CAC should the appropriate person(s) consider that the new obligation on management to provide the information necessary to begin negotiations with the Special Negotiating Body (SNB) is not carried out in accordance with the new requirements of Regulation 5A.

Q 3 - Should the definitions of "information" and "consultation" be introduced as obligations in a new Regulation? Please comment as appropriate.

5. The Negotiation Procedure

5.1 TICE 1999 requires that, following a valid employees' request or after the central management has decided to establish an EWC, a Special Negotiating Body (SNB) must be established to negotiate an EWC agreement with the management.

5.2 The 2009 Directive introduces a number of new provisions aimed at improving the operation of the SNB.

5.3 The new requirements are:

- A simplified method for determining the composition of the SNB;
- A right for the SNB to hold pre- and post-meetings in advance of, or after, meetings with central management without central management being present;
- The provision of information by management to allow for the start of negotiations; and
- A duty to inform certain European workers' and employers' organisations about the composition of the SNB and the commencement of negotiations.

Simplified method for the composition of the SNB

5.4 The composition of the SNB is determined by the spread of employees across the different Member States i.e. in general, the more employees in one Member State the more employee representatives it will have on the SNB. Under TICE 1999 the calculation states that each Member State with an establishment is represented by one member and further supplementary members in proportion to the number of employees working in the establishments.

5.5 The 2009 Directive has simplified the method for determining the composition of the SNB. It states that each Member State is entitled to one SNB seat for each 10 per cent, or a fraction thereof, of the total number of employees of the undertaking employed in that Member State. In other words, each Member State with an establishment will have at least one seat allocated on the SNB so that the views of the employees in that Member State can be voiced and taken into account.

For example:

EEA state	**% of total employees**	**No. of SNB members**
A	38%	4
B	25%	3
C	32%	4
D	5%	1
Total SNB members		**12**

5.6 The new calculation has been incorporated at draft Regulation 7 and amends Regulation 12 of TICE 1999. A similar method is used in other legislation that requires the creation of an SNB, for example the Companies (Cross Border Mergers) Regulations 2007.

Informing European workers' and employers' organisations of the start of negotiations

5.7 The 2009 Directive has introduced a new requirement that the 'competent' European workers' and employers' organisations are informed of the composition of the SNB and of the start of negotiations. The aim of this provision is to enable these bodies to monitor the establishment of new EWCs and to offer assistance to the negotiating parties by, say, advising on best practice.

5.8 Whilst the Directive does not explicitly set out who is required to inform European workers' and employers' organisations, the Government considers it reasonable to assume that it falls to the SNB as it is best placed to inform others of its composition and of the start of negotiations. Regulation 12(4) of TICE 1999 has been replaced by Regulation 12(3). This Regulation retains the requirement that the central and local management are informed of the creation of an SNB and introduces a new requirement that the European social partner organisations should also be informed of the start of negotiations. This provision also requires information about the composition of the SNB to be passed on to the European Social Partners as well as the current requirement to provide this information to central and local managements.

5.9 The Government proposes to use guidance to explain that the organisations are those social partner organisations that are consulted by the European Commission under Article 138 of the Treaty[4]. To assist in the identification of these bodies, the European Commission has published a list of the organisations that fall within this description[5].

Provision of information to start negotiations

5.10 A right already exists in Regulation 7 of TICE 1999 for an employee or an employees' representative to request information from the management on the average number of employees employed by the undertaking in the UK and in each of the other Member States in the previous two years. This is so that the employee or employees' representative can determine whether they are employed by a Community-scale undertaking or Community-scale group of undertakings, to which TICE 1999 would apply. However, it is not stipulated at what point this information is provided.

5.11 Following the interpretation of the European Court of Justice in three cases[6] concerning the communication of information required to initiate

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF
[5] http://ec.europa.eu/social/main.jsp?catId=522&langId=en
[6] C-62/99 Bofrost, C-440/00 Kuhne and Nagle, C-349/01 ADS Anker GMbH

negotiations to establish an EWC, the 2009 Directive has introduced a new requirement that the central management must obtain and transmit information to enable the commencement of negotiations for the establishment of an EWC or an information and consultation procedure. This obligation applies to the negotiation of all EWCs and information and consultation procedures including those revised or concluded in the two years prior to 5 June 2011, if they are subject to renegotiation after that period.

5.12 The 2009 Directive requires that the information must be provided to the 'parties concerned' and must cover, in particular, information concerning the structure of the undertaking and its workforce.

5.13 The Government proposes that the term 'parties concerned' should mean the SNB and draft Regulation 8(b) inserting Regulation 16(4A) into TICE 1999 is drafted accordingly. The obligation to provide information also applies where the management initiates the negotiations. The Government intends to retain the right given at Regulation 7 TICE 1999 as it is important that employees retain the right to request information to assess whether they are within scope of the Regulations.

Q 4 - Should the phrase the "parties concerned" refer to the Special Negotiating Body?

Q 5 - Has the Government identified the correct point at which information must be provided and a suitable mechanism for ensuring that information is provided in a timely manner? If not, please suggest an alternative approach.

Entitlement for the SNB to meet separately from management

5.14 In order to enable employees' representatives to coordinate their work efficiently and effectively during negotiations, the 2009 Directive introduces a new entitlement for the SNB to meet before and after any meeting with the central management, without the central management's representatives being present.

5.15 This new entitlement applies only to the SNB during the negotiation of an EWC agreement or an information and consultation procedure, and allows the use of any necessary means of communication, for example, the provision of translation. The Government understands that in practice most undertakings already allow for pre and post meetings to take place. Draft Regulation 8 amends Regulation 16 of TICE 1999 to include this new entitlement. Draft Regulation 15 introduces a right to bring a complaint about the negotiation procedure. This includes the right to bring a complaint to the CAC where the management does not allow for pre or post-SNB meetings. This can be enforced through a compliance order and through a fine of up to £75,000.

Q 6 - Has the Government identified the correct enforcement mechanism? If not, how can this provision be enforced more effectively?

Use of experts

5.16 TICE 1999 contains an existing entitlement for the SNB to be assisted by experts of its choice; the cost of one of which must be met by the undertaking. The 2009 Directive has clarified that this expert can attend negotiation meetings in an advisory capacity at the request of the SNB. The Directive seeks to recognise the role that trade union organisations can play in helping negotiate EWC agreements and information and consultation procedures and it expressly states that a representative of an appropriate Community-level trade union organisation could fulfil the role of an expert (though it should be noted that the choice of expert remains one for the SNB to make).

5.17 The Government recognises that pan-European trade union organisations offer significant expertise in this area, but it also appreciates there are other organisations and types of representatives in the UK and across Europe that may also be able to offer advice during EWC negotiations. As such, the Government proposes to amend Regulation 16 of TICE 1999 through draft Regulation 8 of TICE 2010 to include a reference to European trade unions. This Regulation is drafted broadly so that it does not exclude other types of expert.

5.18 Article 5(4) of the 2009 Directive states that experts chosen by the SNB to assist them are allowed to attend negotiation meetings in an advisory capacity where the SNB invites them. Recital 27 of the Directive identifies the role of the experts as providing support to employees' representatives who express a need for it. In this context, the Government considers that the role of the expert at negotiation meetings is to provide advice and expertise to help SNB members to put their point across effectively. This advice may come during the course of the negotiation meeting itself, but the Government considers that this does not give experts the right to act on behalf of the SNB or an individual SNB member at that meeting. In other words, the expert may provide the SNB with advice, but may not speak on its behalf.

5.19 All experts advising negotiation meetings continue to be bound by the confidentiality provisions found at Regulation 23 of TICE 1999, which states that neither the members of the SNB nor any experts are authorised to reveal information provided to them in confidence.

Q 7 - Is the Government's interpretation of the role of experts at SNB meetings correct? If not, please suggest an alternative approach.

6. Content and Scope of an EWC agreement

6.1 The 2009 Directive aims to improve the effectiveness of EWCs. To help to do this the Directive sets out a number of issues that define when an EWC should be consulted and about what. This includes, for the first time, a definition of what is considered to be a transnational issue and a requirement to link national and transnational level information and consultation.

The EWC agreement

6.2 Regulation 17 in TICE 1999 sets out broadly what should be included in an EWC agreement. The 2009 Directive introduces some new requirements and strengthens some of the existing provisions. Specifically, the 2009 Directive includes:

- A new definition of what constitutes a transnational issue;
- A new requirement for the agreement to set out the arrangements for linking information and consultation of the EWC and of national employee representation bodies;
- A new requirement to consider the balance of representation of employees on the EWC;
- A new right to create a select committee where necessary; and
- A strengthened requirement to set out the date of entry into force and the procedure for amending or terminating an EWC agreement.

Defining Transnational issues

6.3 One of the key requirements of the 2009 Directive is that EWCs should be consulted about issues that are transnational in nature. It also requires that the SNB and central management agree how to link information and consultation at a transnational level with national level information and consultation. To address this, the Directive introduces for the first time a definition of ‘transnational’. It states that a matter should be considered to be transnational where it affects the community-scale undertaking as a whole or where it concerns at least two undertakings in two different member states.

6.4 The Government appreciates that this definition was agreed after much careful negotiation. As such, the Government does not feel that it would be appropriate to refine or develop the definition. It is therefore proposed to implement this definition at draft Regulation 4(1)(c) as a write-out from the Directive. Recital 16 to the 2009 Directive states that matters should be considered transnational where they are of importance for the European workforce, regardless of the number of Member States involved. The Government has not stipulated this in the Regulations as it acknowledges that there was not agreement amongst the social partners about the wording and impact of this Recital. Similarly, the Government considers that incorporating

the text of the Recital will not aid legal clarity and will, in fact, create an unduly wide interpretation of what should be considered “transnational”

Linking of the EWC procedures to national employee representation bodies

6.5 Taken together, Articles 6 and 12 of the 2009 Directive create a new requirement that EWC agreements, either newly established or renegotiated from 5 June 2011 onwards, must include arrangements for linking the information and consultation of the EWC with those of the national employee representation bodies.

6.6 The Government believes that to set hard and fast rules on how national and transnational level information and consultation should be linked could create significant practical difficulties. The structure and roles of representative bodies may be very complex and varied. Some may be company-level whilst others are based at the workplace. Some bodies are involved in collective bargaining whilst others may be consultative only. Importantly, some bodies undertake other statutory roles (on, say, business transfers or collective redundancies), and there is a danger than any prescriptive language in TICE 2010 duties may cut across existing statutory provisions The Government proposes that it should be left to the negotiating parties to determine the exact nature of the link between an EWC and relevant national level information and consultation so that it can reflect the structure and operation of the company in question and can give suitable regard to the diverse information and consultation regimes across the Member States in which the company operates. Therefore, TICE 2010 Regulation 12, which inserts Regulation 19D into TICE 1999, is drafted in such a way that the timing and nature of the link between national and transnational information and consultation is flexible.

6.7 TICE 2010 introduces a new Regulation 21B into TICE 1999 to ensure that this requirement is enforceable. The new Regulation provides remedies for certain specified failures of central management, including where an EWC or national employee representation body has not been informed or consulted in line with the new requirement to link their consultation. The Government proposes that the provisions are enforced at the CAC which can issue a compliance notice and, if appropriate, refer to the EAT for a penalty of up to £75,000 to be levied against the central management.

Q 8 – The Government has suggested a flexible approach to the way that in which national and transnational information and consultation are linked. Is this the most appropriate way to implement this provision? If not, please suggest an alternative approach.

Balanced representation of employees

6.8 Regulation 17(4)(b) of TICE 1999 requires that the SNB and the central management agree on the composition of the EWC, its size, the allocation of the seats on the EWC and term of office of the EWC members. The 2009 Directive has expanded these requirements so that, where possible, regard

should be given to the activities, category and gender of the representatives in order to ensure that they represent the composition of the workforce.

6.9 Some organisations may cover many sectors and occupations. It is therefore intrinsically difficult to allocate seats on an EWC (which would usually have relatively few seats) to ensure that all groups are represented. It may also be the case that employees of certain categories may be unwilling or unable to step forward and act as an employee representative on the EWC.

6.10 The Directive only requires that consideration is given to the balanced representation of the EWC "where possible". The Government believes that this qualification is very important in order to avoid placing unnecessary burden on the parties or delaying the implementation of an EWC agreement. Regulation 9 of TICE 2010 inserts a new paragraph in Regulation 17 of TICE 1999 that requires that balanced representation should be taken into account "so far as reasonably practicable".

Q 9 – Is the Government correct to require balanced representation only "so far as reasonably practicable"? Please comment as appropriate.

Creation of a select committee

6.11 In cases where the SNB and the central management cannot agree on the terms of an EWC or information and consultation agreement, a set of subsidiary requirements apply that set out how and when information and consultation should take place. The existing subsidiary requirements (in the Schedule to TICE 1999) allow the EWC the opportunity to create a select committee, with a maximum of three members, in order to coordinate the activities of the EWC. No such provision exists for negotiated EWC agreements in TICE 1999.

6.12 A new provision has been introduced in the 2009 Directive so that, where they think it is necessary, the management and the SNB can agree to include provisions in an EWC agreement dealing with the setting up of a select committee to help to run the European Works Council. The preamble to the Directive sets out that the role of the select committee is to permit the coordination and greater effectiveness of the regular activities of the EWC and that it can also include the undertaking of information and consultation activities on behalf of the EWC where exceptional circumstances arise.

6.13 The Government has incorporated this provision at draft Regulation 9(b) which amends Regulation 17 of TICE 1999.

Start dates and termination dates for EWC Agreements

6.14 The existing requirement for the management and the SNB to determine the duration of the EWC agreement and procedure for renegotiation has been amended by the 2009 Directive to require the parties to specify within the agreement the date when it comes into force. Under the 2009 Directive, the agreement must also specify arrangements for amending and terminating the agreement. Also added is the requirement to determine

circumstances which would require the agreement to be renegotiated including, where necessary, when the structure of the undertaking changes.

6.15 The Government believes that most EWC agreements already include similar provisions to ensure for the clear operation, renewal and termination of existing arrangements. TICE 2010 Regulation 9(c) has been drafted accordingly, closely reflecting the text of the 2009 Directive.

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

7. Rights and Responsibilities of EWCs

7.1 The 2009 Directive creates a new set of rights and responsibilities for EWCs. Specifically it places a duty on the EWC members to collectively represent the interests of the employees and a responsibility for the EWC members to ensure that information is provided to employees on the content and outcome of formal consultation. The Directive only applies this duty to the EWCs and does not specify that this should happen where there are alternative information and consultation procedures in place.

7.2 The Government proposes that for the purposes of these provisions the EWC is treated as a single legal entity and that the responsibilities outlined here will fall on the EWC as a collective rather on the individual EWC members.

Duty to represent collectively the interests of employees

7.3 Article 10(1) of the 2009 Directive provides, in the context of the requirement that the EWC should have the means required to apply the rights in the Directive, that an EWC should represent collectively the interests of the employees of the undertaking or group of undertakings. This Article is drafted somewhat ambiguously but the Government has interpreted this provision as a stand-alone obligation on the EWC to ensure that it represents collectively the employees.

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

Duty to inform employees of the content and outcome of an information and consultation procedure

7.4 The 2009 Directive has placed a new duty on the members of an EWC to inform the employees of the content and outcome of formal discussions between the central management and the EWC, subject to the constraints of confidential information provisions.

7.5 This addresses the issue that on occasion, the outcome of the discussions between the management and the EWC is not disseminated back to the employees. This new provision is intended to keep employees informed of EWC developments and the EWC's dialogue with central management.

7.6 This provision is related to the requirement that EWC members have the ‘means required’ to fulfil their duties because the EWC must obviously have adequate means at its disposal to disseminate news about its activities among the workforce. Such material could be distributed to the employees using existing means of communication as far as possible, for instance through the use of existing mechanisms such as company newsletters, intranets etc. However, this may require additional resource or alternative, and new, approaches to the dissemination of information. As appropriate methods for feedback are likely to vary widely, the systems for fulfilling this new duty

should be determined by the SNB and the management during their negotiations to establish an EWC agreement.

7.7 Effective EWCs can only operate where workers are willing and able to act as representatives. The Government considers it important, therefore, that the new provisions do not deter workers from putting themselves forward to act as EWC members by placing too onerous a burden on them or introducing the potential for them to suffer penalties for failing to carry out this duty. With this in mind, the Government intends to apply this duty to the EWC collectively and not to individual EWC members. The Government also proposes that there is no financial penalty applicable for a failure to provide this information.

7.8 Regulation 11 of TICE 2010 implements this new duty to inform and also allows for employees who feel that their EWC has not fulfilled its duty in this respect to complain to the CAC, who can issue a compliance order.

Q 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 workplaces?

Q 13 - Is it correct to apply the duty to provide employees with feedback to the EWC as a single entity, rather than to the individual EWC members? If not, how should this duty be applied?

8. Rights and Protections of EWC members

8.1 At present, TICE 1999 protects employees who are SNB or EWC members, information and consultation representatives or candidates in elections for any of those roles, from detriment and dismissal as a result of their involvement. It also provides that such employees have a right to remuneration for reasonable time taken off to fulfil his or her duties.

The "Means Required"

8.2 Central to allowing representatives to fulfil their roles is the requirement introduced by the 2009 Directive for the central management to provide EWC members with the "means required" to perform their duties.

8.3 "Means required" is difficult to define. The Government appreciates that this term could be interpreted quite widely, but the Government considers that it is for the parties to decide what these means should be and, ultimately, for the courts to decide if they have been provided. Whilst it is not the Government's intention to prescribe what constitutes the "means required" it will use guidance to address the issue of what this could include. The Government considers that the provision of "means required" will almost certainly include a financial commitment on the part of central management. This is most likely to include travel and accommodation costs and may also extend to costs relating to translation services for EWC meetings. It is also the Government's belief that the "means required" may include costs associated with the EWC bringing a case against the central management for non-compliance with the Regulations.

8.4 This provision is found at Regulation 10 in TICE 2010.

Q 14 - Is the Government correct in its interpretation of the "means required"? Please comment specifically on the Government's consideration of what management may be liable for.

Access to training without loss of wages

8.5 Neither the 1994 Directive nor TICE 1999 presently include a right to access to training for SNB or EWC members. Nonetheless, it is common for representatives to receive training from the employer, a trade union and sometimes both. A new entitlement relating to such training was introduced by the 2009 Directive to try to enhance the ability of EWC members to understand complex issues discussed in the EWC in order to improve the quality of discussions and optimise the functioning of the EWC.

8.6 The provisions require that the training must be necessary for the exercise of representative duties in an international environment and that it should be provided to members of both the SNB and of the EWC. The Government does not intend to prescribe what constitutes suitable training as this will vary depending on the way that the EWC is constituted and operates. Instead, we believe that it will most likely be determined during the negotiations between the management and the SNB.

8.7 The appropriateness of training for the SNB is also difficult to predict. Such training will need to be informed by the capabilities of the members appointed to the SNB before negotiations commence. As this will differ from one SNB member to the next and will be dependent on an individual's competence and experience, the implementing measure of this provision is necessarily flexible.

8.8 The 2009 Directive provides that the right to training should be "without loss of wages". This requirement would be met if UK law provided an entitlement for the relevant employees to receive time-off with pay for training. Time-off for certain training and job-related duties and activities are already a legal entitlement established by various pieces of employment law. The Government intends to follow a similar approach at draft regulation 18 which, taken together with draft Regulations 19 and 20, implement these provisions and provide for their enforcement.

8.9 Whilst the employer is required to meet the costs of the training, the new provision does not stipulate who is responsible for deciding on the content of the training itself. The Government considers this to be a matter for the parties to determine, though it would aim to encourage co-operation between the employees and central management on the content and manner of training.

Q 15 – The Government intends not to specify who is responsible for determining what training should be provided to SNB and EWC Members. Is this the right approach? Please comment as appropriate.

9. Subsidiary Requirements (Annex 1 to the Directive)

9.1 The subsidiary requirements are referred to in Article 7 of the Directive and set out the minimum requirements for an EWC agreement. The subsidiary requirements come into effect in three possible scenarios:

- Where the central management and the SNB so decide; or
- Where the central management has failed to initiate negotiations within six months of the receipt of a written request from the employees or their representatives; or
- Where, after three years from the date of the written request, the SNB and management have failed to reach agreement.

Annex 1(1)(a)

9.2 This text sets out the type of information that the EWC shall consider. It has largely been brought up from paragraph 2 of the Annex to the 1994 Directive, though it introduces a new requirement that consultation must take place in such a way that the employees' representatives can meet central management to obtain a response, with reasons for that response, to an opinion offered by the EWC to the report produced by central management. This is implemented at amending regulation 33(b).

Annex 1(1)(c) and 1(1)(d)

9.3 Annex 1(1)(c) of the 2009 Directive has been amended to introduce the same method used for determining the number of EWC members as it introduced for SNBs in Article 5(2)(b).

9.4 Annex 1(1)(d) has been amended to increase the maximum number of members that may be appointed to any select committee that is set up from three to five.

9.5 Draft Regulation 29 amends paragraph 2 of the Schedule of TICE 1999 to reflect these changes.

10. Enforcement and Remedies

10.1 In implementing the 2009 Directive the Government is under an obligation to ensure there are effective, dissuasive and proportionate sanctions in place for failures to abide by the Regulations.

10.2 TICE 1999 provides a number of mechanisms for employees or their representatives to enforce their rights under the Regulations, including the ability to apply to the Central Arbitration Committee (CAC) or the Employment Appeals Tribunal (EAT) for a compliance notice and, in certain circumstances, for a fine to be imposed on the central management. As the 2009 Directive introduces a significant number of new rights and obligations, the Government has introduced corresponding rights of enforcement, including financial penalties where appropriate.

10.3 For ease of reference, a table outlining how each new provision of the 2009 Directive is enforceable is attached at **Annex D**.

10.4 The enforcement of rights under TICE 1999 is split between the CAC and the EAT, with the EAT hearing some complaints and applying a penalty where appropriate. As described in more detail below, the Government intends to establish the CAC as the body with sole responsibility for hearing cases. The EAT will no longer hear complaints but will retain its penalty-awarding status.

10.5 When TICE 1999 was first introduced, it was decided that an effective and proportionate penalty was to allow for the EAT to impose a fine of up to £75,000 – then the estimated annual running costs of an EWC – for certain breaches of the legislation. The fine is payable to the Government. The Government does not intend to alter the enforcement mechanism, but would be interested in respondents' views about the level of the maximum fine available given the increase in running costs of EWCs.

10.6 In line with other protections for employees engaged in EWC or information and consultation activity (for example, the protection from detriment for acting as an EWC member) the right for SNB and EWC members to receive training will be enforceable at an employment tribunal.

Q 16 - Is the current level of maximum fine effective, proportionate and dissuasive? If, not, please suggest an appropriate maximum fine.

11. Other Issues

11.1 This Consultation document has aimed to cover in some detail the key issues raised by the UK Government's approach to transposing the 2009 Directive. In it the Government has asked for your views on specific aspects of the draft Regulations and the more general approach to implementation. If you would like to raise any further issues or comment on anything else associated with European Works Councils, the Government is happy to hear your views. In particular, the Government would appreciate any comments you have on the drafting of the Regulations and on the accompanying Impact Assessment.

11.2 The Government is also always interested in the issues faced by EWCs in action. It is particularly interested in information on practical problems faced (and solutions found) and in ways that the Government can structure its guidance to best meet your needs.

Q 17 - What practical issues have you experienced in the operation of European Works Councils?

Q 18 - Do you have any other views on the way the Regulations have been drafted? Please submit any drafting suggestions if you have them (please continue on a separate sheet if necessary).

Q 19 - Do you have any comments on the Impact Assessment at Annex G ?

12. Implementation of aspects of the Agency Workers Directive

12.1 The Agency Workers Directive (AWD) (2008/104/EC) of 19 November 2008 aims to provide better employment rights for agency workers. Part of this looks at the way that agency workers are represented and at the way that information is provided on how they are used within an undertaking. Article 7 of the AWD introduces the requirement that agency workers count towards thresholds that trigger rights to employee representation. Article 8 considers what information must be provided on the use of agency workers in the undertaking. Both Articles will have an impact on TICE 1999 and we intend to introduce the requirements through TICE 2010. We believe that this will make it clearer how the AWD impacts on transnational information and consultation.

12.2 It should be noted that the transposition dates for the EWC Directive and the AWD are different. The other provisions of the AWD will not come into force until 1 October 2011. As such, the provisions in TICE 2010 relating to the implementation of the AWD provisions will also not come into force until 1 October 2011. If you would like more information on the AWD, please see the current Government Consultation on draft implementing Regulations at www.berr.gov.uk/consultations/page53060.html.

TICE and Article 7 of the AWD

12.3 Under Article 7 of the AWD Member States may provide that temporary agency workers shall count towards the number of employees employed by the temporary work agency that has placed them when calculating the threshold above which bodies representing workers are to be formed. Following an earlier Consultation exercise on the impact of the AWD, the Government has decided that this, inevitably, impacts on TICE 1999.

12.4 It is important to be clear that in this instance the agency worker counts towards the threshold of the agency that has placed them, not the organisation that hires them. This measure will not bring about a change to the thresholds that apply in TICE 1999. And this new provision will not result in new representational rights for agency workers. Regulation 4(c) TICE 2010 introduces new requirement to count temporary agency workers when determining:

- Whether the temporary work agency meets the threshold within the definitions of “community-scale undertaking” and “community-scale group of undertakings” in Regulation 2 TICE 1999;
- The number of employees in the temporary work agency; and
- Whether a valid employee request has been received to start negotiations over the establishment of an EWC or information and consultation agreement within that temporary work agency.

TICE and Article 8 of the AWD

12.5 Article 8 of the AWD requires that ‘suitable information’ on the use of agency workers is provided by an undertaking whenever information is provided on the employment situation in that undertaking to bodies representing workers. Following a Consultation earlier this year on the implementation of the AWD, it was felt that this would require an amendment to TICE 1999 to ensure that this information is provided.

12.6 Regulation 4 of TICE 2010 introduces a definition of what is considered suitable information for these purposes. There are various points at which this suitable information should be provided including in relation to the new “information and consultation” obligations at draft Regulation 5; in draft Regulation 8, where information must be provided to allow negotiations to start; and at draft Regulation 9, which requires that information is provided on temporary agency workers where information on the employment situation is provided during the operation of an EWC. The definition used is standard across all legislation that requires amendment as a result of Article 8 of the AWD. If you have any comments on this definition, please register them through a response to the AWD Consultation, which closes on the 11 December 2009.

13. Other Procedural Changes to TICE 1999

13.1 In addition to the changes to be made as required by the 2009 Directive, the Government also seeks to make some minor adjustments to the enforcement regime of TICE 1999 so that it is consistent with other similar legislation.

13.2 The introduction of TICE 1999 created a framework for the informing and consulting of employees that was, at the time, new to the UK. Since then, four other sets of Regulations establishing information and consultation procedures have been introduced; the enforcement procedures of which are slightly different to TICE 1999. For the sake of consistency the Government is therefore considering aligning these procedures so that they are the same across all five sets of Regulations.

13.3 The proposed changes will affect Regulations 20 and 21 of TICE 1999 as well as see a change of penalty awarding body in Northern Ireland. None of these issues to be addressed were considered sufficiently significant to warrant a change in the law in their own right. However, as changes are being made to TICE 1999 as a result of the 2009 Directive, the Government has decided to address these inconsistencies at the same time. Each of the changes is set out in greater detail below and would come into effect on 5 June 2011.

TICE 1999 - Regulations 20 and 21

- TICE Regulation 20 provides that a complaint may be made to the Employment Appeal Tribunal (EAT) where there is a failure to establish an EWC or an information and consultation procedure.

- Regulation 21 provides that a complaint may be made to the EAT in relation to the operation of such arrangements.

13.4 When the enforcement mechanism of TICE 1999 was first being determined, a distinction was drawn between complaints relating to a failure to establish an EWC or disputes about the operation of an EWC or information and consultation procedure. It was decided that these types of legal issues dealt with under Regulation 20 and 21 should be heard in the more formal setting of the EAT.

13.5 Since then, the legal framework on information and consultation rights has developed further. Following the re-organisation of the Central Arbitration Committee (CAC) in 2000, it now acts as an enforcement body for more recent similar legislation, including:

- the Information and Consultation of Employees Regulations 2004;
- the European Public Limited Liability Company Regulations 2004;
- the European Cooperative Society (Involvement of Employees) Regulations 2006; and
- the Companies (Cross-Border Mergers) Regulations 2007.

13.6 The Government therefore proposes that any complaints under Regulation 20 and 21 of TICE 1999, as well as complaints brought under the new provisions of TICE 2010, should be considered by the CAC and that the EAT should only be responsible for issuing any penalties in this regard.

Q 20 - Is the Central Arbitration Committee the correct court to hear all complaints under these Regulations? If not, please state your reasons.

Time-limit

13.7 It is common in UK employment law that a time-limit is imposed that restricts how long after an alleged breach of Regulations a party may make a complaint to the Courts. Unusually, neither Regulations 20 nor 21 of TICE 1999 stipulate such a time limit for presenting a complaint to the EAT. The Government would like to address this anomaly not only so that there is legal certainty for parties making applications to the Courts but also so that the enforcement regime for TICE 1999 is consistent with other sets of legislation containing information and consultation provisions.

13.8 The differing nature of the offences covered by the two Regulations means that the Government intends to treat them differently in terms of time limits for complaints. The Government considers that it is feasible to introduce a time limit of three months for a complaint to be made under Regulation 21, though not under Regulation 20. It considers that the nature of the obligations under Regulation 20 would make it difficult to establish a clear date of failure and to try to introduce artificial dates would potentially lead to a narrowing of employees' rights.

13.9 The Government considers that the introduction of a time limit for such complaints is unlikely to have any significant impact on an employees ability to bring a complaint as the EAT is currently able to reject complaints which are judged to be vexatious or out of time. Such considerations would likely be informed by the time-limits established by similar sets of legislation as administered by the CAC in order to determine the consideration of an appropriate time limit for alleged complaints.

13.10 Existing provisions such as the facility to appeal to the EAT from the CAC on a point of law would remain identical throughout the five sets of Regulations referred to above.

Q 21 - Is it appropriate to introduce a three-month time-limit for applications to the Central Arbitration Committee under Regulation 21 TICE 1999 but not under Regulation 20? Please comment as appropriate.

Penalty awarding body in Northern Ireland

13.11 In Northern Ireland, the Industrial Court is responsible for hearing complaints, and awarding penalties under TICE 1999.

13.12 The intention was that the power to award penalties should in fact rest with the Northern Ireland High Court as that court is equivalent to the Employment Appeals Tribunal in Great Britain in respect of its penalty-awarding powers. It should also be noted that in similar employee involvement legislation, the Industrial Court is responsible for hearing complaints and the High Court awards penalties.

13.13 In order to correct this anomaly it is proposed to make various technical amendments so that penalties are awarded in Northern Ireland under TICE 1999 by the Northern Ireland High Court.

Q 22 - Is the High Court the correct body to award penalties in Northern Ireland?

14. Entry Into Force

14.1 The Government proposes that the Regulations should come into force on 5 June 2011, which is the last date on which Member States may bring into force the laws necessary to give effect to the 2009 Directive. This is the date when most other member states plan to bring into force their own implementing Regulations. There are strong advantages in having a common commencement date across most member states as the Directive concerns the establishment and operation of international bodies - EWCs - whose memberships are drawn from two or more member states. Each EWC may to some extent be influenced by laws in at least one other Member State.

14.2 That said, the Government intends to finalise the 2010 TICE Regulations as soon as possible after this Consultation has ended. The aim is to make and lay the Regulations in Parliament in spring 2010 under section 2(2) of the European Communities Act 1972. The Regulations will be subject to the negative resolution procedure for gaining Parliamentary approval. This timetable will give interested parties over a year's notice of the UK's approach to implementation of the new provisions that will come into effect in June 2011, and should enable them to prepare thoroughly for the changes involved. In particular, because the Directive and therefore the implementing Regulations treat agreements differently depending on the actions that parties take in the two years prior to 5 June 2011, the early finalisation of the Regulations enables parties to take informed decisions about what actions they wish to take.

14.3 The Government also intends to produce guidance on the TICE 2010 Regulations, and post that guidance on the Business Link and Directgov websites. The Government intends to do this by the time the Regulations complete their Parliamentary passage.

14.4 The Government has been engaged in informal consultation with representatives of both employers and trades unions before drawing up this Consultation document. Those discussions will continue throughout the process of implementation.

Annex A: Draft Regulations

DRAFT STATUTORY INSTRUMENTS

2010 No. 0000

TERMS AND CONDITIONS OF EMPLOYMENT

The Transnational Information and Consultation of Employees (Amendment) Regulations 2010

Made - - - -	*2010*
Laid before Parliament	*2010*
Coming into force	*5th June 2011*
save for the following, which shall come into force on	*1st October 2011*
regulation 4, insofar as it inserts the definition of "suitable information relating to the use of agency workers" and paragraph (4B);	
regulation 5, insofar as it inserts regulation 5A(7);	
regulation 8, insofar as it inserts regulation 16(4C);	
regulation 9, insofar as it inserts regulation 17(9);	
regulation 12, insofar as it inserts regulation 19E(6); and	
regulation 32 (use of agency workers).	

The Secretary of State makes the following Regulations in exercise of the powers conferred on him by section 2(2) of the European Communities Act 1972([7]).

The Secretary of State has been designated for the purposes of that section in relation to measures relating to the information and consultation of employees([8]).

Citation, commencement, extent and interpretation

1.—1.1. These Regulations may be cited as the Transnational Information and Consultation of Employees (Amendment) Regulations 2010 and shall come into force on 5th June 2011, save for the following which shall come into force on 1st October 2011:

([7]) 1972 c.68.
([8]) S.I. 1999/2788.

(a) regulation 4, in so far as it inserts the definition of "suitable information relating to the use of agency workers" and paragraph (4B);

(b) regulation 5, in so far as it inserts regulation 5A(7);

(c) regulation 8, in so far as it inserts regulation 16(4C);

(d) regulation 9, in so far as it inserts regulation 17(9);

(e) regulation 12, in so far as it inserts regulation 19E(6); and

(f) regulation 32 (use of agency workers).

(2) These Regulations extend to Northern Ireland.

(3) In these Regulations "the Principal Regulations" means the Transnational Information and Consultation of Employees Regulations 1999([9]).

Application

2.—1.2. Subject to paragraphs (2) and (3), these Regulations do not apply to a Community-scale undertaking or a Community-scale group of undertakings where—

(a) the conditions in regulation 44(2) or 45(2) of the Principal Regulations are satisfied, whether or not the relevant agreements are revised due to changes in the structure of the Community-scale undertaking or Community-scale group of undertakings; or

(b) an agreement which has been reached under regulation 17 of the Principal Regulations is signed or revised on or after 5 June 2009 and before 5 June 2011.

(2) Where paragraph 1(a) applies, the following apply—

(a) regulation 12, in so far as it inserts regulation 19E (adaptation) into the Principal Regulations;

(b) regulations 9 to 11 of the Principal Regulations (request to negotiate and functions of the special negotiating body);

(c) regulation 12 of the Principal Regulations (composition of the special negotiating body), as amended by these Regulations;

(d) regulations 13 to 15 of the Principal Regulations (UK members of the special negotiating body);

(e) regulations 16 and 17 of the Principal Regulations (negotiation procedure and content and scope of a European Works Council agreement and information and consultation procedure), as amended by these Regulations; and

(f) regulation 18 of the Principal Regulations (subsidiary requirements).

(3) Where paragraph (1)(b) applies, the following apply—

(a) regulation 12, in so far as it inserts regulation 19E (adaptation) into the Principal Regulations;

(b) regulations 13 to 16 (disputes and penalties);

(c) regulations 21 to 28 (protections for members of a European Works Council, etc and miscellaneous);

(d) regulations 9 to 11 of the Principal Regulations (request to negotiate and functions of the special negotiating body);

(e) regulation 12 of the Principal Regulations (composition of the special negotiating body), as amended by these Regulations;

(f) regulations 13 to 15 of the Principal Regulations (UK members of the special negotiating body);

([9]) S.I. 1999/3323.

(g) regulations 16 and 17 of the Principal Regulations (negotiation procedure and content and scope of a European Works Council agreement and information and consultation procedure), as amended by these Regulations; and

(h) regulation 18 of the Principal Regulations (subsidiary requirements).

Amendment of the Principal Regulations

3. The Principal Regulations are amended as set out in regulations 4 to 33.

Amendment of regulation 2 (Interpretation)

4. In regulation 2 (interpretation)—

(a) in paragraph (1) after the definition of "Member State" insert—

""national employee representation bodies" means—

(a) where the employees are of a description in respect of which an independent trade union is recognised by their employer for the purpose of collective bargaining, that trade union; and

(b) bodies to which any employee representatives are elected or appointed by employees, as a result of which they hold positions in which they are expected to receive, on behalf of the employees, information—

(i) which is relevant to the terms and conditions of employment of the employees, or

(ii) about the activities of the undertaking which may significantly affect the interests of the employees,

(including information relevant only to a specific aspect of the terms and conditions or interests of the employees, such as health and safety or collective redundancies), but excluding information relating to transnational matters;";

(b) in paragraph (1) after the definition of "special negotiating body" insert—

""suitable information relating to the use of agency workers" means—

(a) the number of agency workers contracted to work for and under the direction of the undertaking;

(b) the areas of the business in which those agency workers are contracted to work; and

(c) the type of work those agency workers are contracted to undertake;"; and

(c) after paragraph (4) insert—

"(4A) In paragraph (1) and in regulations 5A, 17 and 19D, matters or questions are transnational where they concern—

(a) the Community-scale undertaking or Community-scale group of undertakings as a whole, or

(b) at least two undertakings or establishments of the Community-scale undertaking or Community-scale group of undertakings situated in two different Member States.

(4B) The following provisions relate to agency workers "otherwise engaged" by one or more temporary work agencies within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010([10])—

(a) an agency worker engaged by a temporary work agency, that was such an undertaking at the relevant date, shall be treated as being employed by that temporary work agency for the duration of their assignment with a hirer for the purposes of—

([10]) S.I. 2010/xxxx.

(i) the thresholds within the definitions of "Community-scale undertaking" and "Community-scale group of undertakings" in this regulation;

(ii) the means of calculating the number of employees in regulations 6 and 7(3); and

(iii) the means of establishing whether a valid request has been made under regulation 9(2); and

(b) in this paragraph, "agency worker", "hirer" and "temporary work agency" have the meanings provided for in regulations 3, 2 and 4, respectively, of the Agency Workers Regulations 2010([11]).".

Information and consultation

5. After regulation 5 (the central management) insert—

"Information and consultation

5A.—(1) The following persons, as the case may be, shall give information in accordance with paragraphs (2) and (3)—

(a) the management of every undertaking belonging to the Community-scale group of undertakings;

(b) the central management; or

(c) the representative agent or the management treated as the central management of the Community-scale undertaking or Community-scale group of undertakings within the meaning of regulation 5(2).

(2) Information shall be given to, as the case may be—

(a) an employee;

(b) an employees' representative;

(c) members of a European Works Council in the context of a European Works Council; or

(d) information and consultation representatives in the context of an information and consultation procedure.

(3) Information shall be given at such time, in such fashion and with such content as are appropriate to enable the recipient to—

(a) acquaint themselves with and examine the subject matter of the information;

(b) undertake a detailed study of its possible impact; and

(c) where appropriate, prepare for consultation or negotiations with the central management.

(4) Consultation shall occur—

(a) between members of a European Works Council in the context of a European Works Council, or information and consultation representatives in the context of an information and consultation procedure, and the appropriate level of management, and

(b) so far as reasonably practicable, at such time, in such fashion and with such content as are appropriate to enable the European Works Council or the information and consultation representatives to express an opinion on the basis of the information provided to them.

(5) The opinion referred to in paragraph (4)(b) shall be delivered within a reasonable time.

(6) Information and consultation shall be limited to transnational matters.

([11]) S.I. 2010/xxxx.

(7) Where information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, is disclosed by one or more of the persons mentioned in paragraph (1), this shall include suitable information relating to the use of agency workers (if any).".

Amendment of regulation 8 (Complaint of failure to provide information)

6. In regulation 8 (complaint of failure to provide information)—

(a) at the end of paragraph (1)(a) omit "or";

(b) for paragraph (1)(b) substitute—

"(b) the recipient has provided the information referred to in regulation 7(3) but the recipient has failed to comply with regulation 5A(3) in a material respect; or

(c) the information which has been provided by the recipient is false or incomplete in a material particular"; and

(c) for paragraphs (2)(b) and (c) substitute—

"(b) the fashion in which such information is to be disclosed to the complainant;

(c) the date (or if more than one, the earliest date) on which the recipient refused or failed to disclose information, disclosed false or incomplete information, or failed to comply with regulation 5A(3) in a material respect; and

(d) a date (not being less than one week from the date of the order) by which the recipient must disclose the information specified in the order.".

Amendment of regulation 12 (Composition of the special negotiating body)

7. For regulation 12 (composition of the special negotiating body) substitute—

"**Composition of the special negotiating body**

12.—(1) The special negotiating body shall be constituted in accordance with paragraph (2).

(2) In each Member State in which employees of a Community-scale undertaking or Community-scale group of undertakings are employed to work, those employees shall elect or appoint one member of the special negotiating body for each 10% or fraction thereof which those employees represent of the total workforce.

(3) The special negotiating body shall inform the central management, local managements and the European social partner organisations of the composition of the special negotiating body and of the start of the negotiations.".

Amendment of regulation 16 (Negotiation procedure)

8. In regulation 16 (negotiation procedure)—

(a) after paragraph (1) insert—

"(1A) In preparation for and within a reasonable time following any meeting with the central management, the members of the special negotiating body are entitled to meet without the central management or its representatives being present, using any means necessary for communication.";

(b) after paragraph (4) insert—

"(4A) The following persons, as the case may be, shall obtain and provide to the special negotiating body the information required for the purposes of beginning the negotiations—

(a) the management of every undertaking belonging to the Community-scale group of undertakings;

(b) the central management; or

(c) the representative agent or the management treated as the central management of the Community-scale undertaking or Community-scale group of undertakings within the meaning of regulation 5(2).

(4B) The information referred to in paragraph (4A) shall include—

(a) the average number of employees employed by the Community-scale undertaking or Community-scale group of undertakings;

(b) information in relation to the structure of the Community-scale undertaking or the Community-scale group of undertakings; and

(c) information in relation to the workforce of the Community-scale undertaking or Community-scale group of undertakings.

(4C) Where information disclosed under paragraph (4A) includes information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, this shall include suitable information relating to the use of agency workers (if any).”; and

(c) in paragraph (5) after “choice” insert—

“(which may include representatives of European trade union organisations) who may, at the request of the special negotiating body, attend in an advisory capacity any meeting convened in accordance with paragraph (1)”.

Amendment of regulation 17 (Content and scope of a European Works Council agreement and information and consultation procedure)

9. In regulation 17 (content and scope of a European Works Council agreement and information and consultation procedure)—

(a) in paragraph (4)(c) after “European Works Council” insert—

“and the arrangements for linking information and consultation of the European Works Council and the national employee representation bodies, taking into account the need for the information and consultation to—

(i) occur at the appropriate level of management, and

(ii) relate to transnational matters;”;

(b) after paragraph (4)(d) insert—

“(dd) where the parties decide that it is necessary to establish a select committee, the composition of the select committee, the procedure for appointing its members, the functions and the procedural rules;”;

(c) for paragraph (4)(f) substitute—

“(f) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement, the circumstances in which the agreement shall be renegotiated including where the structure of the Community-scale undertaking or Community-scale group of undertakings changes and the procedure for its renegotiation.”;

(d) after paragraph (4) insert—

“(4A) In determining the allocation of seats under paragraph 4(b), an agreement referred to in paragraph 4 shall, so far as reasonably practicable, take into account the need for balanced representation of employees with regard to their activities, category and gender.”; and

(e) after paragraph (8) insert—

“(9) Where information disclosed under a European Works Council agreement or an information and consultation procedure includes information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, this shall include suitable information relating to the use of agency workers (if any).”.

Means necessary

10. After regulation 19 (cooperation) insert—

"**Means necessary**

19A.—(1) The central management shall provide the members of the European Works Council with the means necessary to enable them to fulfil their duties under these Regulations.".

European Works Council to inform, etc and Complaint of failure to inform

11. After regulation 19A (means necessary) insert—

"**European Works Council to inform, etc**

19B.—(1) Subject to regulation 23, the European Works Council shall inform—

(a) the employees' representatives in the establishments of a Community-scale undertaking or in the undertakings of a Community-scale group of undertakings; or

(b) to the extent that any employees are not represented by employees' representatives, the employees themselves,

of the content and outcome of the information and consultation procedure carried out in accordance with these Regulations.

(2) The European Works Council shall represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.

Complaint of failure to inform

19C.—(1) An employee or employees' representative may present a complaint to the CAC that—

(a) the European Works Council has failed to inform them under regulation 19B(1) of the content and outcome of the information and consultation procedure; or

(b) the information which has been provided by the European Works Council is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the European Works Council to disclose information to the complainant which order shall specify—

(a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant;

(b) the date (or if more than one, the earliest date) on which the European Works Council refused or failed to disclose information, or disclosed false or incomplete information;

(c) a date (not being less than one week from the date of the order) by which the European Works Council must disclose the information specified in the order.

(3) The CAC shall not find a complaint under this regulation well-founded where it considers that the failure to inform or the provision of false or incomplete information resulted from a failure by the central management to provide the members of the European Works Council with the means necessary to enable them to fulfil their duties under these Regulations.

(4) A complaint brought under paragraph (1) must be brought within a period of three months beginning with the date of the alleged failure.".

Links between information and consultation of European Works Council and national employee representation bodies and Adaptation

12. After regulation 19C (complaint of failure to inform) insert—

"**Links between information and consultation of European Works Council and national employee representation bodies**

19D.—(1) Information and consultation of the European Works Council under these Regulations shall be linked to the information and consultation of the national employee representation bodies—

(a) in accordance with the arrangements made under regulation 17(4)(c); and

(b) with due regard to their respective competences and the scope of their activities, taking into account the need for information and consultation to occur at the appropriate level of management and to relate to transnational matters.

(2) Where—

(a) no arrangements have been made under regulation 17(4)(c), and

(b) there are circumstances likely to lead to substantial changes in work organisation or contractual relations,

the European Works Council and the national employee representation bodies shall be informed and consulted in accordance with paragraph (1)(b).

Adaptation

19E.—(1) The central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure where paragraph (2) applies.

(2) This paragraph applies where—

(a) the structure of a Community-scale undertaking or Community-scale group of undertakings changes significantly;

(b) there is—

(i) at least one European Works Council agreement in force, or

(ii) at least one agreement for an information and consultation procedure in force;

(c) under the agreements referred to in sub-paragraph (b)—

(i) there are no provisions for the continuance of the European Works Council or information and consultation procedure, as the case may be, where there are significant changes in the structure of the Community-scale undertaking or Community-scale group of undertakings, or

(ii) there are such provisions as referred to in sub-paragraph (i), but there is a conflict between them; and

(d) a valid request within the meaning of regulation 9(2) and (3) has been made by employees or employees' representatives and on the relevant date within the meaning of regulation 6(4) the undertaking is a Community-scale undertaking or the group of undertakings is a Community-scale group of undertakings.

(3) Notwithstanding paragraph (1), the central management may initiate the negotiations referred to in paragraph (1) on its own initiative.

(4) Where the central management has initiated negotiations under paragraph (1) or (3), there shall be on the special negotiating body at least three members of every existing European Works Council in addition to the members elected or appointed in accordance with regulation 12(1).

(5) Before the establishment of a European Works Council or an information and consultation procedure under paragraph (1) or (3), in so far as reasonably practicable, the

existing European Works Councils and information and consultation procedures shall continue to operate as adapted by agreement between, as appropriate—

(a) the members of the European Works Council and the central management, or

(b) the information and consultation representatives and the central management.

(6) Where information disclosed under a European Works Council agreement or an information and consultation procedure includes information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, this shall include suitable information relating to the use of agency workers (if any).".

Amendment of regulation 20 (Failure to establish European Works Council or information and consultation procedure)

13. In regulation 20 (failure to establish European Works Council or information and consultation procedure)—

(a) in paragraphs (1), (4), (5), (7) and (10) for "Appeal Tribunal" substitute "CAC";

(b) in paragraph (7) omit the words after "paragraph (4)" and insert "the relevant applicant may, within the period of three months beginning with the date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.";

(c) after paragraph (7) insert—

"(7A) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure."; and

(d) in paragraph (8) for "(7)" substitute "(7A)".

Amendment of regulation 21 (Disputes about operation of European Works Council or information and consultation procedure)

14. In regulation 21 (disputes about operation of European Works Council or information and consultation procedure)—

(a) in paragraphs (1), (4), (6) and (9) for "Appeal Tribunal" substitute "CAC";

(b) in paragraph (1) after "considers that"—

(i) omit "," and the words after it; and

(ii) insert "paragraph (1A) applies.";

(c) after paragraph (1) insert—

"(1A) This paragraph applies where a relevant applicant considers that, because of the failure of a defaulter—

(a) the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule, have not been complied with; or

(b) regulation 5A has not been complied with in a material respect, or the information which has been provided by the management under regulation 5A is false or incomplete in a material particular.

(1B) A complaint brought under paragraph (1) must be brought within a period of three months beginning with the date of the alleged failure or non-compliance.";

(d) in paragraph (6) omit the words after the first reference to "central management" and insert "the relevant applicant may, within the period of three months beginning with the date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.";

(e) after paragraph (6) insert—

"(6A) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure."; and

(f) in paragraph (7) for "(6)" substitute "(6A)".

Disputes about negotiation procedure and other failures of central management

15. After regulation 21 (disputes about operation of European Works Council or information and consultation procedure) insert—

"**Disputes about negotiation procedure**

21A.—(1) A relevant applicant may present a complaint to the CAC where he considers that, because of the failure of a defaulter—

(a) the members of the special negotiating body have been unable to meet in accordance with regulation 16(1A);

(b) the employees or the employees' representatives have not been provided with information in accordance with regulation 16(4A); or

(c) the employees or the employees' representatives have been provided with information in accordance with regulation 16(4A) but regulation 5A(3) has not been complied with in a material respect.

(2) A complaint brought under paragraph (1) must be brought within a period of three months beginning with the date of the alleged failure or non-compliance.

(3) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with regulation 16(1), 16(4A) or 5A(3), as the case may be.

(4) An order made under paragraph (3) shall specify—

(a) the steps which the defaulter is required to take;

(b) the date of the failure; and

(c) the period within which the order must be complied with.

(5) If the CAC makes a decision under paragraph (3), the relevant applicant may, within the period of three months beginning with the date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the defaulter requiring it to pay a penalty to the Secretary of State in respect of the failure.

(7) Paragraph (6) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the defaulter, that the failure resulted from a reason beyond the defaulter's control or that it has some other reasonable excuse for its failure.

(8) Regulation 22 shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

(10) In this regulation—

(a) "defaulter" means a person mentioned in regulation 16(4A)(a), (b) or (c) against whom the complaint is presented;

(b) "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management;

(c) "relevant applicant" means—

(i) a member of the special negotiating body;

(ii) an employee; or

(iii) an employees' representative.

Disputes about other failures of central management

21B.—(1) A relevant applicant may present a complaint to the CAC where he considers that—

(a) because of the failure of the central management, the members of the European Works Council have not been provided with the means necessary to enable them to fulfil their duties under these Regulations in accordance with regulation 19A;

(b) regulation 19D(2) applies and that, because of the failure of the central management, the European Works Council and the national employee representation bodies have not been informed and consulted in accordance with regulation 19D(1)(b); or

(c) the central management has failed to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure in accordance with regulation 19E.

(2) A complaint brought under paragraph (4) must be brought within a period of three months beginning with the date of the alleged failure or non-compliance.

(3) Where the CAC finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the central management to take such steps as are necessary to comply with regulation 19A, 19D(1)(b) or 19E, as the case may be.

(4) An order made under paragraph (3) shall specify—

(a) the steps which the central management is required to take;

(b) the date of the failure; and

(c) the period within which the order must be complied with.

(5) If the CAC makes a decision under paragraph (3), the relevant applicant may, within the period of three months beginning with the date on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.

(7) Paragraph (6) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the central management, that the failure resulted from a reason beyond the central management's control or that is has some other reasonable excuse for its failure.

(8) Regulation 22 shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

(10) In this regulation—

(a) "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management;

(b) "relevant applicant" means—

(i) for a complaint in relation to regulation 19A, a member of the European Works Council;

(ii) for a complaint in relation to regulation 19D(1)(b), a member of the European Works Council, a national employee representation body, an employee, or an employees' representative; or

(iii) for a complaint in relation to regulation 19E, a member of a European Works Council, an information and consultation representative, an employee or an employees' representative.".

Amendment of regulation 22 (Penalties)

16. In regulation 22(4) (penalties) for "Appeal Tribunal" substitute "CAC".

Amendment of regulation 25 (Right to time off for members of a European Works Council, etc)

17. In regulation 25(2) (right to time off for members of a European Works Council, etc) after "this regulation" insert "and regulation 25A".

Right to training for members of a European Works Council, etc

18. After regulation 25 (Right to time off for members of a European Works Council, etc) insert—

"**Right to training for members of a European Works Council, etc**

25A.—(1) To the extent necessary for the exercise of his representative duties, an employee who is—

(a) a member of a special negotiating body; or

(b) a member of a European Works Council,

is entitled to be provided by his employer with training.

(2) Such an employee is entitled to be permitted by his employer to take reasonable time off during the employee's working hours in order to undertake such training.".

Amendment of regulation 26 (Right to remuneration for time off under regulation 25)

19. In regulation 26(1) and (7) after "regulation 25" insert "or 25A".

Amendment of regulation 27 (Right to time off: complaints to tribunals)

20. In regulation 27 (right to time off: complaints to tribunals)—

(a) in paragraph (1)(a)—

(i) after "regulation 25" insert "or 25A"; and

(ii) omit "or";

(b) for paragraph (1)(b) substitute—

"(b) has failed to provide the employee with training to which he is entitled under regulation 25A; or

(c) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 26."; and

(c) for paragraph (5) substitute—

"(5) If the complaint is that the employer failed to provide the employee with training, the tribunal shall also order the employer to provide the employee with training where the tribunal considers this to be appropriate in the circumstances, having regard to regulation 25A(1).

(6) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 26, the tribunal shall also order the employer to pay to the employee the amount which it finds due to him.".

Amendment of regulation 28 (Unfair dismissal)

21. In regulation 28(6)(b) (unfair dismissal) after "Northern Ireland" insert "the High Court or".

Amendment of regulation 29 (Subsidiary provisions relating to unfair dismissal: Great Britain)

22. In regulation 29 (subsidiary provisions relating to unfair dismissal: Great Britain)—

(a) in paragraph (1) after "regulation 28" insert "(as amended)"; and

(b) in paragraph (2) after "regulation 28" insert "(as amended)".

Amendment of regulation 30 (Subsidiary provisions relating to unfair dismissal: Northern Ireland)

23. In regulation 30 (subsidiary provisions relating to unfair dismissal: Northern Ireland)—

(a) in paragraph (1) after "regulation 28" insert "(as amended)"; and

(b) in paragraph (2) after "regulation 28" insert "(as amended)".

Amendment of regulation 31 (Detriment)

24. In regulation 31(6)(b) (detriment) after "Northern Ireland" insert "the High Court or".

Amendment of regulation 36 (Industrial Court: jurisdiction)

25. In regulation 36(1) (industrial court: jurisdiction)—

(a) for "Appeal Tribunal" substitute "CAC"; and

(b) after the second reference to "Industrial Court" insert "and references in regulations 20, 21 and 22 to the Appeal Tribunal shall be read as references to the High Court in Northern Ireland".

Amendment of regulation 37 (Industrial Court: proceedings)

26. For regulation 37 (Industrial Court: proceedings) substitute—

"**Industrial Court and High Court in Northern Ireland: proceedings**

37.—(1) Where under these Regulations a person presents a complaint or makes an application to the Industrial Court or the High Court in Northern Ireland, the complaint or application must be in writing and in such form as the Court may require.

(2) In its consideration of an application or complaint under these Regulations, the Industrial Court or the High Court in Northern Ireland, as the case may be, shall make such enquiries as it sees fit and give any person whom it considers has a proper interest in the application or complaint an opportunity to be heard.

(3) A decision, declaration or order made by the Industrial Court or the High Court in Northern Ireland under these Regulations must be in writing and state the reasons for the Court's findings.

(4) A decision, declaration or order made by the Industrial Court under these Regulations may be relied on and enforced as if it were a decision, declaration or order made by the High Court in Northern Ireland.

(5) An appeal lies to the Court of Appeal in Northern Ireland on any question of law arising from a decision, declaration or order of, or arising in any proceedings before, the Industrial Court under these Regulations.".

Amendment of regulation 39 (ACAS and the Labour Relations Agency)

27. In regulation 39(1), (2) and (3) (ACAS and the Labour Relations Agency) after "CAC," omit "the Appeal Tribunal,".

Amendment of regulation 40 (Restrictions on contracting out: general)

28. In regulation 40(1)(b) (restrictions on contracting out: general) after "Northern Ireland" insert "the High Court or".

Amendment of paragraph 2 (Composition of the European Works Council) of the Schedule

29. For paragraph 2 (composition of the European Works Council) of the Schedule substitute—

"Composition of the European Works Council

2.—(1) The European Works Council shall be constituted in accordance with paragraph (2).

(2) In each Member State in which employees of a Community-scale undertaking or Community-scale group of undertakings are employed to work, those employees shall elect or appoint one member of the European Works Council for each 10% or fraction thereof which those employees represent of the total workforce.

(3) The European Works Council shall inform the central management and any more appropriate level of management of the composition of the European Works Council.

(4) To ensure that it can co-ordinate its activities, the European Works Council shall elect from among its members a select committee comprising no more than five members who are to act on behalf of the European Works Council.".

Amendment of paragraph 6 (Competence of the European Works Council) of the Schedule

30. After sub-paragraph 6(2) (competence of the European Works Council) of the Schedule insert—

"(3) Information and consultation of employees shall take place between members of a European Works Council and the most appropriate level of management according to the matters under discussion.".

Amendment of paragraph 8 (Exceptional information and consultation meetings) of the Schedule

31. In paragraph 8 (exceptional information and consultation meetings) of the Schedule—

(a) in sub-paragraph (1) omit "on measures significantly affecting employees' interests"; and

(b) in sub-paragraph (2) for "measures" substitute "circumstances".

Use of agency workers

32. After paragraph 8 (exceptional information and consultation meetings) of the Schedule insert—

"**Use of agency workers**

8A.—(1) Where information disclosed under paragraph 7 or 8 includes information as to the employment situation in the Community-scale undertaking or, as the case may be, the Community-scale group of undertakings, this shall include suitable information relating to the use of agency workers (if any).".

Amendment of paragraph 9 (Procedures) of the Schedule

33. In paragraph 9 (procedures) of the Schedule—

(a) in sub-paragraph (6) after the first reference to "European Works Council" insert "and its select committee"; and

(b) after sub-paragraph (6) insert—

"(7) The employer must ensure that the consultation referred to in paragraphs 7(1) and 8(1) is conducted in such a way that the members of the European Works Council can—

(a) meet with the central management; and

(b) obtain a reasoned response from the central management to any opinion expressed by those representatives on the reports referred to in paragraphs 7(1) and 8(3).

(8) Information and consultation carried out in accordance with this Schedule shall be carried out subject to regulation 23.".

Name
Title
Date Department for Business, Innovation & Skills

Annex B: The Transnational Information and Consultation Of Employees Regulations 1999

STATUTORY INSTRUMENTS

1999 No. 3323

TERMS AND CONDITIONS OF EMPLOYMENT

The Transnational Information and Consultation of Employees Regulations 1999

Made - - - -	*12th December 1999*
Laid before Parliament	*14th December 1999*
Coming into force - -	*15th January 2000*

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972([12]) in relation to measures relating to the information and consultation of employees ([13]), in exercise of the powers conferred on him by that provision, hereby makes the following Regulations—

PART I

General

Citation, commencement and extent

1.—1.3. These Regulations may be cited as the Transnational Information and Consultation of Employees Regulations 1999 and shall come into force on 15th January 2000.

(1) These Regulations extend to Northern Ireland.

Interpretation

2.—1.4. In these Regulations—

"the 1996 Act" means the Employment Rights Act 1996([14]);

"the 1996 Order" means the Employment Rights (Northern Ireland) Order 1996([15]);

"ACAS" means the Advisory, Conciliation and Arbitration Service;

"Appeal Tribunal" means the Employment Appeal Tribunal;

"CAC" means the Central Arbitration Committee;

([12]) 1972 c.68.
([13]) S.I. 1999/2788.
([14]) 1996 c.18.
([15]) S.I. 1996/1919 (N.I.16).

"central management" means—

(a) the central management of a Community-scale undertaking, or

(b) in the case of a Community-scale group of undertakings, the central management of the controlling undertaking,

or, where appropriate, the central management of an undertaking or group of undertakings that could be or is claimed to be a Community-scale undertaking or Community-scale group of undertakings;

"Community-scale undertaking" means an undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States;

"Community-scale group of undertakings" means a group of undertakings which has—

(a) at least 1000 employees within the Member States,

(b) at least two group undertakings in different Member States, and

(c) at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

"consultation" means the exchange of views and establishment of dialogue between members of a European Works Council in the context of a European Works Council, or information and consultation representatives in the context of an information and consultation procedure, and central management or any more appropriate level of management;

"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

"controlled undertaking" has the meaning assigned to it by regulation 3;

"controlling undertaking" has the meaning assigned to it by regulation 3;

"employee" means an individual who has entered into or works under a contract of employment and in Part VII and regulation 41 includes, where the employment has ceased, an individual who worked under a contract of employment;

"employees' representatives" means—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer for the purpose of collective bargaining, representatives of the trade union who normally take part as negotiators in the collective bargaining process, and

(b) any other employee representatives elected or appointed by employees to positions in which they are expected to receive, on behalf of the employees, information—

(i) which is relevant to the terms and conditions of employment of the employees, or

(ii) about the activities of the undertaking which may significantly affect the interests of the employees,

but excluding representatives who are expected to receive information relevant only to a specific aspect of the terms and conditions or interests of the employees, such as health and safety or collective redundancies;

"European Works Council" means the council, established under and in accordance with—

(a) regulation 17, or regulation 18 and the provisions of the Schedule, or

(b) where appropriate, the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 6 of, or Article 7 of and the Annex to, the Transnational Information and Consultation Directive,

with the purpose of informing and consulting employees;

"Extension Directive" means Council Directive 97/74/EC of 15 December 1997([16]) extending, to the United Kingdom, the Transnational Information and Consultation Directive;

([16]) O.J. L 10, 16.1.98, p.22.

"group of undertakings" means a controlling undertaking and its controlled undertakings;

"group undertaking" means an undertaking which is part of a Community-scale group of undertakings;

"independent trade union" has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992([17]) or in Northern Ireland the 1996 Order;

"information and consultation procedure" means one or more information and consultation procedures agreed under—

(a) regulation 17, or

(b) where appropriate, the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 6(3) of the Transnational Information and Consultation Directive;

"information and consultation representative" means a person who represents employees in the context of an information and consultation procedure;

"local management" means the management of one or more establishments in a Community-scale undertaking or of one or more undertakings in a Community-scale group of undertakings which is not the central management;

"Member State" means a state which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993([18]);

"special negotiating body" means the body established for the purposes of negotiating with central management an agreement for a European Works Council or an information and consultation procedure;

"Transnational Information and Consultation Directive" means Council Directive 94/45/EC of 22 September 1994([19]) on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees;

"UK management" means the management which is, or would be, subject to the obligation in regulation 13(2) or paragraph 4(1) of the Schedule, being either the central management in the United Kingdom or the local management in the United Kingdom;

"UK member of the special negotiating body" means a member of the special negotiating body who represents UK employees for the purposes of negotiating with central management an agreement for a European Works Council or an information and consultation procedure.

(2) To the extent that the Transnational Information and Consultation Directive and the Extension Directive permit the establishment of more than one European Works Council in a Community-scale undertaking or Community-scale group of undertakings, these Regulations shall be construed accordingly.

(3) In paragraphs (1) and (4) of this regulation and in regulations 6, 13 to 15 and paragraphs 3 to 5 of the Schedule, references to "UK employees" are references to employees who are employed in the United Kingdom by a Community-scale undertaking or Community-scale group of undertakings.

(4) In regulations 13 and 15 and paragraphs 3 and 4 of the Schedule, references to "UK employees' representatives" are references to employees' representatives who represent UK employees.

([17]) 1992 c.52.

([18]) The application of the Transnational Information and Consultation Directive was extended to the EEA by virtue of Decision 55/95 of the EEA Joint Committee, 22 July 1995 (O.J. L 140 13.6.96, p. 52). The application of the Extension Directive was extended to the EEA by virtue of Decision 95/98 of the EEA Joint Committee, 25 December 1998 (O.J. L 189 22.7.99, p.69). References to the Directives are in point 27 in Annex XVIII to the EEA Agreement.

([19]) O.J. L 254, 30.9.94, p.64.

(5) In the absence of a definition in these Regulations, words and expressions used in particular regulations and particular paragraphs of the Schedule to these Regulations which are also used in the provisions of the Transnational Information and Consultation Directive or the Extension Directive to which they are designed to give effect have the same meaning as they have in those provisions.

Controlled and Controlling Undertaking

3.—1.5. In these Regulations "controlling undertaking" means an undertaking which can exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it and "controlled undertaking" means an undertaking over which such a dominant influence can be exercised.

(1) The ability of an undertaking to exercise a dominant influence over another undertaking shall be presumed, unless the contrary is proved, when in relation to another undertaking it directly or indirectly—

(a) can appoint more than half of the members of that undertaking's administrative, management or supervisory body;

(b) controls a majority of the votes attached to that undertaking's issued share capital; or

(c) holds a majority of that undertaking's subscribed capital.

(2) In applying the criteria in paragraph (2), a controlling undertaking's rights as regards voting and appointment shall include—

(a) the rights of its other controlled undertakings; and

(b) the rights of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other of the controlling undertaking's controlled undertakings.

(3) Notwithstanding paragraphs (1) and (2) above an undertaking shall not be a controlling undertaking of another undertaking in which it has holdings where the first undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation [(EC) No 139/2004 of 20 January 2004]([20]) on the control of concentrations between undertakings.

(4) A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising functions, according to the law of a Member State, relating to liquidation, winding-up, insolvency, cessation of payments, compositions of creditors or analogous proceedings.

(5) Where the law governing an undertaking is the law of a Member State, the law applicable in order to determine whether an undertaking is a controlling undertaking shall be the law of that Member State.

(6) Where the law governing an undertaking is not that of a Member State the law applicable shall be the law of the Member State within whose territory—

(a) the representative of the undertaking is situated; or

(b) in the absence of such a representative, the management of the group undertaking which employs the greatest number of employees is situated.

(7) If two or more undertakings (whether situated in the same or in different Member States) meet one or more of the criteria in paragraph (2) in relation to another undertaking, the criteria shall be applied in the order listed in relation to each of the first-mentioned undertakings and that which meets the criterion that is highest in the order listed shall be presumed, unless the contrary is proved, to exercise a dominant influence over the undertaking in question.

Circumstances in which provisions of these Regulations apply

4.—1.6. Subject to paragraph (2) the provisions of regulations 7 to 41 and of regulation 46 shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings

([20]) O.J. L XXXX.

only where, in accordance with regulation 5, the central management is situated in the United Kingdom.

(1) The following regulations shall apply in relation to a Community-scale undertaking or Community-scale group of undertakings whether or not the central management is situated in the United Kingdom—

(a) regulations 7 and 8(1), (2) and (4) (provision of information on employee numbers);

(b) regulations 13 to 15 (UK members of the special negotiating body);

(c) regulation 18 to the extent it applies paragraphs 3 to 5 of the Schedule (UK members of the European Works Council);

(d) regulations 23(1) to (5) (breach of statutory duty);

(e) regulations 25 to 33 (protections for members of a European Works Council, etc.);

(f) regulations 34 to 39 (enforcement bodies) to the extent they relate to applications made or complaints presented under any of the other regulations referred to in this paragraph;

(g) regulations 40 and 41 (restrictions on contracting out).

The central management

5.—1.7. The central management shall be responsible for creating the conditions and means necessary for the setting up of a European Works Council or an information and consultation procedure in a Community-scale undertaking or Community-scale group of undertakings where—

(a) the central management is situated in the United Kingdom;

(b) the central management is not situated in a Member State and the representative agent of the central management (to be designated if necessary) is situated in the United Kingdom; or

(c) neither the central management nor the representative agent (whether or not as a result of being designated) is situated in a Member State and—

(i) in the case of a Community-scale undertaking, there are employed in an establishment, which is situated in the United Kingdom, more employees than are employed in any other establishment which is situated in a Member State, or

(ii) in the case of a Community-scale group of undertakings, there are employed in a group undertaking, which is situated in the United Kingdom, more employees than are employed in any other group undertaking which is situated in a Member State, and the central management initiates, or by virtue of regulation 9(1) is required to initiate, negotiations for a European Works Council or information and consultation procedure.

(2) Where the circumstances described in paragraph (1)(b) or (1)(c) apply, the central management shall be treated, for the purposes of these Regulations, as being situated in the United Kingdom and—

(a) the representative agent referred to in paragraph (1)(b); or

(b) the management of the establishment referred to in paragraph (1)(c)(i) or of the group undertaking, referred to in paragraph (1)(c)(ii),

shall be treated, respectively, as being the central management.

PART II

EMPLOYEE NUMBERS & REQUEST TO NEGOTIATE ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR INFORMATION AND CONSULTATION PROCEDURE

Calculation of numbers of employees

6.—1.8. For the purposes of determining whether an undertaking is a Community-scale undertaking or a group of undertakings is a Community-scale group of undertakings, the number of employees employed by the undertaking, or group of undertakings, shall be determined—

(a) in the case of UK employees, by ascertaining the average number of employees employed during a two year period, calculated in accordance with paragraph (2) below;

(b) in the case of employees in another Member State, by ascertaining the average number of employees employed during a two year period, calculated in accordance with the provisions of the law or practice of that Member State which is designed to give effect to the Transnational Information and Consultation Directive.

(2) Subject to paragraph (3), the average number of UK employees is to be ascertained by—

(a) determining the number of UK employees in each month in the two year period preceding the relevant date (whether they were employed throughout the month or not);

(b) adding together all of the monthly numbers, and

dividing the number so determined by 24.

(3) For the purposes of the calculation in paragraph 2(a) if for the whole of a month within the two year period an employee works under a contract by virtue of which he would have worked for 75 hours or less in that month—

(a) were the month to have contained 21 working days;

(b) were the employee to have had no absences from work; and

(c) were the employee to have worked no overtime,

the employee may be counted as half a person for the month in question, if the UK management so decides.

(4) For the purposes of this regulation, regulations 7 to 10 and regulation 20 “relevant date” means—

(a) where a request under regulation 7 is made and no valid request under regulation 9 has been made, the last day of the month preceding the month in which the request under regulation 7 is made; and

(b) where a valid request under regulation 9 is made (whether or not a request under regulation 7 has been made), the last day of the month preceding the month in which the request under regulation 9 is made.

(5) Where appropriate, the references in paragraph (4) to regulations 7 and 9 shall be read, instead, as references to the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to, respectively, Article 11(2) and Article 5(1) of the Transnational Information and Consultation Directive.

Entitlement to information

7.—1.9. An employee or an employees’ representative may request information from the management of an establishment, or of an undertaking in the United Kingdom for the purpose of determining whether, in the case of an establishment, it is part of a Community-scale undertaking or Community-scale group of undertakings or, in the case of an undertaking, it is a Community-scale undertaking or is part of a Community-scale group of undertakings.

(1) In this regulation and regulation 8, the management of an establishment or undertaking to which a request under paragraph (1) is made is referred to as the "recipient".

(2) The recipient must provide the employee or employees' representative who has made the request with information on the average number of employees employed by the undertaking, or as the case may be the group of undertakings, in the United Kingdom and in each of the other Member States in the last two years.

Complaint of failure to provide information

8.—1.10. An employee or employees' representative who has requested information under regulation 7 may present a complaint to the CAC that—

(a) the recipient has failed to provide the information referred to in regulation 7(3); or

(b) the information which has been provided by the recipient is false or incomplete in a material particular.

(2) Where the CAC finds the compliant well-founded it shall make an order requiring the recipient to disclose information to the complainant which order shall specify—

(a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant;

(b) the date (or if more than one, the earliest date) on which the recipient refused or failed to disclose information, or disclosed false or incomplete information;

(c) a date (not being less than one week from the date of the order) by which the recipient must disclose the information specified in the order.

(3) If the CAC considers that, from the information it has obtained in considering the complaint, it is beyond doubt that the undertaking is, or that the establishment is part of, a Community-scale undertaking or that the establishment or undertaking is part of a Community-scale group of undertakings, it may make a declaration to that effect.

(4) The CAC shall not consider a complaint presented under this regulation unless it is made after the expiry of a period of one month beginning on the date on which the complainant made his request for information under regulation 7.

Request to negotiate an agreement for a European Works Council or information and consultation procedure

9.—1.11. The central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure where—

(a) a valid request has been made by employees or employees' representatives; and

(b) on the relevant date the undertaking is a Community-scale undertaking or the group of undertakings is a Community-scale group of undertakings.

(2) A valid request may consist of—

(a) a single request made by at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishments in at least two different Member States; or

(b) a number of separate requests made on the same or different days by employees or by employees' representatives, which when taken together mean that at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishments in at least two different Member States have made requests.

(3) To amount to a valid request the single request referred to in paragraph (2)(a) or each separate request referred to in paragraph (2)(b) must—

(a) be in writing;

(b) be sent to—

(i) the central management, or

(ii) the local management;

(c) specify the date on which it was sent; and

(d) where appropriate, be made after the expiry of a period of two years, commencing on the date of a decision under regulation 16(3) (unless the special negotiating body and central management have otherwise agreed).

(4) The date on which a valid request is made is—

(a) where it consists of a single request satisfying paragraph 2(a) or of separate requests made on the same day satisfying paragraph 2(b), the date on which the request is or requests are sent; and

(b) where it consists of separate requests made on different days satisfying paragraph 2(b), the date of the sending of the request which resulted in that paragraph being satisfied.

(5) The central management may initiate the negotiations referred to in paragraph (1) on its own initiative.

Dispute as to whether valid request made or whether obligation in regulation 9(1) applies

10.—1.12. If the central management considers that a request (or separate request) did not satisfy any requirement of regulation 9(2) or (3) it may apply to the CAC for a declaration as to whether the request satisfied the requirement.

(1) The CAC shall only consider an application for a declaration made under paragraph (1) if—

(a) the application is made within a three month period beginning on the date when a request, or if more than one the first request, was made for the purposes of regulation 9, whether or not that request satisfied the requirements of regulations 9(2) and (3);

(b) the application is made before the central management takes any step to initiate negotiations for the establishment of a European Works Council or an information and consultation procedure; and

(c) at the time when the application is made there has been no application by the central management for a declaration under paragraph (3).

(2) If the central management considers for any reason that the obligation in regulation 9(1) did not apply to it on the relevant date, it may, within a period of three months commencing on the date on which the valid request was made, apply to the CAC for a declaration as to whether that obligation applied to it on the relevant date.

(3) Where the date on which the valid request was made is a date falling before the date of any declaration made pursuant to an application made under this regulation the operation of the periods of time specified in paragraphs (1) (b) and (1)(c) of regulation 18 shall be suspended for a period of time—

(a) commencing on the date of the application; and

(b) ending on the date of the declaration.

(4) If on an application for a declaration under this regulation the CAC does not make any declaration in favour of the central management and considers that the central management has, in making the application or conducting the proceedings, acted frivolously, vexatiously, or otherwise unreasonably, the CAC shall make a declaration to the effect that paragraph (4) does not apply.

PART III

SPECIAL NEGOTIATING BODY

Functions of the special negotiating body

11. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of a European Works Council or the arrangements for implementing an information and consultation procedure.

Composition of the special negotiating body

12.—1.13. The special negotiating body shall be constituted in accordance with paragraphs (2) and (3) below.

(1) There shall be on the special negotiating body at least one member representing each Member State in which the Community-scale undertaking has one or more establishments, or in which the Community-scale group of undertakings has its controlling undertaking or one or more controlled undertakings.

(2) There shall be on the special negotiating body the following additional members—

(a) one additional member from a Member State in which there are employed 25 per cent or more but less than 50 per cent of the employees of the undertaking or group of undertakings who are employed in the Member State;

(b) two additional members from a Member State in which there are employed 50 per cent or more but less than 75 per cent of the employees of the undertaking or group of undertakings who are employed in the Member States;

(c) three additional members from a Member State in which there are employed 75 per cent or more of the employees of the undertaking or group of undertakings who are employed in the Member States.

(3) The special negotiating body shall inform the central management and local managements of the composition of the special negotiating body.

Ballot arrangements

13.—1.14. Subject to regulation 15, the UK members of the special negotiating body shall be elected by a ballot of the UK employees.

(1) The UK management must arrange for the holding of a ballot of employees referred to in paragraph (1), which satisfies the requirements specified in paragraph (3).

(2) The requirements referred to in paragraph (2) are that—

(a) the ballot of the UK employees must comprise a single ballot but may instead, if the UK management so decides, comprise separate ballots of employees in such constituencies as the UK management may determine where—

(i) the number of UK members of the special negotiating body to be elected is more than one, and

(ii) the UK management considers that if separate ballots were held for those constituencies, the UK members of the special negotiating body to be elected would better reflect the interests of the UK employees as a whole than if a single ballot were held;

(b) a UK employee who is an employee of the Community-scale undertaking or the Community-scale group of undertakings on the day on which votes may be cast in the ballot, or if the votes may be cast on more than one day, on the first day of those days, is entitled to vote in the ballot of the UK employees;

(c) any UK employee, or UK employees' representative, who is an employee of, or an employees' representative in, the Community-scale undertaking or Community-scale group of undertakings immediately before the latest time at which a person may become a candidate in the ballot, is entitled to stand in the ballot of the UK employees as a candidate for election as a UK member of the special negotiating body;

(d) the UK management must, in accordance with paragraph (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of the UK employees but may instead, where there are to be separate ballots, appoint more than one independent ballot supervisor in accordance with that paragraph, each of whom is to supervise such of the separate ballots as the UK management may determine, provided that each separate ballot is supervised by a supervisor;

(e) after the UK management has formulated proposals as to the arrangements for the ballot of the UK employees and before it has published the final arrangements under sub-paragraph (f) it must, so far as reasonably practicable, consult with the UK employees' representatives on the proposed arrangements for the ballot of the UK employees;

(f) the UK management must publish the final arrangements for the ballot of the UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, the UK employees and the UK employees' representatives.

(3) Any UK employee or UK employees' representative who believes that the arrangements for the ballot of the UK employees are defective may, within a period of 21 days beginning on the date on which the UK management published the final arrangements under sub-paragraph (f), present a complaint to the CAC.

(4) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the UK management to modify the arrangements it has made for the ballot of the UK employees or to satisfy the requirements in sub-paragraph (e) or (f) of paragraph (3).

(5) An order under paragraph (5) shall specify the modifications to the arrangements which the UK management is required to make and the requirements which it must satisfy.

(6) A person is an independent ballot supervisor for the purposes of paragraph (3)(d) if the UK management reasonably believes that he will carry out any functions conferred on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

(7) For the purposes of paragraph (4) the arrangements for the ballot of the UK employees are defective if—

(a) any of the requirements specified in sub-paragraphs (b)-(f) of paragraph (3) is not satisfied; or

(b) in a case where the ballot is to comprise separate ballots, the constituencies determined by the UK management do not reflect adequately the interests of the UK employees as a whole.

Conduct of ballot

14.—1.15. The UK management must—

(a) ensure that a ballot supervisor appointed under regulation 13(3)(d) carries out his functions under this regulation and that there is no interference with his carrying out of those functions from the UK management, or the central management (where it is not also the UK management); and

(b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

(2) A ballot supervisor's appointment shall require that he—

(a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of the UK employees published by the UK management under regulation 13(3)(f) or, where appropriate, in

accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under regulation 13(4);

(b) does not conduct the ballot or any of the separate ballots before the UK management has satisfied the requirement specified in regulation 13(3)(e) and—

(i) where no complaint has been presented under regulation 13(4), before the expiry of a period of 21 days beginning on the date on which the UK management published its arrangements under regulation 13(3)(f); or

(ii) where a complaint has been presented under regulation 13(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of the complaint;

(c) conducts the ballot, or each separate ballot so as to secure that—

(i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote,

(ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand,

(iii) so far as is reasonably practicable, those voting are able to do so in secret, and

(iv) the votes given in the ballot are fairly and accurately counted.

(3) As soon as reasonably practicable after the holding of the ballot, the ballot supervisor must publish the results of the ballot in such manner as to make them available to the UK management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot and the persons who stood as candidates in the ballot.

(4) A ballot supervisor shall publish a report ("an ineffective ballot report") where he considers (whether or not on the basis of representations made to him by another person) that—

(a) any of the requirements referred to in paragraph (2) was not satisfied with the result that the outcome of the ballot would have been different; or

(b) there was interference with the carrying out of his functions or a failure by management to comply with all reasonable requests made by him with the result that he was unable to form a proper judgment as to whether each of the requirements referred to in paragraph (2) was satisfied in relation to the ballot.

(5) Where a ballot supervisor publishes an ineffective ballot report the report must be published within a period of one month commencing on the date on which the ballot supervisor publishes the results of the ballot under paragraph (3).

(6) A ballot supervisor shall publish an ineffective ballot report in such manner as to make it available to the UK management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot and the persons who stood as candidates in the ballot.

(7) Where a ballot supervisor publishes an ineffective ballot report then—

(a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the UK management shall again be under the obligation in regulation 13(2);

(b) if there have been separate ballots and sub-paragraph (a) does not apply—

(i) the UK management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was issued to be reheld in accordance with regulation 13 and this regulation, and

(ii) no such ballot shall have effect until it has been reheld and no ineffective ballot report has been published in respect of it.

(8) All costs relating to the holding of a ballot, including payments made to a ballot supervisor for supervising the conduct of the ballot, shall be borne by the central management (whether or not an ineffective ballot report has been made).

Consultative Committee

15.—1.16. Where a consultative committee exists—

(a) no UK member of the special negotiating body shall be elected by a ballot of the UK employees, except in the circumstances specified in paragraphs (2), (3) or (9) below; and

(b) the committee shall be entitled to nominate from its number the UK members of the special negotiating body.

(2) Where the consultative committee fails to nominate any UK members of the special negotiating body, all of the UK members of the special negotiating body shall be elected by a ballot of the UK employees in accordance with regulations 13 and 14.

(3) Where the consultative committee nominates such number of persons to be a UK member, or UK members, of the special negotiating body, which number is less or more than the number of UK members of the special negotiating body required, the consultative committee shall be treated as having failed to have nominated any UK members of the special negotiating body.

(4) In this regulation, "a consultative committee" means a body of persons—

(a) whose normal functions include or comprise the carrying out of an information and consultation function;

(b) which is able to carry out its information and consultation function without interference from the UK management, or from the central management (where it is not also the UK management);

(c) which, in carrying out its information and consultation function, represents all the UK employees; and

(d) which consists wholly of persons who were elected by a ballot (which may have consisted of a number of separate ballots) in which all the employees who, at the time, were UK employees were entitled to vote.

(5) In paragraph (4) "information and consultation function" means the function of—

(a) receiving, on behalf of all the UK employees, information which may significantly affect the interests of the UK employees, but excluding information which is relevant only to a specific aspect of the interests of the employees, such as health and safety or collective redundancies; and

(b) being consulted by the UK management or the central management (where it is not also the UK management) on the information referred to in sub-paragraph (a) above.

(6) The consultative committee must publish the names of the persons whom it has nominated to be UK members of the special negotiating body in such manner as to bring them to the attention of the UK management and, so far as reasonably practicable, the UK employees and UK employees' representatives.

(7) Where the UK management, a UK employee or a UK employees' representative believes that—

(a) the consultative committee does not satisfy the requirements in paragraph (4) above; or

(b) any of the persons nominated by the consultative committee is not entitled to be nominated,

it, or as the case may be he, may, within a period of 21 days beginning on the date on which the consultative committee published under paragraph (6) the names of persons nominated, present a complaint to the CAC.

(8) Where the CAC finds the complaint well-founded it shall make a declaration to that effect.

(9) Where the CAC has made a declaration under paragraph (8)—

(a) no nomination made by the consultative committee shall have effect; and

(b) all of the UK members of the special negotiating body shall be elected by a ballot of the UK employees in accordance with regulations 13 and 14.

(10) Where the consultative committee nominates any person to be a UK member of the special negotiating body, that nomination shall have effect after—

(a) where no complaint has been presented under paragraph (7), the expiry of a period of 21 days beginning on the date on which the consultative committee published under paragraph (6) the names of persons nominated; or

(b) where a complaint has been presented under paragraph (7), the complaint has been determined without a declaration under paragraph (8) having been made.

PART IV

EUROPEAN WORKS COUNCIL AND INFORMATION AND CONSULTATION PROCEDURE

Negotiation procedure

16.—1.17. With a view to concluding an agreement referred to in regulation 17 the central management must convene a meeting with the special negotiating body and must inform local managements accordingly.

(1) Subject to paragraph (3), the special negotiating body shall take decisions by a majority of the votes cast by its members and each member of the special negotiating body is to have one vote.

(2) The special negotiating body may decide not to open negotiations with central management or to terminate negotiations. Any such decision must be taken by at least two thirds of the votes cast by its members.

(3) Any decision made under paragraph (3) shall have the following effects–

(a) the procedure to negotiate and conclude the agreement referred to in regulation 17 shall cease from the date of the decision; and

(b) a purported request made under regulation 9 less than two years after the date of the decision shall not be treated as such a request, unless the special negotiating body and the central management otherwise agree.

(4) For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice.

(5) The central management shall pay for any reasonable expenses relating to the negotiations that are necessary to enable the special negotiating body to carry out its functions in an appropriate manner; but where the special negotiating body is assisted by more than one expert the central management is not required to pay such expenses in respect of more than one of them.

Content and scope of a European Works Council agreement and information and consultation procedure

17.—1.18. The central management and the special negotiating body are under a duty to negotiate in a spirit of cooperation with a view to reaching a written agreement on the detailed arrangements for the information and consultation of employees in a Community-scale undertaking or Community-scale group of undertakings.

(1) In this regulation and regulations 18 and 20, the central management and the special negotiating body are referred to as “the parties”.

(2) The parties may decide in writing to establish an information and consultation procedure instead of a European Works Council.

(3) Without prejudice to the autonomy of the parties, where the parties decide to proceed with the establishment of a European Works Council, the agreement establishing it shall determine—

(a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;

(b) the composition of the European Works Council, the number of members, the allocation of seats and the term of office of the members;

(c) the functions and the procedure for information and consultation of the European Works Council;

(d) the venue, frequency and duration of meetings of the European Works Council;

(e) the financial and material resources to be allocated to the European Works Council; and

(f) the duration of the agreement and the procedure for its renegotiation.

(4) If the parties decide to establish an information and consultation procedure instead of a European Works Council—

(a) the agreement establishing the procedure must specify a method by which the information and consultation representatives are to enjoy the right to meet to discuss the information conveyed to them; and

(b) the information conveyed to the information and consultation representatives shall relate in particular to transnational questions which significantly affect the interests of the employees.

(5) An agreement referred to in paragraph (4) or (5) is not to be subject to the provisions of the Schedule, except to the extent that the parties provide in the agreement that any of those requirements are to apply.

(6) Where a Community-scale group of undertakings comprises one or more undertakings or groups of undertakings which are themselves Community-scale undertakings or Community-scale groups of undertakings, the European Works Council shall be established at the level of the first-mentioned Community-scale group of undertakings, unless an agreement referred to in paragraph (4) provides otherwise.

(7) Unless a wider scope is provided for in an agreement referred to in paragraph (1), the powers and competence of a European Works Council and the scope of an information and consultation procedure shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

Subsidiary requirements

18.—1.19. The provisions of the Schedule shall apply if—

(a) the parties so agree;

(b) within the period of six months beginning on the date on which a valid request referred to in regulation 9 was made, the central management refuses to commence negotiations; or

(c) after the expiry of a period of three years beginning on the date on which a valid request referred to in regulation 9 was made, the parties have failed to conclude an agreement under regulation 17 and the special negotiating body has not taken the decision under regulation 16(3).

Cooperation

19.—1.20. The central management and the European Works Council are under a duty to work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

(1) The duty in paragraph (1) shall apply also to the central management and information and consultation representatives.

PART V

COMPLIANCE AND ENFORCEMENT

Failure to establish European Works Council or information and consultation procedure

20.—1.21. A compliant may be presented to the Appeal Tribunal by a relevant applicant who considers—

(a) that the parties have reached agreement on the establishment of a European Works Council or an information and consultation procedure, or that regulation 18 applies; and

(b) that, because of a failure of the central management, the European Works Council or information and consultation procedure has not been established at all, or has not been established fully in accordance with the terms of the agreement under regulation 17 or, as the case may be, in accordance with the provisions of the Schedule.

(2) In this regulation "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management.

(3) In this regulation "relevant applicant" means—

(a) in a case where a special negotiating body exists, the special negotiating body; or

(b) in a case where a special negotiating body does not exist, an employee, employees' representative, or person who was a member of the special negotiating body (if that body existed previously).

(4) Where the Appeal Tribunal finds the compliant well-founded it shall make a decision to that effect and may make an order requiring the central management to take such steps as are necessary to establish the European Works Council or information and consultation procedure in accordance with the terms of the agreement under regulation 17 or, as the case may be, to establish a European Works Council in accordance with the provisions of the Schedule.

(5) The Appeal Tribunal shall not find a complaint under this regulation to be well-founded where—

(a) the central management made no application in relation to the request under regulation 10(1), or where the request consisted of separate requests was unable by reason of the time limit in sub-paragraph (a) of that regulation to make an application under the regulation in relation to a particular request, and shows that the request was not a valid request because a requirement of regulation 9(2) or (3) was not satisfied; or

(b) the central management made no application under regulation 10(3) but shows that the obligation in regulation 9(1) did not, for any reason, apply to it on the relevant date.

(6) An order under paragraph (4) shall specify—

(a) the steps which the central management is required to take;

(b) the date of the failure of the central management; and

(c) the period within which the order must be complied with.

(7) If the Appeal Tribunal makes a decision under paragraph (4) above it shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.

(8) Paragraph (7) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the central management, that the failure resulted from a reason beyond the central management's control or that it has some other reasonable excuse for its failure.

(9) Regulation 22 shall apply in respect of a penalty notice issued under this regulation.

(10) No order of the Appeal Tribunal under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

Disputes about operation of European Works Council or information and consultation procedure

21.—1.22. Where—

(a) a European Works Council or information and consultation procedure been established under regulation 17; or

(b) a European Works Council has been established by virtue of regulation 18,

a complaint may be presented to the Appeal Tribunal by a relevant applicant who considers that, because of the failure of a defaulter, the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule, have not been complied with.

(2) In this regulation, "failure" means an act or omission and a failure by the local management shall be treated as a failure by the central management.

(3) In this regulation "relevant applicant" means—

(a) in the case of a failure concerning a European Works Council, either the central management or the European Works Council; or

(b) in the case of a failure concerning an information and consultation procedure, either the central management or any one or more of the information and consultation representatives,

and "defaulter" means the persons mentioned in sub-paragraph (a) or (b) against whom the complaint is presented.

(4) Where the Appeal Tribunal finds the complaint well-founded it shall make a decision to that effect and may make an order requiring the defaulter to take such steps as are necessary to comply with the terms of the agreement under regulation 17 or, as the case may be, the provisions of the Schedule.

(5) An order made under paragraph (4) shall specify—

(a) the steps which the defaulter is required to take;

(b) the date of the failure; and

(c) the period within which the order must be complied with.

(6) If the Appeal Tribunal makes a decision under paragraph (4) and the defaulter in question is the central management, the Appeal Tribunal shall issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.

(7) Paragraph (6) shall not apply if the Appeal Tribunal is satisfied, on hearing the representations of the central management, that the failure resulted from a reason beyond the central management's control or that it has some other reasonable excuse for its failure.

(8) Regulation 22 shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the Appeal Tribunal under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management.

Penalties

22.—1.23. A penalty notice issued under regulation 20 or 21 shall specify—

(a) the amount of the penalty which is payable;

(b) the date before which the penalty must be paid; and

(c) the failure and period to which the penalty relates.

(2) No penalty set by the Appeal Tribunal under this regulation may exceed £75,000.

(3) When setting the amount of the penalty, the Appeal Tribunal shall take into account—

(a) the gravity of the failure;

(b) the period of time over which the failure occurred;

(c) the reason for the failure;

(d) the number of employees affected by the failure; and

(e) the number of employees of the Community-scale undertaking or Community-scale group of undertakings in the Member States.

(4) The date specified under paragraph (1)(b) above must not be earlier than the end of the period within which an appeal against a decision or order made by the Appeal Tribunal under regulation 20 or 21 may be made.

(5) If the specified date in a penalty notice has passed and—

(a) the period during which an appeal may be made has expired without an appeal having been made; or

(b) such an appeal has been made and determined,

the Secretary of State may recover from the central management, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.

(6) The making of an appeal suspends the effect of a penalty notice.

(7) Any sums received by the Secretary of State under regulation 20 or 21 or this regulation shall be paid into the Consolidated Fund.

PART VI

CONFIDENTIAL INFORMATION

Breach of statutory duty

23.—1.24. A person who is or at any time was—

(a) a member of a special negotiating body or a European Works Council;

(b) an information and consultation representative; or

(c) an expert assisting a special negotiating body, a European Works Council or its select committee, or information and consultation representatives,

shall not disclose any information or document which is or has been in his possession by virtue of his position as described in sub-paragraph (a), (b) or (c) of this paragraph, which the central management has entrusted to him on terms requiring it to be held in confidence.

(2) In this regulation and in regulation 24, a person specified in paragraph (1)(a), (b) or (c) of this regulation is referred to as a "recipient".

(3) The obligation to comply with paragraph (1) is a duty owed to the central management, and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

(4) Paragraph (3) shall not affect the liability which any person may incur, nor affect any right which any person may have, apart from paragraph (3).

(5) No action shall lie under paragraph (3) where the recipient reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act([21]) or, as the case may be, Article 67A of the 1996 Order([22]).

(6) A recipient whom the central management (which is situated in the United Kingdom) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration as to whether it was reasonable for the central management to impose such a requirement.

([21]) Section 43A of the 1996 Act was inserted by the Public Interest Disclosure Act 1998 (c.23), section 1.

([22]) Article 67A was inserted by the Public Interest Disclosure (Northern Ireland) Order (S.I. 1998 No. 1763 (N.I. 17).

(7) If the CAC considers that the disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking, it shall make a declaration that it was not reasonable for the central management to require the recipient to hold the information or document in confidence.

(8) If a declaration is made under paragraph (7), the information or document shall not at any time thereafter be regarded as having been entrusted to the recipient who made the application under paragraph (6), or to any other recipient, on terms requiring it to be held in confidence.

Withholding of information by central management

24.—1.25. The central management is not required to disclose any information or document to a recipient when the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking or group of undertakings concerned.

(1) Where there is a dispute between the central management and a recipient as to whether the nature of the information or document which the central management has failed to provide is such as is described in paragraph (1), the central management or a recipient may apply to the CAC for a declaration as to whether the information or document is of such a nature.

(2) If the CAC makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, seriously harm the functioning of, or be prejudicial to, the undertaking or group of undertakings concerned, the CAC shall order the central management to disclose the information or document.

(3) An order under paragraph (3) above shall specify—

(a) the information or document to be disclosed;

(b) the recipient or recipients to whom the information or document is to be disclosed;

(c) any terms on which the information or document is to be disclosed; and

(d) the date before which the information or document is to be disclosed.

PART VII

PROTECTIONS FOR MEMBERS OF A EUROPEAN WORKS COUNCIL, ETC.

Right to time off for members of a European Works Council, etc.

25.—1.26. An employee who is—

(a) a member of a special negotiating body;

(b) a member of a European Works Council;

(c) an information and consultation representative; or

(d) a candidate in an election in which any person elected will, on being elected, be such a member or representative,

is entitled to be permitted by his employer to take reasonable time off during the employee's working hours in order to perform his functions as such a member, representative or candidate.

(2) For the purposes of this regulation the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

Right to remuneration for time off under regulation 25

26.—1.27. An employee who is permitted to take time off under regulation 25 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(1) Chapter II of Part XIV of the 1996 Act (a week's pay) and, in relation to Northern Ireland, Chapter IV of Part I of the 1996 Order shall apply in relation to this regulation as they apply, respectively, in relation to section 62 of the 1996 Act and Article 90 of the 1996 Order.

(2) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time is taken.

(3) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by—

(a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken; or

(b) where the employee has not been employed for a sufficient period to enable the calculation to be made under sub-paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances.

(4) The considerations referred to in paragraph (4)(b) are—

(a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and

(b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

(5) A right to any amount under paragraph (1) does not affect any right of an employee in relation to remuneration under his contract of employment ("contractual remuneration").

(6) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 25 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and, conversely, any payment of remuneration under paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Right to time off: complaints to tribunals

27.—1.28. An employee may present a complaint, in Great Britain to an employment tribunal and in Northern Ireland to an industrial tribunal, that his employer—

(a) has unreasonably refused to permit him to take time off as required by regulation 25; or

(b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 26.

(2) A tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a tribunal finds a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.

(4) If the complaint is that the employee has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under regulation 26 if the employer had not refused.

(5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 26, the tribunal shall also order the employer to pay to the employee the amount which it finds due to him.

Unfair dismissal

28.—1.29. An employee who is dismissed and to whom paragraph (2) or (5) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, paragraph (3) or (6), as unfairly dismissed for the purposes of Part X of the 1996 Act and of Part XI of the 1996 Order.

(1) This paragraph applies to an employee who is—

(a) a member of a special negotiating body;

(b) a member of a European Works Council;

(c) an information and consultation representative; or

(d) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(2) The reason is that—

(a) the employee performed any functions or activities as such a member, representative or candidate; or

(b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 25 or 26;

or proposed to do so.

(3) The reason in paragraph (3)(a) does not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 23(1), unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act or, as the case may be, by Article 67A of the 1996 Order.

(4) This paragraph applies to any employee whether or not he is an employee to whom paragraph (2) applies.

(5) The reasons are that the employee—

(a) took, or proposed to take, any proceedings before an employment tribunal or industrial tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;

(b) exercised, or proposed to exercise, any entitlement to apply or complain to the Appeal Tribunal or the CAC, or in Northern Ireland the Industrial Court, conferred by these Regulations;

(c) requested, or proposed to request, information in accordance with regulation 7;

(d) acted with a view to securing that a special negotiating body, a European Works Council or an information and consultation procedure did or did not come into existence;

(e) indicated that he supported or did not support the coming into existence of a special negotiating body, a European Works Council or an information and consultation procedure;

(f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or of a European Works Council or an information and consultation representative;

(g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;

(h) voted in such a ballot;

(i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or

(j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

(6) It is immaterial for the purposes of paragraph (6)(a)—

(a) whether or not the employee has the right; or

(b) whether or not the right has been infringed;

but for that paragraph to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

Subsidiary provisions relating to unfair dismissal: Great Britain

29.—1.30. In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)([23]) there shall be inserted "or (7D)" immediately before "applies" and after subsection (7C) there shall be inserted—

"(7D) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation).".

(1) In section 108([24]) of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)([25]) the word "or" at the end of paragraph (gh) shall be omitted and after paragraph (h) there shall be inserted—

"or

(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of the regulation) applies.".

(2) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2) (cases where upper age limit does not apply)([26]) the word "or" at the end of paragraph (gh) shall be omitted and after paragraph (h) there shall be inserted—

"or

(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.".

Subsidiary provisions relating to unfair dismissal: Northern Ireland

30.—1.31. In Article 137([27]) of the 1996 Order (redundancy as unfair dismissal) in paragraph (1)(c) (which requires one of a specified group of paragraphs to apply for a person to be treated as unfairly dismissed) for "(7A)" there shall be substituted "(7B)" and after paragraph (7A) there shall be inserted—

"(7B) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation).".

(1) In Article 140([28]) of the 1996 Order (exclusion of right: qualifying period of employment) in paragraph (3) (cases where no qualifying period of employment is required)([29]) the word "or" at the end of sub-paragraph (h) shall be omitted and after sub-paragraph (j) there shall be inserted—

([23]) Section 105 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.

([24]) Section 108(1) was amended by S.I. 1999/1436, Article 3.

([25]) Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

([26]) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

([27]) Article 137 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.

([28]) Article 140(1) was amended by S.R. 1999 No. 277, Article 3.

"or

(k) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.".

(2) In Article 141 of the 1996 Order (exclusion of right: upper age limit) in paragraph (2) (cases where upper age limit does not apply)([30]) the word "or" at the end of sub-paragraph (h) shall be omitted and after sub-paragraph (j) there shall be inserted—

"or

(k) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies.".

Detriment

31.—1.32. An employee to whom paragraph (2) or (5) applies has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in, respectively, paragraph (3) or (6).

(1) This paragraph applies to an employee who is—

(a) a member of a special negotiating body,

(b) a member of a European Works Council,

(c) an information and consultation representative, or

(d) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(2) The ground is that—

(a) the employee performed any functions or activities as such a member, representative or candidate, or

(b) the employee or a person acting on his behalf made a request to exercise an entitlement conferred on the employee by regulation 25 or 26;

or proposed to do so.

(3) The ground in paragraph (3)(a) does not apply where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 23(1), unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act or, as the case may be, Article 67A of the 1996 Order.

(4) This paragraph applies to any employee, whether or not he is an employee to whom paragraph (2) applies.

(5) The grounds are that the employee—

(a) took, or proposed to take, any proceedings before an employment tribunal or industrial tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;

(b) exercised, or proposed to exercise, any entitlement to apply or complain to the Appeal Tribunal, the CAC, or in Northern Ireland the Industrial Court, conferred by these Regulations;

(c) requested, or proposed to request, information in accordance with regulation 7;

(d) acted with a view to securing that a special negotiating body, a European Works Council or an information and consultation procedure did or did not come into existence;

([29]) Article 140(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

([30]) Article 141(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

(e) indicated that he supported or did not support the coming into existence of a special negotiating body, a European Works Council or an information and consultation procedure;

(f) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or of a European Works Council or an information and consultation representative;

(g) influenced or sought to influence the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;

(h) voted in such a ballot;

(i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot has been properly conducted; or

(j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

(6) It is immaterial for the purposes of paragraph (6)(a)—

(a) whether or not the employee has the right; or

(b) whether or not the right has been infringed;

but for that paragraph to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

Detriment: enforcement and subsidiary provisions

32.—1.33. An employee may present a complaint, in Great Britain to an employment tribunal and in Northern Ireland to an industrial tribunal, that he has been subjected to a detriment in contravention of regulation 31.

(1) The provisions of—

(a) sections 48(2) to (4) and 49 of the 1996 Act([31]) (complaints to employment tribunals and remedies); or

(b) in relation to Northern Ireland, Articles 71(2) to (4) and 72 of the 1996 Order([32]) (complaints to industrial tribunals and remedies);

shall apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of that Act or Article 71 of that Order (as the case may be), but taking references in those provisions to the employer as references to the employer within the meaning of regulation 31(1) above.

(2) Regulation 31 does not apply where the detriment in question amounts to dismissal.

Conciliation

33.—1.34. In section 18 of the Employment Tribunals Act 1996 (conciliation) in subsection (1) (which specifies the proceedings and claims to which the section applies)([33])—

(a) at the end of paragraph (f), the word "or" shall be omitted; and

(b) after paragraph (ff), there shall be inserted—

"or

(g) under regulation 27 or 32 of the Transnational Information and Consultation of Employees Regulations 1999.".

([31]) Sections 48 and 49 were amended respectively by sections 1(2)(b) and 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c.8); there have also been amendments to the sections that are not relevant to these Regulations.

([32]) There have been amendments to Articles 71 and 72 that are not relevant to these Regulations.

([33]) 1996 c.17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(2) In Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996 (conciliation) in paragraph (1) (which specifies the proceedings and claims to which the Article applies)([34])—

(a) at the end of sub-paragraph (e), the word "or" shall be omitted; and

(b) after sub-paragraph (f) there shall be inserted—

"or

(g) under regulation 27 or 32 of the Transnational Information and Consultation of Employees Regulations 1999.".

PART VIII

MISCELLANEOUS

The Appeal Tribunal, Industrial Court, CAC, ACAS and the Labour Relations Agency

Appeal Tribunal: jurisdiction

34.—1.35. Any proceedings before the Appeal Tribunal arising under these Regulations, other than proceedings before the Appeal Tribunal under paragraph (i) of section 21(1) of the Employment Tribunals Act 1996([35]), shall—

(a) where the central management is situated in England and Wales, be in England and Wales;

(b) where the central management is situated in Scotland, be in Scotland.

(2) Paragraph (1) shall apply to proceedings before the Appeal Tribunal arising under regulation 8 as if for the words "central management" there were substituted the words "recipient (within the meaning given to that term by regulation 7)".

(3) Paragraph (1) shall apply to proceedings before the Appeal Tribunal arising under regulation 13 or 15 or paragraph 4 of the Schedule as if for the words "central management" there were substituted the words "UK management".

Appeal Tribunal: proceedings

35.—1.36. The Employment Tribunals Act 1996 shall be amended as follows.

(1) At the end of section 20 (the Appeal Tribunal), insert—

"(4) Subsection (2) is subject to regulation 34 of the Transnational Information and Consultation of Employees Regulations 1999.".

(2) In section 21 (jurisdiction of the Appeal Tribunal), in subsection (1) (which specifies the proceedings and claims to which the section applies)—

(a) at the end of paragraph (ff), the word "or" shall be omitted; and

(b) in paragraph (g), for "or under the Working Time Regulations 1998" there shall be substituted—

",

(h) the Working Time Regulations 1998, or

(i) the Transnational Information and Consultation of Employees Regulations 1999.".

([34]) S.I. 1996/1921 (N.I. 18). Article 20(1) has been amended on a number of occasions to specify additional proceedings and claims to which the Article applies.

([35]) Section 21(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies. Paragraph (i) is inserted by regulation 35(3) of these Regulations from the date they come into force.

(3) In section 30 (Appeal Tribunal procedure rules), in paragraph (b) of subsection (2)([36]), after "any application" insert "or complaint".

Industrial Court: jurisdiction

36.—1.37. Where the central management is situated in Northern Ireland, any complaint under regulation 20 or 21 shall be presented to the Industrial Court instead of to the Appeal Tribunal and references in those regulations and in regulation 22 to the Appeal Tribunal shall be read as references to the Industrial Court.

(1) Where the central management is situated in Northern Ireland, any application under regulation 10, 23 or 24 shall be made to the Industrial Court instead of to the CAC, and references in those regulations to the CAC shall be read as references to the Industrial Court.

(2) Where the recipient (within the meaning given to that term by regulation 7) is situated in Northern Ireland, any complaint under regulation 8 shall be presented to the Industrial Court instead of to the CAC, and references in regulation 8 to the CAC shall be read as references to the Industrial Court.

(3) Where the UK management is situated in Northern Ireland, any complaint under regulation 13 or 15 or paragraph 4 of the Schedule shall be presented to the Industrial Court instead of to the CAC, and references in those regulations or that paragraph to the CAC shall be read as references to the Industrial Court.

Industrial Court: proceedings

37.—1.38. Where under these Regulations a person presents a complaint or makes an application to the Industrial Court, the complaint or application must be in writing and in such form as the Court may require.

(1) In its consideration of an application or compliant under these Regulations, the Industrial Court shall make such enquiries as it sees fit and give any person whom it considers has a proper interest in the application or complaint an opportunity to be heard.

(2) A decision, declaration or order made by the Industrial Court under these Regulations—

(a) must be in writing and state the reasons for the Court's findings; and

(b) may be relied on and enforced as if it were a decision, declaration or order made by the High Court in Northern Ireland.

(3) An appeal lies to the Court of Appeal in Northern Ireland on any question of law arising from a decision, declaration or order of, or arising in any proceedings before, the Industrial Court under these Regulations.

CAC: proceedings

38.—1.39. Where under these Regulations a person presents a complaint or makes an application to the CAC the complaint or application must be in writing and in such form as the CAC may require.

(1) In its consideration of an application or complaint under these Regulations, the CAC shall make such enquiries as it sees fit and give any person whom it considers has a proper interest in the application or complaint an opportunity to be heard.

(2) Where the central management is situated in England and Wales—

(a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the High Court in England and Wales; and

(b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the High Court in England and Wales.

([36]) Section 30(2) was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8), section 1(2)(a).

(3) Where the central management is situated in Scotland—

(a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the Court of Session; and

(b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the Court of Session.

(4) Paragraphs (3) and (4) shall apply to an order made under regulation 8 as if for the words "central management" there were substituted the words "recipient".

(5) Paragraphs (3) and (4) shall apply, as appropriate, to a declaration or order made under regulation 13 or 15 or paragraph 4 of the Schedule as if for the words "central management" there were substituted the words "UK management".

(6) A declaration or order made by the CAC under these Regulations must be in writing and state the reasons for the CAC's findings.

(7) An appeal lies to the Appeal Tribunal on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under these Regulations.

ACAS and the Labour Relations Agency

39.—1.40. If on receipt of an application or complaint under these Regulations the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to ACAS or to the Labour Relations Agency and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly, whereupon ACAS, or as the case may be the Labour Relations Agency, shall seek to promote a settlement of the matter.

(1) If an application or complaint so referred is not settled or withdrawn and ACAS, or as the case may be the Labour Relations Agency, is of the opinion that further attempts at conciliation are unlikely to result in a settlement, it shall inform the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, of its opinion.

(2) If the application or complaint is not referred to ACAS or to the Labour Relations Agency, or if it is so referred, on ACAS, or as the case may be the Labour Relations Agency, informing the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, of its opinion that further attempts at conciliation are unlikely to result in a settlement, the CAC, the Appeal Tribunal, or as the case may be the Industrial Court, shall proceed to hear and determine the application or complaint.

Restrictions on contracting out

Restrictions on contracting out: general

40.—1.41. Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of these Regulations other than a provision of Part VII; or

(b) to preclude a person from bringing any proceedings before the Appeal Tribunal or the CAC, or in Northern Ireland the Industrial Court, under any provision of these Regulations other than a provision of Part VII.

(2) Paragraph (1) does not apply to any agreement to refrain from continuing any proceedings referred to in sub-paragraph (b) of that paragraph made after the proceedings have been instituted.

Restrictions on contracting out: Part VII

41.—1.42. Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of Part VII of these Regulations; or

(b) to preclude a person from bringing any proceedings before an employment tribunal, or in Northern Ireland an industrial tribunal, under that Part.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal or, in Northern Ireland, an industrial tribunal where—

(a) a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation); or

(b) in relation to Northern Ireland, the Labour Relations Agency has taken action under Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal, or in Northern Ireland an industrial tribunal, proceedings within—

(a) section 18(1)(g) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available); or

(b) in relation to Northern Ireland, Article 20(1)(g) of the Industrial Tribunals (Northern Ireland) Order 1996,

if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of paragraph (3) the conditions regulating compromise agreements are that—

(a) the agreement must be in writing;

(b) the agreement must relate to the particular proceedings;

(c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal or, in Northern Ireland, an industrial tribunal;

(d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;

(e) the agreement must identify the adviser ; and

(f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.

(5) A person is a relevant independent adviser for the purposes of paragraph (4)(c)—

(a) if he is a qualified lawyer;

(b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or

(c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.

(6) But a person is not a relevant independent adviser for the purposes of paragraph (4)(c) in relation to the employee—

(a) if he is, is employed by or is acting in the matter for the employer or an associated employer;

(b) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer; or

(c) in the case of a person within paragraph (5)(c), if the employee makes a payment for the advice received from him.

(7) In paragraph (5)(a), "qualified lawyer" means—

(a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a

barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990)([37]);

(b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practicing certificate; and

(c) as respects Northern Ireland, a barrister (whether in practice as such or employed to give legal advice) or a solicitor who holds a practicing certificate.

[(7A) A person shall be treated as being a qualified lawyer within paragraph (7)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors' practice.]

(8) For the purposes of paragraph (6) any two employers shall be treated as associated if—

(a) one is a company of which the other (directly or indirectly) has control; or

(b) both are companies of which a third person (directly or indirectly) has control;

and "associated employer" shall be construed accordingly.

PART IX

EXCEPTIONS

Article 6 agreements

42.—1.43. Where, in accordance with regulation 5, the central management is situated in the United Kingdom and, immediately before the date on which these Regulations come into force an Article 6 agreement is in force, those provisions referred to in regulation 4(1) which apply only where the central management is situated in the United Kingdom shall only apply if—

(a) the parties to the Article 6 agreement agree or have agreed (whether before or after these Regulations come into force) to the effect that the provisions of these Regulations which would have applied in respect of the agreement had it been made under regulation 17 should apply in respect of the Article 6 agreement; or

(b) the Article 6 agreement ceases to have effect.

(2) In paragraph (1) and regulation 47 "Article 6 agreement" means an agreement for the establishment of a European Works Council or information and consultation procedure made under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 6 of the Transnational Information and Consultation Directive.

(3) Where paragraph (1)(a) applies these Regulations shall apply as if the Article 6 agreement had been made under regulation 17.

Article 7 European Works Councils

43.—1.44. Where, in accordance with regulation 5, the central management is situated in the United Kingdom, and immediately before the date these Regulations come into force an Article 7 European Works Council exists, those provisions referred to in regulation 4(1) which apply only where the central management is situated in the United Kingdom shall only apply if—

(a) the central management and European Works Council agree or have agreed (whether before or after these Regulations come into force) to the effect that the provisions of these Regulations which would have applied in respect of the European Works Council had it been made, by virtue of regulation 18, under these Regulations should apply in respect of the Article 7 European Works Council; or

(b) the European Works Council decides, under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to paragraph 1(f) of the Annex to the Transnational Information and Consultation Directive,

([37]) 1990 c.41.

to negotiate an agreement for a European Works Council or an information and consultation procedure.

(2) In paragraph (1) and regulations 47 and 48 "Article 7 European Works Council" means a European Works Council established under the provisions of the law or practice of a Member State other than the United Kingdom which are designed to give effect to Article 7 of, and the Annex to, the Transnational Information and Consultation Directive.

(3) Where paragraph (1)(a) or (b) applies these Regulations shall apply, subject to the modifications referred to in paragraphs (4) to (6) of regulation 48, as if the Article 7 European Works Council had been established, by virtue of regulation 18, under these Regulations and, in a case where paragraph (1)(b) applies, as if a decision had been taken under paragraph 10(2) of the Schedule.

Article 3 agreements

44.—1.45. None of the obligations in these Regulations applies to a Community-scale undertaking or Community-scale group of undertakings where the conditions specified in Article 3 of the Extension Directive are satisfied.

(1) The conditions referred to in paragraph (1) above are that—

(a) an agreement is in force which—

(i) is in force immediately before 16th December 1999;

(ii) covers the entire workforce in the Member States; and

(iii) provides for the transnational information and consultation of employees, and

(b) the obligation (whether arising under these Regulations or under the national law or practice of any other Member State), to initiate negotiations for the establishment of a European Works Council or information and consultation procedure would, but for this paragraph, have applied to the Community-scale undertaking or Community-scale group of undertakings solely as a result of the Extension Directive.

(2) If an agreement when taken together with one or more other agreements satisfies the requirements specified in paragraph (2)(a) that agreement, when taken together with such other agreements, shall be treated as an agreement for the purposes of that paragraph.

Article 13 agreements

45.—1.46. None of the obligations in these Regulations applies to a Community-scale undertaking or Community-scale group of undertakings where the conditions specified in Article 13 of the Transnational Information and Consultation Directive are satisfied.

(1) The conditions referred to in paragraph (1) are that an agreement is in force which—

(a) was in force immediately before whichever is the earlier of 23rd September 1996 and the day after the date on which the national law or practice giving effect to the Transnational Information and Consultation Directive came into force in the Member State (other than the United Kingdom) whose national law governs the agreement;

(b) covers the entire workforce in the Member States; and

(c) provides for the transnational information and consultation of employees.

(2) If an agreement when taken together with one or more other agreements satisfies the requirements specified in paragraph (2) that agreement, when taken together with such other agreements, shall be treated as an agreement for the purposes of that paragraph in question.

Merchant Navy

46.—1.47. Subject to paragraph (3), no long haul crew member shall be—

(a) a member of a special negotiating body;

(b) a member of a European Works Council; or

(c) an information and consultation representative.

(2) In paragraph (1), a "long haul crew member" means a person who is a member of a merchant navy crew other than—

(a) a ferry worker; or

(b) a person who normally works on voyages the duration of which is less than 48 hours.

(3) Paragraph (1) shall not apply where the central management decides that the long haul crew member in question shall be permitted to be, as the case may be, a member of a special negotiating body or of a European Works Council, or an information and consultation representative.

(4) Where paragraph (1) applies, no long haul crew member shall—

(a) stand as a candidate for election as a member of a special negotiating body or of a European Works Council, or as an information and consultation representative; or

(b) be appointed or nominated to be a member of a special negotiating body or of a European Works Council, or an information and consultation representative.

[46A]

[(1) These regulations do not apply to an SE that is—

(a) a Community-scale undertaking, or

(b) a controlling undertaking of a Community-scale group of undertakings,

except where the special negotiating body has taken the decision referred to in regulation 29 of the European Public Limited-Liability Company Regulations 2004 (decision not to open, or to terminate, negotiations).

(2) In this regulation an "SE" means a company established in accordance with the European Public Limited-Liability Company Regulations 2004.]

[46B]

[(1) These regulations do not apply to an SCE that is—

(a) a Community-scale undertaking, or

(b) a controlling undertaking of a Community-scale group of undertakings,

except where the special negotiating body has taken the decision referred to in regulation 19 of, or paragraph 13 of Schedule 1 to, the European Cooperative Society (Involvement of Employees) Regulations 2006 (decision not to open, or to terminate, negotiations).

(2) In this regulation an "SCE" means a European Cooperative Society established in accordance with the European Cooperative Society Regulations 2006.]

PART X

TRANSITIONALS

Transitionals: special negotiating body

47.—1.48. Where immediately before the date on which these Regulations come into force—

(a) a special negotiating body has been validly requested or established under the provisions of the law or practice of a Member State other than the United Kingdom which is designed to give effect to the Transnational Information and Consultation Directive;

(b) no Article 6 agreement is in force; and

(c) no Article 7 European Works Council has been established—

paragraphs (2) and (3) shall apply.

(2) Where the central management is situated in the United Kingdom these Regulations shall apply, with the modifications specified in paragraphs (4) to (6), as if a valid request had been

made under regulation 9 and, where appropriate, as if the special negotiating body had been established under these Regulations.

(3) Where the central management is not situated in the United Kingdom the regulations referred to in regulation 4(2) shall apply with the modifications specified in paragraphs (5) and (6) of this regulation.

(4) Regulation 12 shall apply in respect of the composition of the special negotiating body only to the extent that it determines the number of UK members on the special negotiating body but shall not affect in any way the number of non-UK members on the special negotiating body.

(5) Where, as a result of the implementation of the Extension Directive by a Member State (including the United Kingdom) there are required to be UK members on the special negotiating body and immediately before the date on which these Regulations come into force—

(a) no person has been designated to attend meetings of the special negotiating body as a representative of employees in the United Kingdom; or

(b) one or more persons have been designated to attend meetings of the special negotiating body as a representative of employees in the United Kingdom,

then in the case mentioned in sub-paragraph (a), the UK members of the special negotiating body shall be elected or appointed in accordance with regulations 13 to 15, and in the case mentioned in sub-paragraph (b), the person or persons shall be treated as from the date on which these Regulations come into force as a UK member of the special negotiating body who has been elected or appointed in accordance with regulations 13 to 15.

(6) Where the number of persons referred to in paragraph (5)(b) is—

(a) in the case where regulation 12 applies, less than the number of UK members of the special negotiating body required by that regulation, or

(b) in a case where regulation 12 does not apply, less than the number of UK members of the special negotiating body required by the provisions of the law or practice of the Member State under which the special negotiating body was established,

the additional number of UK members of the special negotiating body needed to secure compliance with regulation 12 or, as the case may be, the law or practice of the Member State referred to in sub-paragraph (b) of this paragraph shall be elected or appointed in accordance with regulations 13 to 15.

Transitionals: Article 7 European Works Councils

48.—1.49. Where, immediately before the date on which these Regulations come into force, a European Works Council has been established under the provisions of the law or practice of a Member State other than the United Kingdom, which are designed to give effect to Article 7 of, and the Annex to, the Transnational Information and Consultation Directive, paragraphs (2) and (3) shall apply.

(1) Where the central management is situated in the United Kingdom and regulation 43(1)(a) or 43(1)(b) applies these Regulations shall apply with the modifications specified in paragraphs (4) to (6) as if the European Works Council had been established under these Regulations.

(2) Where the central management is not situated in the United Kingdom, or is situated in the United Kingdom but neither regulation 43(1)(a) nor 43(1)(b) applies, the regulations referred to in regulation 4(2) shall apply with the modifications specified in paragraphs (5) and (6) of this regulation.

(3) Paragraph 2 of the Schedule shall apply in respect of the composition of the European Works Council only to the extent that it determines the number of UK members on the European Works Council but shall not affect in any way the number of non-UK members on the European Works Council.

(4) Where, as a result of the implementation of the Extension Directive by a Member State (including the United Kingdom), there are required to be UK members on the European Works Council and immediately before the date on which these Regulations come into force—

(a) no person has been designated to attend meetings of the European Works Council as a representative of employees in the United Kingdom; or

(b) one or more persons have been designated to attend meetings of the European Works Council as a representative of employees in the United Kingdom,

then in the case mentioned in sub-paragraph (a), the UK members of the European Works Council shall be appointed or elected in accordance with paragraphs 3 to 5 of the Schedule, and in the case mentioned in sub-paragraph (b), the person or persons shall be treated as from the date on which these Regulations come into force as a UK member of the European Works Council who has been elected or appointed in accordance with paragraphs 3 to 5 of the Schedule.

(5) Where the number of persons referred to in paragraph (5)(b) is—

(a) in a case where paragraph 2 of the Schedule applies, less than the number of UK members of the European Works Council required by that paragraph; or

(b) in a case where paragraph 2 of the Schedule does not apply, less than the number of UK members of the European Works Council required by the law or practice of the Member State under which the European Works Council was established,

the additional number of UK members needed to secure compliance with paragraph 2 or, as the case may be, the law or practice of the Member State referred to in sub-paragraph (b) of this paragraph shall be elected or appointed in accordance with paragraphs 3 to 5 of the Schedule.

Alan Johnson
Parliamentary Under Secretary of State for Competitiveness
12th December 1999 Department of Trade and Industry

SCHEDULE

Regulation 18

SUBSIDIARY REQUIREMENTS

Establishment of European Works Council

1. A European Works Council shall be established in the Community-scale undertaking or Community-scale group of undertakings in accordance with the provisions in this Schedule.

Composition of the European Works Council

2.—1.50. The European Works Council shall comprise a minimum of three, and a maximum of 30, members.

(1) Subject to sub-paragraph (1), the European Works Council shall be constituted in accordance with sub-paragraphs (3) and (4) below.

(2) There shall be on the European Works Council at least one member representing each Member State in which the Community-scale undertaking has one or more establishments, or in which the Community-scale group of undertakings has its controlling undertaking or one or more controlled undertakings.

(3) There shall be on the European Works Council the following additional members—

(a) one additional member from a Member State in which there are employed 25 per cent or more but less than 50 per cent of the employees of the undertaking or group of undertakings who are employed in the Member States;

(b) two additional members from a Member State in which there are employed 50 per cent or more but less than 75 per cent of the employees of the undertaking or group of undertakings who are employed in the Member States;

(c) three additional members from a Member State in which there are employed 75 per cent or more of the employees of the undertaking or group of undertakings who are employed in the Member States.

(4) The European Works Council shall inform the central management and any more appropriate level of management of the composition of the European Works Council.

(5) Where the European Works Council decides its size so warrants, it shall elect from among its members a select committee comprising no more than three members who are to act on behalf of the European Works Council.

Appointment or election of UK members of the European Works Council

3.—1.51. The UK members of the European Works Council must be UK employees and—

(a) in a case where all of those employees are represented by UK employees' representatives, shall be elected or appointed by such employees' representatives;

(b) in a case where not all of those employees are represented by UK employees' representatives, shall be elected by ballot.

(2) For the purposes of this paragraph all of the UK employees are represented by UK employees' representatives if each of the employees referred to in sub-paragraph (1) is a UK employee—

(a) in respect of which an independent trade union is recognised by his employer for the purpose of collective bargaining; or

(b) who has elected or appointed an employees' representative for the purpose of receiving, on the employee's behalf, information—

(i) which is relevant to the employee's terms and conditions of employment; or

(ii) about the activities of the undertaking which may significantly affect the employee's interests

but excluding representatives who are expected to receive information relevant only to a specific aspect of the terms and conditions or interests of the employee, such as health and safety or collective redundancies.

(3) Where sub-paragraph (1)(a) above applies, the election or appointment of members of the European Works Council shall be carried out by whatever method the UK employees' representatives decide.

(4) Where sub-paragraph (1)(b) applies, the UK members of the European Works Council are to be elected by a ballot of the UK employees in accordance with paragraphs 4 and 5.

Ballot arrangements

4.—1.52. The UK management must arrange for the holding of a ballot of employees referred to in paragraph 3(4), which satisfies the requirements specified in sub-paragraph(2).

(1) The requirements referred to in sub-paragraph (1) are that—

(a) the ballot of the UK employees must comprise a single ballot, but may instead, if the UK management so decides, comprise separate ballots of employees in such constituencies as the UK management may determine where—

(i) the number of UK members of the European Works Council to be elected is more than one, and

(ii) the UK management considers that if separate ballots were held for those constituencies, the UK members of the European Works Council to be elected would better reflect the interests of the UK employees as a whole than if a single ballot were held;

(b) a UK employee who is an employee of the Community-scale undertaking or the Community-scale group of undertakings on the day on which votes may be cast in the ballot or, if the votes may be cast on more than one day, on the first day of those days is entitled to vote in a ballot of the UK employees;

(c) any UK employee who is an employee of the Community-scale undertaking or Community-scale group of undertakings immediately before the latest time at which a person may become a candidate in the ballot, is entitled to stand in the ballot of the UK employees as a candidate for election as a UK member of the European Works Council;

(d) the UK management must, in accordance with sub-paragraph (6), appoint an independent ballot supervisor to supervise the conduct of the ballot of the UK employees but may instead, where there are to be separate ballots, appoint more than one independent ballot supervisor in accordance with that sub-paragraph, each of whom is to supervise such of the separate ballots as the UK management may determine, provided that each separate ballot is supervised by a supervisor;

(e) after the UK management has formulated proposals as to the arrangements for the ballot of the UK employees and before it has published the final arrangements under paragraph (f) it must, so far as reasonably practicable, consult with the UK employees' representatives on the proposed arrangements for the ballot of the UK employees;

(f) the UK management must publish the final arrangements for the ballot of the UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, the UK employees and the UK employees' representatives.

(2) Any UK employee or UK employees' representative who believes that the arrangements for the ballot of the UK employees are defective may, within a period of 21 days beginning on the date the UK management published the final arrangements under paragraph (f), present a complaint to the CAC.

(3) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the UK management to modify the arrangements it has made for

the ballot of the UK employees or to satisfy the requirements in paragraph (e) or (f) of sub-paragraph (2).

(4) An order under sub-paragraph (4) shall specify the modifications to the arrangements which the UK management is required to make and the requirements which it must satisfy.

(5) A person is an independent ballot supervisor for the purposes of sub-paragraph (2)(d) if the UK management reasonably believes that he will carry out any functions conferred on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

(6) For the purposes of sub-paragraph (3), the arrangements for the ballot of the UK employees are defective if—

(a) any of the requirements specified in paragraphs (b) to (f) of sub-paragraph (2) is not satisfied; or

(b) in a case where the ballot is to comprise separate ballots, the constituencies determined by the UK management do not reflect adequately the interests of the UK employees as a whole.

Conduct of ballot

5.—1.53. The UK management must—

(a) ensure that the ballot supervisor appointed under paragraph 4(2)(d) carries out his functions under this paragraph and that there is no interference with his carrying out of those functions from the UK management, or the central management (where it is not also the UK management); and

(b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

(2) A ballot supervisor's appointment shall require that he—

(a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of the UK employees published by the UK management under paragraph 4(2)(f) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under paragraph 4(3);

(b) does not conduct the ballot or any of the separate ballots before the UK management has satisfied the requirement specified in paragraph 4 (2)(e) and—

(i) where no complaint has been presented under paragraph 4(3), before the expiry of a period of 21 days beginning on the date on which the UK management published its arrangements under paragraph 4(2)(f); or

(ii) where a complaint has been presented under paragraph 4(3), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of the complaint;

(c) conducts the ballot, or each separate ballot, so as to secure that—

(i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote,

(ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand,

(iii) so far as is reasonably practicable, those voting are able to do so in secret, and

(iv) the votes given in the ballot are fairly and accurately counted.

(3) As soon as reasonably practicable after the holding of the ballot, or each separate ballot, the ballot supervisor must publish the results of the ballot in such manner as to make them available to the UK management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot or who stood as candidates in the ballot.

(4) A ballot supervisor shall publish an ineffective ballot report where he considers (whether or not on the basis of representations made to him by another person) that—

(a) any of the requirements referred to in sub-paragraph (2) was not satisfied with the result that the outcome of the ballot would have been different; or

(b) there was interference with the carrying out of his functions or a failure by management to comply with all reasonable requests made by him with the result that he was unable to form a proper judgment as to whether each of the requirements referred to in sub-paragraph (2) was satisfied in relation to the ballot.

(5) Where a ballot supervisor publishes an ineffective ballot report the report must be published within a period of one month commencing on the date on which the ballot supervisor publishes the results of the ballot under sub-paragraph (3).

(6) A ballot supervisor shall publish an ineffective ballot report in such manner as to make it available to the UK management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot or who stood as candidates in the ballot.

(7) Where a ballot supervisor publishes an ineffective ballot report then—

(a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the UK management shall again be under the obligation in paragraph 4(1);

(b) if there have been separate ballots and paragraph (a) does not apply—

(i) the UK management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was issued to be reheld in accordance with paragraph 4 and this paragraph, and

(ii) no such ballot shall have effect until it has been so reheld and no ineffective ballot report has been published in respect of it.

(8) All costs relating to the holding of a ballot, including payments made to a ballot supervisor for supervising the conduct of the ballot, shall be borne by the central management (whether or not an ineffective ballot report has been made).

Competence of the European Works Council

6.—1.54. The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States.

(1) In the case of a Community-scale undertaking or Community-scale group of undertakings falling within regulation 5(1)(b) or 5(1)(c), the competence of the European Works Council shall be limited to those matters concerning all of its establishments or group undertakings situated within the Member States or concerning at least two of its establishments or group undertakings situated in different Member States.

Information and consultation meetings

7.—1.55. Subject to paragraph 8, the European Works Council shall have the right to meet with the central management once a year in an information and consultation meeting, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects.

(1) The central management shall inform the local managements accordingly.

(2) The information and consultation meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of

production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

Exceptional information and consultation meetings

8.—1.56. Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet in an exceptional information and consultation meeting, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

(1) Those members of the European Works Council who have been elected or appointed by the establishments or undertakings which are directly concerned by the measures in question shall also have the right to participate in an exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph organised with the select committee elected under sub-paragraph (6) of paragraph 2.

(2) The exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or Community-scale group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

(3) The exceptional information and consultation meeting referred to in sub-paragraph (1) of this paragraph shall not affect the prerogatives of the central management.

Procedures

9.—1.57. Before an information and consultation meeting or exceptional information and consultation meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with sub-paragraph (2) of paragraph 8, shall be entitled to meet without the management concerned being present.

(1) Subject to regulation 23, the members of the European Works Council shall inform—

(a) the employees' representatives of the employees in the establishments of a Community-scale undertaking or in the undertakings of a Community-scale group of undertakings; or

(b) to the extent that any employees are not represented by employees' representatives, the employees themselves

of the content and outcome of the information and consultation procedure carried out in accordance with the provisions of this Schedule.

(2) The European Works Council shall adopt its own rules of procedure.

(3) The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

(4) The operating expenses of the European Works Council shall be borne by the central management; but where the European Works Council is assisted by more than one expert the central management is not required to pay such expenses in respect of more than one of them.

(5) The central management shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner. In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless the central management and European Works Council, or select committee, otherwise agree.

The continuing application of the subsidiary requirements

10.—1.58. Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of an agreement referred to in regulation 17 or to continue to apply the subsidiary requirements adopted in accordance with the provisions of this Schedule.

(1) If the European Works Council decides to negotiate an agreement in accordance with regulation 17, it shall notify the central management in writing to that effect, and

(a) such notification shall be treated as a valid request made under regulation 9: and

(b) regulations 16, 17 and 18 shall apply in respect of the negotiations for an agreement as if references in those regulations to the special negotiating body were references to the European Works Council.

Annex C: Directive 2009/38/EC

This Annex contains the text of the 2009 Directive marked-up to demonstrate where the text differs from that of the 1994 Directive. Text that has been struck through is text deleted form the 1994 Directive whilst new text included in the 2009 Directive is highlighted.

DIRECTIVE 2009/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 6 May 2009

on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

(Recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

~~Having regard to the Agreement on social policy annexed to Protocol 14 on social policy annexed to the Treaty establishing the European Community, and in particular Article 2 (2) thereof,~~

Having regard to the Treaty establishing the European Community, and in particular Article 137 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([38]),

Having consulted the Committee of the Regions,

Acting in accordance with the procedure referred to in Article ~~189c~~ 251 of the Treaty ([39]),

Whereas:

(1) A number of substantive changes are to be made to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees ([40]). In the interests of clarity, that Directive should be recast.

~~on the basis of the Protocol on Social Policy annexed to the Treaty establishing the European Community, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Portuguese Republic (hereinafter referred to as 'the Member States'), desirous of implementing the Social Charter of 1989, have adopted an Agreement on Social Policy;~~

[38] Opinion of 4 December 2008 (not yet published in the Official Journal

[39] Opinion of the European Parliament of 16 December 2008 (not yet published in the Official Journal) and Council Decision of 17 December 2008.

[40] OJ L 254, 30.9.1994, p. 64.

~~Whereas Article 2 (2) of the said Agreement authorizes the Council to adopt minimum requirements by means of directives;~~

(2) Pursuant to Article 15 of Directive 94/45/EC, the Commission has, in consultation with the Member States and with management and labour at European level, reviewed the operation of that Directive and, in particular, examined whether the workforce size thresholds are appropriate, with a view to proposing suitable amendments where necessary.

(3) Having consulted the Member States and management and labour at European level, the Commission submitted, on 4 April 2000, a report on the application of Directive 94/45/EC to the European Parliament and to the Council.

~~Whereas point 17 of the Community Charter of Fundamental Social Rights of Workers provides, inter alia, that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in different Member States; whereas the Charter states that 'this shall apply especially in companies or groups of companies having establishments or companies in two or more Member States';~~

~~Whereas the Council, despite the existence of a broad consensus among the majority of Member States, was unable to act on the proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees (4), as amended on 3 December 1991 (5);~~

~~Whereas the Commission, pursuant to Article 3 (2) of the Agreement on Social Policy, has consulted management and labour at Community level on the possible direction of Community action on the information and consultation of workers in Community-scale undertakings and Community-scale groups of undertakings;~~

~~Whereas the Commission, considering after this consultation that Community action was advisable, has again consulted management and labour on the content of the planned proposal, pursuant to Article 3 (3) of the said Agreement, and management and labour have presented their opinions to the Commission;~~

~~Whereas, following this second phase of consultation, management and labour have not informed the Commission of their wish to initiate the process which might lead to the conclusion of an agreement, as provided for in Article 4 of the Agreement;~~

(4) Pursuant to Article 138(2) of the Treaty, the Commission consulted management and labour at Community level on the possible direction of Community action in this area.

(5) Following this consultation, the Commission considered that Community action was advisable and again consulted management and labour at Community level on the content of the planned proposal, pursuant to Article 138(3) of the Treaty.

(6) Following this second phase of consultation, management and labour have not informed the Commission of their shared wish to initiate the process which might lead to the conclusion of an agreement, as provided for in Article 138(4) of the Treaty.

(7) It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.

(8) Pursuant to Article ~~1 of the Agreement~~ 136 of the Treaty, one particular objective of the Community and the Member States is to promote dialogue between management and labour.

(9) This Directive is part of the Community framework intended to support and complement the action taken by Member States in the field of information and consultation of employees. This framework should keep to

a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted. EN L 122/28 Official Journal of the European Union 16.5.2009

(10) The functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees who are affected by their decisions.

(11) Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.

(12) Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.

(13) In order to guarantee that the employees of undertakings or groups of undertakings operating in two or more Member States are properly informed and consulted, it is necessary to set up European Works Councils or to create other suitable procedures for the transnational information and consultation of employees.

(14) The arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness with regard to the provisions of this Directive. To that end, informing and consulting the European Works Council should make it possible for it to give an opinion to the undertaking in a timely fashion, without calling into question the ability of undertakings to adapt. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.

(15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies and must be limited to transnational matters.

(16) The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.

(17) It is necessary to have a definition of 'controlling undertaking' relating solely to this Directive, without prejudice to the definitions of 'group' or 'control' ~~which might be adopted in texts to be drafted in the future~~ in other acts.

(18) The mechanisms for informing and consulting employees in undertakings or groups of undertakings operating in two or more Member States must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States.

(19) In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement

the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.

(20) In accordance with the principle of subsidiarity, it is for the Member States to determine who the employees' representatives are and in particular to provide, if they consider appropriate, for a balanced representation of different categories of employees.

(21) It is necessary to clarify the concepts of information and consultation of employees, in accordance with the definitions in the most recent Directives on this subject and those which apply within a national framework, with the objectives of reinforcing the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue and ensuring the legal certainty required for the application of this Directive.

(22) The definition of 'information' needs to take account of the goal of allowing employees representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in undertakings.

(23) The definition of 'consultation' needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.

(24) The information and consultation provisions laid down in this Directive must be implemented in the case of an undertaking or a group's controlling undertaking which has its central management outside the territory of the Member States by its representative agent, to be designated if necessary, in one of the Member States or, in the absence of such an agent, by the establishment or controlled undertaking employing the greatest number of employees in the Member States.

(25) The responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.

(26) The special negotiating body must represent employees from the various Member States in a balanced fashion. Employees' representatives must be able to cooperate to define their positions in relation to negotiations with the central management.

(27) Recognition must be given to the role that recognised trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express a need for such support. In order to enable them to monitor the establishment of new European Works Councils and promote best practice, competent trade union and employers' organisations recognised as European social partners shall be informed of the commencement of negotiations. Recognised competent European trade union and employers' organisations are those social partner organi-sations that are consulted by the Commission under Article 138 of the Treaty. The list of those organisations is updated and published by the Commission.

(28) The agreements governing the establishment and operation of European Works Councils must include the methods for modifying, terminating, or renegotiating them when necessary, particularly where the make-up or structure of the undertaking or group of undertakings is modified.

(29) Such agreements must lay down the arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular conditions of the undertaking or group of undertakings. The arrangements must be defined in such a way that they respect the competences

and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change.

(30) Those agreements must provide, where necessary, for the establishment and operation of a select committee in order to permit coordination and greater effectiveness of the regular activities of the European Works Council, together with information and consultation at the earliest opportunity where exceptional circumstances arise.

(31) Employees' representatives may decide not to seek the setting-up of a European Works Council or the parties concerned may decide on other procedures for the transnational information and consultation of employees.

(32) Provision should be made for certain subsidiary requirements to apply should the parties so decide or in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations.

(33) In order to perform their representative role fully and to ensure that the European Works Council is useful, employees' representatives must report to the employees whom they represent and must be able to receive the training they require.

(34) Provision should be made for the employees' representatives acting within the framework of this Directive to enjoy, when exercising their functions, the same protection and guarantees as those provided to employees' representatives by the legislation and/or practice of the country of employment. They must not be subject to any discrimination as a result of the lawful exercise of their activities and must enjoy adequate protection as regards dismissal and other sanctions.

(35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(36) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.

(37) For reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice. Priority must be given to negotiations on these procedures for linking information within each undertaking or group of undertakings. If there are no agreements on this subject and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process must be conducted at both national and European level in such a way that it respects the competences and areas of action of the employee representation bodies. Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and/or practice. National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies, but must not reduce the general level of protection of employees.

(38) This Directive should be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community ([41]) and to the specific procedures referred to in Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ([42]) and Article 7 of

[41] OJ L 80, 23.3.2002, p. 29
[42] OJ L 225, 12.8.1998, p. 16.

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ([43]).

(39) Special treatment should be accorded to Community-scale undertakings and groups of undertakings in which there existed, on 22 September 1996, an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

(40) Where the structure of the undertaking or group of undertakings changes significantly, for example, due to a merger, acquisition or division, the existing European Works Council(s) must be adapted. This adaptation must be carried out as a priority pursuant to the clauses of the applicable agreement, if such clauses permit the required adaptation to be carried out. If this is not the case and a request establishing the need is made, negotiations, in which the members of the existing European Works Council(s) must be involved, will commence on a new agreement. In order to permit the information and consultation of employees during the often decisive period when the structure is changed, the existing European Works Council(s) must be able to continue to operate, possibly with adaptations, until a new agreement is concluded. Once a new agreement is signed, the previously established councils must be dissolved, and the agreements instituting them must be terminated, regardless of their provisions on validity or termination.

(41) Unless this adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary. Provision should be made so that, as long as agreements concluded prior to 22 September 1996 under Article 13(1) of Directive 94/45/EC or under Article 3(1) of Directive 97/74/EC ([44]) remain in force, the obligations arising from this Directive should not apply to them. Furthermore, this Directive does not establish a general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and 5 June 2011.

(42) Without prejudice to the possibility of the parties to decide otherwise, a European Works Council set up in the absence of agreement between the parties must, in order to fulfil the objective of this Directive, be kept informed and consulted on the activities of the undertaking or group of undertakings so that it may assess the possible impact on employees' interests in at least two different Member States. To that end, the undertaking or controlling undertaking must be required to communicate to the employees' appointed representatives general information concerning the interests of employees and information relating more specifically to those aspects of the activities of the undertaking or group of undertakings which affect employees' interests. The European Works Council must be able to deliver an opinion at the end of the meeting.

(43) Certain decisions having a significant effect on the interests of employees must be the subject of information and consultation of the employees' appointed representatives as soon as possible.

(44) The content of the subsidiary requirements which apply in the absence of an agreement and serve as a reference in the negotiations must be clarified and adapted to developments in the needs and practices relating to transnational information and consultation. A distinction should be made between fields where information must be provided and fields where the European Works Council must also be consulted, which involves the possibility of obtaining a reasoned response to any opinions expressed. To enable the select committee to play the necessary coordinating role and to deal effectively with exceptional circumstances, that committee must be able to have up to five members and be able to consult regularly.

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[43] OJ L 82, 22.3.2001, p. 16.

[44] Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 10, 16.1.1998, p. 22).

(45) Since the objective of this Directive, namely the improvement of the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(46) This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).

(47) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.

(48) In accordance with point 34 of the Interinstitutional Agreement on better law-making ([45]), Member States are encouraged to draw up, for themselves and in the interests of the Community, tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(49) This Directive should be without prejudice to the obligations of the Member States relating to the time limits set out in Annex II, Part B for transposition into national law and application of the Directives,

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

GENERAL

Article 1

Objective

1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees ~~under the terms, in the manner and with the effects laid down in this Directive~~. The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.

3. Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European

[45] OJ C 321, 31.12.2003, p. 1

Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues.

4. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.

5. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2(1)(c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2(1)(a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.

6. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

7. Member States may provide that this Directive shall not apply to merchant navy crews.

Article 2

Definitions

1. For the purposes of this Directive:

(a) ‘Community-scale undertaking’ means any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States;

(b) ‘group of undertakings’ means a controlling undertaking and its controlled undertakings;

(c) ‘Community-scale group of undertakings’ means a group of undertakings with the following characteristics:

— at least 1 000 employees within the Member States,

— at least two group undertakings in different Member States,

and

— at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

(d) ‘employees’ representatives’ means the employees’ representatives provided for by national law and/or practice;

(e) ‘central management’ means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;

(f) ‘information’ means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings;

(g) ‘consultation’ means the ~~exchange of views and~~ establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’ representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;

(h) ‘European Works Council’ means a council established in accordance with Article 1(2) or the provisions of Annex I, with the purpose of informing and consulting employees;

(i) ‘special negotiating body’ means the body established in accordance with Article 5(2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1(2).

2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice.

Article 3

Definition of ‘controlling undertaking’

1. For the purposes of this Directive, ‘controlling undertaking’ means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it.

2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly:

(a) holds a majority of that undertaking’s subscribed capital;

(b) controls a majority of the votes attached to that undertaking’s issued share capital;

or

(c) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body3. For the purposes of paragraph 2, a controlling undertaking’s rights as regards voting and

appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

4. Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ([46]).

5. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

6. The law applicable in order to determine whether an undertaking is a controlling undertaking shall be the law of the Member State which governs that undertaking. Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

7. Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

SECTION II

ESTABLISHMENT OF A EUROPEAN WORKS COUNCIL OR AN EMPLOYEE INFORMATION AND CONSULTATION PROCEDURE

Article 4

Responsibility for the establishment of a European Works Council or an employee information and consultation procedure

1. The central management shall be responsible for creating the conditions and means necessary for the setting-up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1. In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.

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[46] OJ L 24, 29.1.2004, p. 1.

4. The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of the second subparagraph of paragraph 2 of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c).

Article 5

Special negotiating body

1. In order to achieve the objective set out in Article 1(1), the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

(a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body.

The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies.

~~(b) The special negotiating body shall have a minimum of three members and a maximum of members equal to the number of Member States.~~

(b) The members of the special negotiating body shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together;

~~(c) In these elections or appointments, it must be ensured:~~

~~– firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member,~~

~~– secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated.~~

(c) The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.

4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

Before and after any meeting with the central management, the special negotiating body shall be entitled to meet without representatives of the central management being present, using any necessary means for communication.

For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in Annex I shall not apply.

A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

6. Any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

Article 6

Content of the agreement

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 and effected in writing between the central management and the special negotiating body shall determine:

(a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;

(b) the composition of the European Works Council, the number of members, the allocation of seats, taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender, and the term of office;

(c) the functions and the procedure for information and consultation of the European Works Council and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies, in accordance with the principles set out in Article 1(3);

(d) the venue, frequency and duration of meetings of the European Works Council;

(e) where necessary, the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European Works Council;

(f) the financial and material resources to be allocated to the European Works Council;

(g) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement shall be renegotiated and the procedure for its renegotiation, including, where necessary, where the structure of the Community-scale undertaking or Community-scale group of undertakings changes.

3. The central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.

The agreement must stipulate by what method the employees' representatives shall have the right to meet to discuss the information conveyed to them.

This information shall relate in particular to transnational questions which significantly affect workers' interests.

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of Annex I.

5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

Article 7

Subsidiary requirements

1. In order to achieve the objective set out in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

— where the central management and the special negotiating body so decide,

— where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1),

or

— where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5).

2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in Annex I.

SECTION III

MISCELLANEOUS PROVISIONS

Article 8

Confidential information

1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence.

The same shall apply to employees' representatives in the framework of an information and consultation procedure.

That obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.

A Member State may make such dispensation subject to prior administrative or judicial authorisation.

3. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.

Article 9

Operation of the European Works Council and the information and consultation procedure for workers

The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

Article 10

Role and protection of employees' representatives

1. Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.

2. Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.

3. Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy protection and guarantees similar to those provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties.

4. In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.

Article 11

Compliance with this Directive

1. Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.

~~2. Member States shall ensure that the information on the number of employees referred to in Article 2 (1) (a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive.~~

2. Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

3. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article.

Such procedures may include procedures designed to protect the confidentiality of the information in question.

Article 12

Relationship with other Community and national provisions

~~1. This Directive shall apply without prejudice to measures taken pursuant to Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (7), and to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (8).~~

~~2. This Directive shall be without prejudice to employees' existing rights to information and consultation under national law~~.

1. Information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3).

2. The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. That agreement shall be without prejudice to the provisions of national law and/or practice on the information and consultation of employees.

3. Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

4. This Directive shall be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC and to the specific procedures referred to in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.

5. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies.

Article 13

Adaptation

Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).

During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central management.

Article 14

Agreements in force

~~1. Without prejudice to paragraph 2, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, on the date laid down in Article 14 (1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the abovementioned date, there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.~~

1. Without prejudice to Article 13, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, either

(a) an agreement or agreements covering the entire workforce, providing for the transnational information and consultation of employees have been concluded pursuant to Article 13(1) of Directive 94/45/EC or Article 3(1) of Directive 97/74/EC, or where such agreements are adjusted because of changes in the structure of the undertakings or groups of undertakings;

or

(b) an agreement concluded pursuant to Article 6 of Directive 94/45/EC is signed or revised between 5 June 2009 and 5 June 2011.

The national law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings referred to in point (b) of the first subparagraph.

2. Upon expiry of the agreements referred to in paragraph 1, the parties to those agreements may decide jointly to renew or revise them. Where this is not the case, the provisions of this Directive shall apply.

Article 15

Report

No later than 5 June 2016, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

Article 16

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 1(2), (3) and (4), Article 2(1), points (f) and (g), Articles 3(4), Article 4(4), Article 5(2), points (b) and (c), Article 5(4), Article 6(2), points (b), (c), (e) and (g), and Articles 10, 12, 13 and 14, as well as Annex I, point 1(a), (c) and (d) and points 2 and 3, no later than 5 June 2011 or shall ensure that management and labour introduce on that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 17

Repeal

Directive 94/45/EC, as amended by the Directives listed in Annex II, Part A, is repealed with effect from 6 June 2011 without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 18

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 1(1), (5), (6) and (7), Article 2(1), points (a) to (e), (h) and (i), Article 2(2), Articles 3(1), (2), (3), (5), (6) and (7), Article 4(1), (2) and (3), Article 5(1), (3), (5) and (6), Article 5(2), point (a), Article 6(1), Article 6(2), points (a), (d) and (f), and Article 6(3), (4) and (5), and Articles 7, 8, 9 and 11, as well as Annex I, point 1(b), (e) and (f), and points 4, 5 and 6, shall apply from 6 June 2011.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 6 May 2009.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J. KOHOUT

ANNEX I

SUBSIDIARY REQUIREMENTS

(referred to in Article 7)

1. In order to achieve the objective set out in Article 1(1) and in the cases provided for in Article 7(1), the establishment, composition and competence of a European Works Council shall be governed by the following rules:

~~(a) The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States.~~
~~In the case of undertakings or groups of undertakings referred to in Article 4 (2), the competence of the European Works Council shall be limited to those matters concerning all their establishments or group undertakings situated within the Member States or concerning at least two of their establishments or group undertakings situated in different Member States~~**.**

(a) The competence of the European Works Council shall be determined in accordance with Article 1(3).

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;

(b) The European Works Council shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

The election or appointment of members of the European Works Council shall be carried out in accordance with national legislation and/or practice;

~~c) The European Works Council shall have a minimum of three members and a maximum of 30.~~
~~Where its size so warrants, it shall elect a select committee from among its members, comprising at most three members.~~
~~It shall adopt its own rules of procedure.~~

(c) The members of the European Works Council shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together;

(d) To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members, which must benefit from conditions enabling it to exercise its activities on a regular basis.

It shall adopt its own rules of procedure;

(e) The central management and any other more appropriate level of management shall be informed of the composition of the European Works Council;

(f) Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of the agreement referred to in Article 6 or to continue to apply the subsidiary requirements adopted in accordance with this Annex.

Articles 6 and 7 shall apply, mutatis mutandis, if a decision has been taken to negotiate an agreement according to Article 6, in which case 'special negotiating body' shall be replaced by 'European Works Council'.

2. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

~~The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.~~

3. Where there are exceptional circumstances or decisions affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted ~~on measures significantly affecting employees' interests~~.

Those members of the European Works Council who have been elected or appointed by the establishments and/or undertakings which are directly concerned by the ~~measures~~ circumstances or decisions in question shall also have the right to participate where a meeting is organised with the select committee.

This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

This meeting shall not affect the prerogatives of the central management.

The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to Article 1(2) and Article 8.

4. The Member States may lay down rules on the chairing of information and consultation meetings.

Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3, shall be entitled to meet without the management concerned being present.

~~5. Without prejudice to Article 8 of the Directive, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Communityscale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Annex.~~

5. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

6. The operating expenses of the European Works Council shall be borne by the central management.

The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.

In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless otherwise agreed.

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the European Works Council. They may in particular limit funding to cover one expert only.

ANNEX II

PART A

Repealed Directive with its successive amendments

(referred to in Article 17)

Council Directive 94/45/EC	(OJ L 254, 30.9.1994, p. 64)
Council Directive 97/74/EC	(OJ L 10, 16.1.1998, p. 22
Council Directive 2006/109/EC	(OJ L 363, 20.12.2006, p. 416)

PART B

Time limits for transposition into national law

(referred to in Article 17)

Directive	Time limit for transposition
94/45/EC	22.9.1996
97/74/EC	15.12.1999
2006/109/EC	1.1.2007

ANNEX III

Correlation table

Directive 94/45/EC	This Directive
Article 1(1)	Article 1(1)
Article 1(2)	Article 1(2), first sentence
—	Article 1(2), second sentence
—	Article 1(3) and (4)
Article 1(3)	Article 1(5)
Article 1(4)	Article 1(6)
Article 1(5)	Article 1(7)
Article 2(1)(a) to (e)	Article 2(1)(a) to (e)
—	Article 2(1)(f)
Article 2(1)(f)	Article 2(1)(g)
Article 2(1)(g) and (h)	Article 2(1)(h) and (i)
Article 2(2)	Article 2(2)
Article 3	Article 3
Article 4(1)(2) and (3)	Article 4(1)(2) and (3)
Article 11(2)	Article 4(4)
Article 5(1) and (2)(a)	Article 5(1) and (2)(a)
Article 5(2)(b) and (c)	Article 5(2)(b)
Article 5(2)(d)	Article 5(2)(c)
Article 5(3)	Article 5(3)
Article 5(4), first subparagraph	Article 5(4), first subparagraph
—	Article 5(4), second subparagraph
Article 5(4), second subparagraph	Article 5(4), third subparagraph
Article 5(5) and (6)	Article 5(5) and (6)
Article 6(1) and (2)(a)	Article 6(1) and (2)(a)
Article 6(2)(b)	Article 6(2)(b)
Article 6(2)(c)	Article 6(2)(c)
Article 6(2)(d)	Article 6(2)(d)
—	Article 6(2)(e)
Article 6(2)(e)	Article 6(2)(f)
Article 6(2)(f)	Article 6(2)(g)
Article 6(3)(4) and (5)	Article 6(3)(4) and (5)
Article 7	Article 7

Directive 94/45/EC	This Directive
Article 8	Article 8
Article 9	Article 9
—	Article 10(1) and (2)
Article 10	Article 10(3)
—	Article 10(4)
Article 11(1)	Article 11(1)
Article 11(2)	Article 4(4)
Article 11(3)	Article 11(2)
Article 11(4)	Article 11(3)
Article 12(1) and (2)	—
—	Article 12(1) to (5)
—	Article 13
Article 13(1)	Article 14(1)
Article 13(2)	Article 14(2)
—	Article 15
Article 14	Article 16
—	Article 17
—	Article 18
Article 16	Article 19
Annex	Annex I
Point 1, introductory wording	Point 1, introductory wording
Point 1(a) (partly) and point 2, second paragraph (partly)	Point 1(a) (partly)
Point 1(b)	Point 1(b)
Point 1(c) (partly) and point 1(d)	Point 1(c)
Point 1(c) (partly)	Point 1(d)
Point 1(e)	Point 1(e)
Point 1(f)	Point 1(f)
Point 2, first paragraph	Point 2
Point 3	Point 3
Point 4	Point 4
Point 5	—
Point 6	Point 5
Point 7	Point 6
—	Annexes II and III

Annex D: Directive 2009/38/EC Obligations and Enforcement

Obligation	In which Regulations?	Can a penalty be awarded? (Y/N)	Is a CAC order possible? (Y/N)
Management to provide employee or employees' representatives with information on the average number of employees employed by the undertaking, etc at such time and in such fashion as appropriate to enable them to examine the information and study its impact	Amending regulations 5 and 6	N	Y
Management to provide employee or employees' representatives with information required to begin negotiations at such time, in such fashion and with such content as appropriate to enable them to examine the information, study its impact and prepare for negotiations	Amending regulations 5 and 15	Y	Y
Management to provide EWC member or I&C rep with information at such time, in such fashion and with such content as appropriate to enable them to examine the information, study its impact and prepare for consultation	Amending regulations 5 and 14	Y	Y
Appropriate level of management to consult EWC members or I&C reps at such time, in such fashion and with such content as appropriate to enable them to express an opinion on the information provided	Amending regulations 5 and 14	Y	Y

Central management to allow SNB members to meet, without central management, before and after any meeting with central management	Amending regulations 8 and 15	Y	Y
Central management to provide information necessary for beginning negotiations to set up an EWC or I&C procedure	Amending regulations 8 and 15	Y	Y
Central management to provide EWC members with the means necessary to fulfil their duties	Amending regulations 10 and 15	Y	Y
EWC to inform employees or employees' representatives of content and outcome of I&C procedure	Amending regulation 11	N	Y
I&C of the EWC to be linked to I&C of the national employee representation bodies	Amending regulations 12 and 15	Y	Y
Central management to initiate negotiations to establish an EWC or I&C procedure where significant changes in structure of undertaking and there is at least one EWC or I&C agreement in force, etc	Amending regulations 12 and 15	Y	Y
Employer to provide SNB and EWC members with training and reasonable time off for training, without loss of wages	Amending regulations 18, 19 and 20	N	N- tribunal declaration
Employer to ensure that, in respect of consultation conducted in accordance with subsidiary requirements of Schedule, EWC members can meet with central management and obtain a reasoned response to any opinion expressed	Amending regulations 33 and 14	Y	Y

Key
EWC - European Works Council
I&C - information and consultation
SNB - Special Negotiating Body

Annex E: The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.

2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET
Telephone: 020 7215 0412
E-mail: Babatunde.Idowu@bis.gsi.gov.uk

Annex F: List of Consultees

ABN Amro Holdings (UK) Ltd
Acas
Accor
ACCORD
Aegon
Aer Lingus
Ahlstrom
Air Products
Airbus UK
Akzo Nobel
Alcan
Alcoa
Aliaxis
Alitalia
Allianz
Allied Domecq
Alstom
Amcor
American Standard Companies
Amphenol
Areva
Arjo Wiggins Appleton
Armstrong Holdings Inc
Arriva
ArvinMeritor
AstraZeneca
Atlas Copco
Autobar
Autoglass
Autoliv
Avecia
Aviva
AXA
B. Braun Ltd
Baker Hughes
Bakers, Food and Allied Workers' Union
Barclays
Barco
Basell UK Ltd.
BASF
BauschLinnemann UK Ltd.
Baxi
Bayer
BAYERISCHE HYPO-UND VEREINSBANK AG
BBVA
Bekaert
Benteler
Better Regulation Commission
Bevans Solicitors
Birmingham Law Society
BMW
BNP Paribas
Boehringer Ingelheim
Bombardier Transportation
Boots
Bosal Holding
Bosch Und Siemens Hausgeräte
BPB Industries
Bracknell Roofing Co. Ltd
Bridgestone - Firestone
British Air Line Pilots Association
British Airways
British American Tobacco
British Petroleum
British Printing Industries Federation
British Retail Consortium
BT Group
Bühler
Bunge
Bunzl (pp Payne Filtrona)
Bunzl plc
Burmah Castrol
Cabinet Office
Cable & Wireless
Cadbury Schweppes
Canon (UK) Ltd
Cap Gemini Ernst & Young
Car Care Plan
Cargill
Cargotec
Carlsberg
Caterpillar
CBI
Cellular Subscriber (ECSD-Motorola)
Central Arbitration Committee
CEVA Logistics
Chartered Institute of Personnel and Development
Chemtura
CHEP
Chesapeake
Citibank

Clarks International
Clive Bell
Coats
Coca-Cola
Cognis UK Ltd.
Communication Workers Union
Compass Group
CONNECT
ConocoPhillips
Continental Can
Converteam
Cooper Industries
Corning
Courtaulds
Cox and Wyman
Crown Cork And Seal Company
CUMMINS-ALLISON LIMITED
DAF Trucks
Daikin
DaimlerChrysler
Dalgety
Danfoss
Danske Bank
David S Smith
Dayco
De La Rue
Department for Children, Schools and Families
Department for Communities and Local Government
Department for Culture, Media and Sport
Department for Employment and Learning
Department for Environment, Food and Rural Affairs
Department for International Development
Department for Transport
Department for Work and Pensions
Department of Constitutional Affairs
Department of Enterprise, Trade and Employment
Deutsche Bank
Deutsche Post World Net
Deutsche Telekom
Devro International
Diageo
Diageo Staff Association
Dimplex UK
DISA
Draka Holding
Duni
DuPont
Dyno Nobel
E.ON
EADS Defence & Security Systems Ltd
EDF
Edmund Nuttall Ltd
EDSCHA UK MANUFACTURING LIMITED
Electrolux
Elopak
Employment Appeal Tribunals
Employment Law Bar Association
Employment Lawyers Association
Employment Tribunals Service
Engineering Employers' Federation (EEF)
EPCOS UK LTD.
Equity
Eramet
Ericsson
European Study Group
Eversheds Solicitors
Exel
ExxonMobil
Faurecia
FCI
FDA
Federal-mogul
Fedex
Fiat
Finnforest
FKI Energy Technology Group
Flowserve
Ford
Foreign and Commonwealth Office
Fortis
Fortum
FRESENIUS MEDICAL CARE (UK) LIMITED
Fujitsu
Gallaher Group
Gallaher UK
Gamma Holding
GE Healthcare
General Electric Plastics

General Federation of Trade Unions
General Motors
Generali Group
Geodis
Gerresheimer Glass
Getinge UK Ltd
Getronics
GKN
Glamox
GlaxoSmithkline
Global One Communications
GMB
Goodrich
Goodyear
Great Universal Stores
Group 4 Securicor
Groupama Holding
Guardian Financial Services
H&M Hennes & Mauritz
Hager Electro
Hammonds Solicitors
Hanson
Hanson Brick
Health and Safety Executive
Heathrow Express
Heidelberg Cement Group
Heinz
Hepworth Building
Hilton Group plc
Hilton International
HM Treasury
Hochtief
Home Office
Honeywell
Howden Group
HSBC Holdings - Midland Bank
Huhtamäki
Hyder
Hydro
Icopal Group
Ikea
Imerys
IMI
Imperial Chemical Industries
Imperial Tobacco Group
Impress Metal Packaging
Independent Democratic Union
Indesit
Ineos
Ingersoll-Rand
Institute of Directors
International Labour Office
International Service System A/s (iss)
Invensys plc
IPA
ITT-Industries
Jabil Circuit
Jacobs Engineering
Johnson & Johnson
Johnson Controls
Jungheinrich
Kellogg
Kemira
Kimberly-clark
Kingfisher
Kodak
Komatsu
Kone
Koninklijke Ten Cate
Kraft Foods
Kverneland
Ladbrokes Group
Lafarge
Lagardère
Laiki Group
Law Society
Lego
Legrand
Leoni
Levi Strauss
Lhoist
Liffe
Lloyds TSB
Local Government Association
L'Oreal
LSG Lufthansa Service Holding AG
Lucy Trsucott
Manitowoc
Marks and Spencer
Mayr-Melnhof Group
MBDA
McCain Foods
Mecom Group
Meggitt
Merck KGaA
Metso
Mick Roberts
Moeller

Monier
Monsanto
Montupet
Morgan Crucible Company
MPM Legal
M-Real
MultiServ
National Assembly for Wales
National Farmers' Union
National Union of Journalists
National Union of Mineworkers
National Union of Rail, Maritime & Transport Workers
Nexans
NKT Services Ltd
Nokia
Nortel Networks
Northern Foods
Norwich Union Insurance Group
Novar
Novo Nordisk
Nycomed Amersham Imaging
O2
Offshore Industry Liaison Committee
Oracle
Orange
ORC Worldwide
Otis
Otto Group
Owens-Corning
Parker Hannifin
PCS
Pearson PLC
Pernod Ricard
Pfizer
Philips Electronics
Pierburg Pump Technology UK Ltd.
Pilkington
Pirelli
Power Control GE
PPG Industries
Professional Association of Cabin Crew Employees
Prospect
Randstad Holding
Rank Group
Rautaruukki
Reckitt Benckiser
Recticel
Reed Elsevier
Renault
Renault-Nissan Alliance
Renold PLC
Rentokil Initial
Reuters Holdings
Rexam
Rhodia Group
RMC (Readymix Concrete) Group
Robert Bosch Limited
Rockwell Automation
Rockwool International
RollsRoyce
Royal & Sun Alliance Insurance Group
Royal Bank Of Scotland Group
RPC Group
RWE
Saint-Gobain
Saint-Gobain Building Distribution Limited
Samsung
Sandvik
Sanofi-Aventis
Sappi
Sara Lee
Sasol Group
SCA
Scancem Group
Scania
Schlumberger
Schmitz Cargobull
Schneider Electric
Schott Glass
SCOR Group
Scottich & Newcastle
Scottish Executive
Scottish TUC
Securicor Group
Seiko Epson Corporation
Sema
Severn Trent
SEW Eurodrive
Sharp
Siemens
Skandia
Skretting
Smith & Nephew PLC
Smiths Group
Smurfit Kappa Group

Société Générale
Sodexho
Solvay Chemicals Ltd
Sonae UK Ltd.
Sony Europe
Stagecoach
Stena
StoraEnso
Stryker Corp.
Suez
Svenska Handelsbanken
Swedish Match
SYNSTAR
T&N PLC
Tate & Lyle
Tenneco
Tessenderlo Group
Texaco
Textron
Thales
The Bar Council
The British Chambers of Commerce
The Department of Health
The Federation of Managerial and Professional Staff Associations
The Law Society Scotland
Thomas Cook Group
Thomson Multimedia
Thyssen Krupp
Tietoenator Corporation
Tomkins
Toray Industries
Toshiba
Total
TOYOTA MOTOR MANUFACTURING (UK) LIMITED
Trades Union Congress
Transdev
Transport Development Group Plc
Transport Salaried Staffs' Association
Trelleborg
Triumph International
TUI Group
Tyco International
UAP
UCB
Umicore
UniCredit Group
Unilever
Union of Construction, Allied Trades & Technicians
Union of Shop, Distributive & Allied Workers
UNIQ (unigate)
UNISON
Unisource
Unisys
Unite Amicus
Unite T&G
United Biscuits (holdings)
United Cinemas International
UPM-Kymmene
UPS
Vaillant Group
Vallourec & Mannesmann Tubes
Vandemoortele International
Veolia Environnement
VF Limited
VINCI
Visteon
Vodafone Group
Voith
Volkswagen
VWR International
Wagon Automotive
Wales TUC
Wella
West Pharmaceutical Services
Whirlpool
Working Lives Research Institute
Xerox Ltd.
Yamaha

Annex G: Impact Assessment

Summary: Intervention & Options		
Department /Agency: BIS	**Title: Review of Commission Directive 94/45/EC on European Work Councils for the purpose of informing and consulting employees. Impact assessment to accompany public consultation on implementing draft UK regulations**	
Stage: Consultation on implementation	**Version:** Version 1	**Date:** 19 November 2009
Related Publications: Government consultation document		

Available to view or download at: www.berr.gov.uk/files/file52969.pdf

Contact for enquiries: Asad Ghani/Carl Davies **Telephone:** 0207 215 1627/ 6220

What is the problem under consideration? Why is government intervention necessary?

A Commission review of the European Works Council (EWC) Directive identified a number of problems with respect to the practical application of the Directive with regard to the information and consultation of employees; legal certainty, and coherence between EWCs and national level procedures, with a significant market failure noted in the form of information asymmetry between employer and employee. Following Member State negotiation, the Commission has published a recast of the EWC Directive which seeks to address the problems set out above. The Government is now holding a public consultation on how the UK should implement the Directive into domestic law.

What are the policy objectives and the intended effects?

The Government's objective is to transpose the recast Directive in order to achieve the Commission's objectives in amending the Directive, which are:

- to improve the effectiveness of information and consultation of employees in existing EWCs;
- to increase the number of EWCs being established;
- to improve legal certainty in the setting up and the operation of EWCs (for example during mergers and acquisitions); and
- to enhance the coherence between EWCs and other national level procedures for informing and consulting employees.

What policy options have been considered? Please justify any preferred option.

Government issued a consultation paper in September 2008 on the European Commission's proposals to recast Directive 94/45/EC (the European Works Council Directive). A Government response to the consultation was published in December 2008. The UK Government would now like to hold a further consultation on regulations to transpose the recast Directive in the UK. Policy options consist of (1) do nothing or (2) implement the Directive in UK law. Option 1 is not viable as the UK would face infraction proceedings and is only used as a benchmark in this Impact Assessment (IA). A more detailed description of option 2 can be found later in this IA and the accompanying consultation document.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Article 15 of the Directive requires a review by the Commission five years after the revised Directive comes into force. The Government will continue to monitor the take-up and use of EWCs through the Workplace Employment Relations Survey (WERS), next report expected in 2011. The Central Arbitration Committee (CAC) and the Employment Appeals Tribunal (EAT) are currently responsible for the enforcement of the Transnational Information and Consultation of Employees Regulations 1999.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:  Date:

Lord Young of Norwood Green, Minister for Postal Affairs and Employment Relations

Summary: Analysis & Evidence

Policy Option: 2	Description: **Implement proposed review to the Directive.**

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ 2.1m	**3**
Average Annual Cost (excluding one-off)	
£ 4.3 – 5.4m	**10**

Description and scale of **key monetised costs** by 'main affected groups' Direct costs are increased costs borne by existing EWCs and indirect costs capture the cost of additional take-up. One-off costs are estimated at £2.05m over 3 years (as 19 new EWCs are expected to be established) and average annual (running) costs are estimated at between £4.29m and £5.35m depending upon scenario considered.

Total Cost over 10 years (PV)	**£ 38.5m – 47.7m**

Other **key non-monetised costs** by 'main affected groups' There are a number of negligible costs relating to Admin Burdens detailed within individual articles.

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£ n/a	0
Average Annual Benefit (excluding one-off)	
£ n/a	10

Description and scale of **key monetised benefits** by 'main affected groups'.

It was not possible to quantify benefits, given their intangible nature.

Total Benefit (PV)	**£ n/a**

Other **key non-monetised benefits** by 'main affected groups'

More effective information & consultation of employees, if achieved, has the potential to demonstrate a positive commitment to employees and to enhance understanding of management, employee-management relationship and the impact of restructuring on employees.

Key Assumptions/Sensitivities/Risks.

Please refer to Sections E and F, which detail assumptions made and risks identified.

Price Base Year 2009	Time Period Years 10	**Net Benefit Range** (NPV) **£ -38.5m – -47.7m**	**NET BENEFIT** (NPV Best estimate) **£ m**

What is the geographic coverage of the policy/option?			UK	
On what date will the policy be implemented?			5 June 2011	
Which organisation(s) will enforce the policy?			CAC/ EAT/ ET	
What is the total annual cost of enforcement for these organisations?			£	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			No	
What is the value of the proposed offsetting measure per year?			£ N/A	
What is the value of changes in greenhouse gas emissions?			£ N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes	Yes	Yes	No

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ negligible Decrease of £ 0 **Net Impact** **£** negligible

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

A: Strategic overview

Existing Government initiatives

The European Works Council (EWC) Directive was adopted in September 1994, with an implementation date of September 1996. At the time, the UK Government had not signed the social chapter of the Maastricht Treaty 1992 and so the Directive did not apply to the UK. The Government accepted the social chapter in June 1997, and as a result the original Directive was extended to cover the UK and was given effect in UK law in January 2000 by the Transnational Information and Consultation of Employees (TICE) Regulations 1999.

B: The issue

The TICE Regulations implement the EWC Directive and set out requirements for informing and consulting employees at the European level in undertakings or groups of undertakings, who have their central management in the UK, with at least 1,000 employees across the Member States of the European Economic Area (EEA) and at least 150 employees in each of two or more of those Member States. The purpose of the Directive is to establish mechanisms for informing and consulting employees where the undertaking has been requested to do so in writing by at least 100 employees or their representatives in two or more Member States, or on the management's own initiative. This will entail the setting up of a European Works Council (or some other form of transnational information and consultation procedure). Where no request is received or where management does not initiate the process, there is no obligation to start negotiations or to set up an EWC.

Once a request has been made (or at the management's initiative) employee representatives[47] are either elected or appointed to a Special Negotiating Body (SNB). Article 6 of the Directive requires the SNB to negotiate with central management to determine the scope, composition and functions of the EWC and the duration of the agreement. Negotiations can last up to three years but where agreement has not been reached after that period, or the undertaking has failed to initiate negotiations six months after receipt of the employees' request to establish an EWC, a set of minimum 'subsidiary requirements' will apply which are laid out in the Annex to the Directive and in the Schedule to the TICE Regulations. In practice few, if any, EWCs have been set up under these fall-back subsidiary requirements but it is understood that the provisions of many EWC agreements have been influenced by them.

Where a company had already in place arrangements to inform and consult all of its employees in the EEA prior to the Directive coming into force, such agreements are exempt from the provisions of the EWC Directive. These provisions are made at Article 13 of the 1994 Directive and apply to agreements concluded by 22 September 1996 (or 15 December 1999 for UK companies when the Directive was extended to the UK). Such voluntary arrangements are often referred to as 'Article 13

[47] An employee representative attends the general 'annual' meetings of the EWC and has a duty to represent and report back to colleagues.

agreements' and 'Article 3 agreements' respectively and make up approximately 40 per cent of the EWCs in operation in the EEA today.

Expenses related to the negotiations are borne by the employer, including the cost of one expert to advise the SNB. The Directive further sets out the procedures for the handling of confidential information and makes provisions to ensure that the employees' representatives do not suffer any detriment as a result of their role. Representatives are also entitled to time off with pay for attending SNB or EWC meetings.

Review of the EWC Directive

The European Commission was under a duty to review the operation of the 1994 EWC Directive. In April 2004, it started that review following which the Commission identified a number of problems in respect of the practical application of the Directive. Following negotiations around a legislative proposal published by the Commission in July 2008, and informed by advice from the European Social Partners (the ETUCE, BusinessEurope, CEEP and UEAPME) the Commission published a recast EWC Directive which seeks to address these problems.

The recast Directive seeks to address existing problems in EWCs – which include ineffective information and consultation (I&C) of employees, lack of legal clarity on I&C issues and lack of coherence between national and transnational procedures – involve clearer definitions of I&C and the scope of EWC activities and purpose, provision for more balanced representation within EWCs, establishment of arrangements to link national-level procedures to those at European level (i.e. EWCs), increased obligation of reporting of information following information and consultation the new specific reporting obligations apply after the EWC is established and after information and consultation has occurred and the right to training without loss of wages for EWC members.

Consultation

Within government
These proposals have been developed in consultation with the following Government departments: Department for Work and Pensions, HM Treasury, the Cabinet Office, the Foreign and Commonwealth Office and the Devolved Administrations.

Public consultation
The Government conducted a public consultation on the proposed negotiating strategy in September 2008. The consultation closed on 6 October 2008. A total of 29 responses were received, of which eight commented on the partial impact assessment. These are discussed below in section E on costs and benefits. The consultation responses largely supported the Government's proposed approach to negotiation but also highlighted a number of areas where there was a divergence of views between workers' representatives and employers' organisations. The Government will be conducting a further public consultation on draft regulations to transpose the recast Directive in the UK in November 2009 which will close on 12 February 2010.

C: Objectives

Background

This Impact Assessment (IA) seeks to assess the impact of the proposed revision of Council Directive 94/45/EC, which allows for the provision and establishment of European Work Councils (EWCs) within companies of more than 1,000 employees operating in two or more EU Member States. The aim of such councils is to improve employee understanding of management decisions in issues such as restructuring by encouraging effective information and consultation for employees in all operating countries. The European Commission is under a duty to review the Directive and, following a Commission review of its failings, the objectives for the recast Directive are:

1. To improve the effectiveness of information and consultation of employees in existing EWCs
2. To increase the number of EWCs being established
3. To improve legal certainty in the setting up and operation of EWCs
4. To enhance the coherence between EWCs and other national level procedures for informing and consulting employees.

The following analysis will review the impact the Directive has had on such companies with headquarters in the UK since its creation in 1994, as well as the likely effect on affected UK businesses of the proposed implementing Regulations.

D: Options identification

Option One: **Do nothing**
The Directive has been agreed at EU level, the UK will now have to implement the necessary changes. Doing nothing therefore is not a viable option.

Option Two**: Implement changes proposed by the draft Directive**
The European Commission decided that the best approach for achieving their goal of improved operation of EWCs was to recast the EWC Directive.

The Commission's proposal of July 2008, as amended by the Social Partners, has now been adopted, and the Government is undertaking this Impact Assessment accordingly as part of its public consultation exercise on the implementing regulations.

The detail of the proposed changes to UK legislation was discussed fully in the consultation document[48] and is presented in summary form below in the section on costs and benefits.

Given that it is not feasible for the UK not to implement the changes stemming from the recast Directive, the Impact Assessment will solely assess the changes to UK legislation.

E: Analysis of options

Costs and Benefits

Assumptions

A number of information sources have been used to inform the cost-benefit analysis that follows. These include data on the current number of EWCs created across the

[48] www.berr.gov.uk/files/file52969.pdf

EEA. Although there is no requirement to register EWCs, the European Trade Union Institute (ETUI) maintains a database of EWCs created since the early 1990s[49], providing information such as date of creation, date ended (if the EWC is no longer effective), the article of the Directive under which the EWC was established, the sector in which the undertaking operates, the number of meetings per year and the number of EWC members by country. These are the best available data to allow an up to date analysis[50] of the current take-up of EWCs in both the UK and across the EEA. The ETUI database has been widely used as a reference source by assorted EU and national institutions as well as research and academic centres.

More detailed information relating, amongst other things, to the costs of setting up and running EWCs are derived from two key sources. First, we revisit and, where necessary, revise original unit cost estimates used in the original Department of Trade and Industry (DTI) Regulatory Impact Assessment[51] (RIA) which accompanied implementation of Directive 97/74/EC extending to the UK Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in community-scale undertakings and community-scale groups of undertakings for the purposes of informing and consulting employees. Much of the analysis used for that RIA was based on a study commissioned by the then DTI[52].

More recent data and information have been taken from the European Commission Impact Assessment[53] (IA) of July 2008 which underpinned the proposal for the recast Directive. The European Commission IA itself drew on the findings of a preparatory study[54] and we have used these data where appropriate.

It should be noted that these studies of EWCs are based on a case study approach and therefore the sample size for obtaining cost estimates is relatively small and may result in wide variations. This may be exacerbated by the fact that the recent European Commission studies report estimates based mainly on EEA averages. These may not always reflect the costs experienced in the creation and operation of UK-based EWCs. Therefore where suitable data exist, we use relevant UK cost estimates wherever possible.

The issue of differential costs by size of EWC was also raised in the consultation. While instructive to present costs with such a breakdown, the lack of reliable data at this level prevents this. Therefore costs in this IA remain based on the average across all sizes of EWC. The unit cost estimates for the set-up and operation of EWCs we have used in this Impact Assessment are presented in tables 1 and 2 below:

1. *Set-up costs*

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[49] ETUI – Database on European Works Councils Agreements: www.ewcdb.eu/
[50] As of mid-August 2008
[51] The Transnational Information and Consultation of Employees Regulations 1999, www.berr.gov.uk/files/file34183.pdf
[52] Costs and benefits of the European Works Coucils Directive, DTI, ERRS No.9. Tina Weber, Peter Foster and Kursat Levent Egriboz. URN 00/630; www.berr.gov.uk/files/file11620.pdf
[53] Impact Assessment on the revision of the European Works Council Directive SEC(2008)2166 of 2 July 2008, http://ec.europa.eu/employment_social/labour_law/docs/2008/impact_assesment_part1_en.pdf
[54] Preparatory study for an Impact Assessment of the European Works Council Directive, EPEC GHK, May 2008, http://ec.europa.eu/employment_social/labour_law/docs/2008/ewc_impact_assessment_preparatory_study_en.pdf

The UK price estimates are derived from the ECOTEC study in 1999, which formed the basis of the UK Impact Assessment (1999), updated to 2009 prices. Details of how prices have been updated are noted below relevant tables. The 'Commission IA average', included for the sake of comparison, comes from the 2008 Commission Impact Assessment figure for the average cost of setting up an EWC agreement since 1996 (hence of Article 6 agreements).

IA Table 1: Average costs of setting up UK EWC (2009 prices)*

Element	Average setting up costs
management time	£18,721
employee time	£7,960
cost of venue	£8,489
Travel	£8,097
translation costs	£3,918
interpretation costs	£14,497
Language and other	£10,448
admin support	£1,567
dissemination costs	£1,306
costs of experts - for employees	£3,833
costs of experts - for management	£5,307
documentation for meetings	£522
admin of ballot	£17,892
Total	**£102,556**
Commission IA average – 2008	£98,584

Source: UK EWC IA (1999).* All figures are updated using the RPI (CHAW) index (factor change of 1.31) apart from figures relating to labour costs (management and employee time & expert costs), whose prices are updated using the Average Earnings Index, excluding bonuses (factor change of 1.47)

2. Operating costs

IA Table 2: Average costs of a UK EWC annual meeting (2009 prices)

Element	Running Costs (£)
management time	£6,471
employee time	£9,434
cost of venue	£19,564
travel	£16,744
translation costs	£6,608
interpretation costs	£13,922
admin support	£2,037
dissemination costs	£3,513
costs of experts - for employees	£2,771
costs of experts - for management	£7,739
documentation for IT	£1,267
TOTAL	**£90,071**

Source: UK EWC IA (1999) . * All figures are updated using the RPI (CHAW) index (factor change of 1.31) apart from figures relating to labour costs (management and employee time & expert costs), whose prices are updated using the Average Earnings Index, excluding bonuses (factor change of 1.47).

IA Table 3: Total average annual running costs of a UK EWC (2009 prices)

Type of meeting	Average unit cost	Average annual frequency	UK average annual cost	Commission IA average
Annual meeting	£90,071	1.1	£101,780	£79,574
Extraordinary meeting				£79,574
Select Committee	£7,371	1.6	£11,793.72	£20,208
Training	£37,687		£37,687	£34,440
Total			£151,261	£213,796

Source: UK EWC Impact Assessment (1999) and Commission IA (2008)
**Unit cost for Select Committee taken from Commission IA. The Commission IA total assumes there are 3 meetings per year.

The UK price estimates are again derived from the ECOTEC study in 1999, which formed the base of the UK Impact Assessment (1999), updated to 2009 prices and the 'European averages' come from the Commission IA (2008), converted from Euros at €1 = £0.8604[55]. The average annual frequency of general (plenary) meetings is derived from the ETUI EWC database data[56], in which UK EWCs list the number of general meetings held each year, whereas the Commission averages assume each EWC holds on average two full-size plenary meetings each year; one standard annual meeting along with one extraordinary meeting. The frequency of Select Committee meetings is calculated from the ECOTEC study (1999) assumption that 80 per cent of UK EWCs hold Select Committee meetings, of which each holds two per year.

Data from the ETUI EWC Database indicates that the majority of UK EWCs hold just one annual meeting (with an average of 1.1 meetings per year for UK EWCs), hosting an average of eight UK and eleven non-UK members. Beyond this, nearly all UK EWCs have provision for Select Committees to meet before the annual meeting in order to prepare the agenda, currently with a maximum of three members, which is proposed to be increased to five members.

Responses to the consultation noted that some of the unit costs derived from the ECOTEC study may have increased since enlargement of the EU from 2004 onwards. We have therefore revised the following unit costs to take account of this:

- the unit costs for travel and subsistence are now taken from the GHK study[57] at £16,744
- the unit costs for Select Committees have also been taken from GHK such that per meeting the at £7,371.

Costs related to translation and interpretation are approximately the same when comparing the GHK and updated ECOTEC estimates and have therefore not been revised further.

Otherwise, we believe the estimated costs and benefits remain broadly accurate.

[55] Source: Bank of England, Monthly average End month Spot Quarterly average, Spot exchange rate. Data for July 2009
[56] ETUI Database on European Works Councils Agreements www.ewcdb.eu/
[57] Travel costs per meeting were estimated at EUR 15,300 and subsistence costs EUR 4,160

Implications for Administrative Burdens (AB)

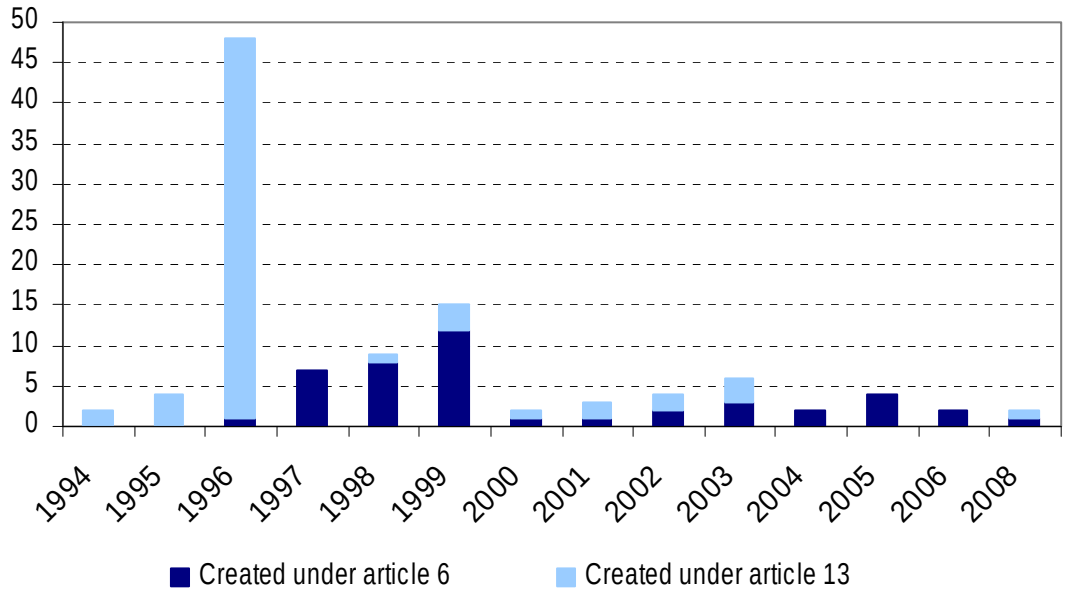
Original PwC administrative burdens exercise estimated total post-BAU (Business as Usual) costs of just under £5.4m a year. This was based on an estimated 55 UK-based EWCs. The proposed changes to the Directive on EWCs has no potential to reduce admin burdens, as amendments increase the obligation to provide information in a number of areas. However, as detailed in more depth in Section E, the additional admin burdens are predicted to be negligible in each of the areas when admin burdens are affected.

Take-up of EWCs in the UK

Since the Directive was originally implemented across the EU in 1994 141 undertakings[58] with headquarters in the UK had, according to the EWC database, been established by the end of August 2008. Of these 113 are currently effective.

Graph 1 below provides a summary of UK-based EWCs created by year. Around 60 per cent were created under Article 13 of the Directive, which allows companies to continue with agreements arranged before the Directive came into force, with the remaining 40 per cent having established newly formed council agreements under Article 6, which entails a specific procedure as set out by the Directive.

IA graph 1: Creation of UK EWCs (those currently effective) by year and by Directive article.



There are an estimated 265 companies[59] with UK headquarters that could potentially fall within the scope of the Directive. This implies a current take-up rate of 43 per cent[60], which compares with the EEA average of 36 per cent.

[58] In November 2008 146 and 116 of these were still effective.
[59] Commission Impact Assessment 2008, page 66, from ETUI-REHS, Brussels, 2006.
[60] Data from the EWC Database in August 2009 suggest that the UK take-up rate around 42 per cent

Under Directive 94/45/EC, companies are only obliged to set up an EWC at the request of 100 or more of its employees. This would remain the case under the 2008 amended Directive, though such amendments intend to allow EWCs to be created more easily, by obliging management to 'obtain and provide information to enable the commencement of negotiations…' Take up could also be increased following proposed improvements to current EWCs, in terms of the provision of more effective information and consultation, improved legal clarity and increased coherence between national and transnational procedures.

BENEFITS

It is extremely difficult to quantify benefits associated with EWCs, given their intangible nature, though it is still worth considering positive effects the establishment and maintenance an EWC may have for a UK company.

The potential benefits of the proposed amendments to the Directive largely mirror those set out during the establishment of Directive 94/45/EC, as the 2008 proposed revision aims to enhance the working of EWCs, by improving the effectiveness of information and consultation of employees.

Evidence from the ECOTEC study in 1999 identified a number of benefits perceived by a majority of companies surveyed, primarily a notion of 'symbolic value' of EWCs, wherein the presence of an EWC 'demonstrates a positive commitment to employees'. This was accompanied by a general consensus that the establishment of an EWC had increased ability to exchange information with employee representatives and had involved employees more closely in the business.

A number of sample companies also believed the EWC had improved employees understanding of reasons for management decisions.

GHK (2008)[61] drew similar perceived benefits from their survey of EWCs across Europe, with 81 per cent of surveyed EWCs agreeing or strongly agreeing that understanding of management decisions had been improved; 79 per cent that there was a better exchange of information trans-nationally and 75 per cent that relations between management and employees had improved. Such benefits, as with those found by ECOTEC, are surely a desirable consequence of the presence of an EWC, though it remains difficult to assess their economic impact and indeed to be certain that the perceived benefits mirror reality.

The Commission Impact Assessment goes further in their benefit analysis, suggesting that associated improvements in legal clarity and effectiveness of information and consultation of employees – particularly on restructuring issues – is likely to improve the management of change within the company. From this, they suggest costs relating to labour disputes and legal processes in situations could be reduced; huge economic costs relating to redundancy payouts (of up to €220 000 per worker)[62] could thus be reduced, which could far outweigh the costs of the running of an EWC. However, the Department for Business, Innovation and Skills (BIS) does not believe that there is sufficient evidence to support this proposed benefit; whilst effective information and consultation is highly desirable in effecting management of change, the presence of an EWC is unlikely to have such a direct impact on issues of this kind.

[61] A Preparatory Study for an Impact Assessment of the European Works Council Directive: GHK Consulting, 2007.
[62] 1999. Commission Impact Assessment, page 41.

The Chartered Institute of Personnel Development (CIPD)[63] have identified in principle increased employee voice leads to benefits for employers from employees' skills and knowledge being better used, leading to higher productivity. Employees feeling more valued, so they are more likely to stay and contribute more. The organisation gains a positive reputation, making it easier to recruit good employees. Conflict is reduced and co-operation between employer and employee is based on interdependence. Employees in turn should benefit from having more influence over their work, higher job satisfaction and more opportunity to develop skills.

In July 2009 BIS published it's 'Engaging for Success: enhancing performance through employee engagement report'[64]. David MacLeod and Nita Clarke led an independent review on employee engagement. The review found that levels of engagement can positively correlate with performance. One area of evidence was the 2006 Gallup study of 23,910 business units which compared top quartile and bottom quartile financial performance with engagement scores. They found that those with engagement scores in the bottom quartile averaged 31-51 per cent more employee turnover, 51 per cent more inventory shrinkage and 62 per cent more accidents. Those with engagement scores in the top quartile averaged 12 per cent customer advocacy, 18 per cent higher productivity and 12 per cent higher profitability. It should be noted that the review found correlation between engagement and performance and that correlation does not necessarily imply causation.

Given mixed evidence for company support for the merits of EWCs, the potential positive impact of EWCs on issues such as the management of change should not be overestimated. It seems more reasonable that, at best, the establishment and presence of an EWC may ameliorate the impact of restructuring on employees rather than achieving significant reductions in the cost of restructuring.

COSTS

The cost estimates presented below focus on two broad areas:

- The direct effect of proposed changes to the Transnational Information and Consultation of Employees Regulations 1999 that seek to implement the recast Directive; and
- The indirect effect of these changes on the possible take-up of EWCs

Direct effect of proposed changes

The changes required by the recast Directive are presented in greater detail in the accompanying consultation document, but are summarised again below:

- Information and consultation must be effective and allow undertakings to take decisions effectively (Article 1.2)
- EWCs to be limited to transnational issues only (Article 1.3/4)
- Information to be defined and consultation to be redefined (Articles 2.1.f and 2.1.g)

[63] www.cipd.co.uk/subjects/empreltns/comconslt/empvoice.htm
[64] www.berr.gov.uk/files/file52215.pdf

- Obligation on management to provide information to enable commencement of negotiations (Article 4.4)
- Changed rules on size and composition of Special Negotiating Body (SNB) to ensure balanced representation of employees (Article 5.2.b)
- The SNB to be allowed to meet before and after any meeting with the central management, without presence of employee representatives (Article 5.4)
- Where possible, ensuring balanced representation of employees as EWC representatives (Article 6.2.b)
- Establishment of arrangements for linking EWC procedures with those of national employee representation bodies (Articles 6.2.c and 12).
- The option to set up a select committee (Article 6.2.e)
- Management and SNB able to amend and terminate agreement and date of entry into force (Article 6.2.g)
- Duty of EWC to represent collectively the interest of employees, with an entitlement to the 'means required' to do this. (Article 10.1)
- EWC members to ensure that they report the outcome of EWC discussions to their members (Article 10.2)
- Access to training without loss of wages for EWC and SNB representatives (10.4)
- Clarification that there is no obligation to renegotiate EWC agreements established under
  Article 6.
- In the case of 'significant changes in structure' taking place within the company, agreements must be renegotiated at the request of at least 100 employees or their representatives (Article 13)

The anticipated effect of each of these changes and their estimated costs are presented in turn below.

Article 1: Legal Clarity on EWC objectives and information and consultation.

Article 1 has been amended so that the arrangements for informing and consulting employees must be defined and implemented is such a way to ensure the effectiveness of the procedure and enable the undertaking to take decisions effectively.

The Commission Impact Assessment argues that the current lack of clarity on information and consultation leads to time-consuming and therefore costly disputes within companies, citing examples of EWC companies who have suffered greatly lengthened restructuring processes, which they claim to be partially as a result of such a lack of clarity. Therefore, it is argued that proposals to this Directive should reduce costs in this area, rather than increase them. However, BIS questions the extent to which a clarification of I&C would reduce costs associated with restructuring and prefers the logic that improved I&C is likely to improve the impact restructuring has on employees.

In addition, the Commission has proposed a new paragraph in order to clarify that the information and consultation procedures for consideration by EWCs is limited to transnational issues and thereby distinct to matters of national interest only. Thus, matters for the consideration of the EWC must concern the Community scale undertaking as a whole, or at least two undertakings or establishments situated in two different Member States.

Clarifying that EWC business should be limited to transnational issues only is unlikely to create any additional costs; conversely, it is likely to shorten EWC meetings by ensuring that the objectives of EWC meetings are understood.

Article 2: Definitions of information and consultation

The Commission has proposed a new definition for 'information' and has amended the definition for 'consultation', introducing the concept of time, fashion and content for the information and consultation procedures, in order to bring it into line with other Directives containing information and consultation provisions.

This is a very similar argument to part one of Article 1 (above), wherein more clearly defined information and consultation could improve company operations, for example by reducing costs resulting from lengthening of undertaking restructuring due to labour disputes. However, BIS prefers the logic that improved I&C is likely to improve the impact restructuring has on employees.

Article 4: Responsibility for the establishment of an EWC

The undertaking must make available information relating to the number of its employees. The new text also states that the undertaking must obtain and provide information to enable the commencement of negotiations undertaken by the Special Negotiating Body (SNB); in particular to the structure of the undertaking and the size of its workforce.

The amendment to this article amounts to the provision of more information, which could involve additional management time. However, given the predicted four new UK EWCs per year (based on past growth in EWC numbers)[65], even if five hours are devoted to such a responsibility, the additional burden would only be (5 x £20[66] x 4) = **£400**. At an estimated £100 per company, this is certainly a negligible cost, whatever the extent of aggregation.

Article 5: Special Negotiating Body (SNB)

A number of changes are proposed for this Article:

- *Introduction of a simplified method for composition of the SNB*
- *Informing other bodies about SNB composition and negotiations*
- *Entitlement for SNB to meet separately from central management*
- *Use of experts*

Introduction of a simplified method for composition of the SNB

The Commission has proposed a simplified method for the composition of the SNB which means that one SNB seat will be allocated per portion of employees employed in that Member State amounting to 10 per cent, or a fraction thereof, of the total number of employees of the undertaking in the EEA.

[65] Taking into account the termination of certain agreements through mergers and acquisitions etc., there has been an average of four new EWCs established per year.

[66] Source: Annual Survey of Hours and Earnings (ASHE). ASHE 2008, managers and senior official code 1 Table 2.5a Hourly pay - Gross (£) - For all employee jobs: United Kingdom, 2008. 21 per cent was added to account for non-wage labour costs and then figures were rounded to the nearest pound.

The Commission IA (2008) states that the change to SNB composition is not controversial and that this Directive update would have 'minimal impact on set-up costs' and lead to a 'limited increase in the number of SNB members and therefore in the costs'.

Informing other bodies about SNB negotiations

There is currently a requirement that the central and local management must be informed about the composition of the SNB. This requirement has been expanded by article 5(2)(c)so that central and local management are also informed of the start of the negotiations and European workers' and employers' organisations are informed of both the SNB composition and the start of negotiations.

The obligation to inform management about the start of negotiations is likely to take very little additional employee representative time. Even if each EWC needed to devote two labour hours to the task, this would cost only £20 to the company (at £10[67] per hour including non-wage labour costs) along with an upper-limit estimate of £200 for external good and services. Retaining the logic that there are on average four new UK EWCs created per year, this gives an annual cost burden of only **£880**[68] to UK companies; another negligible aggregated cost, at only **£220** per new EWC.

Entitlement for SNB to meet separately from central management

In order to enable employees' representatives to be able to cooperate together to define their positions in the negotiations, a new entitlement has been proposed to allow the SNB to meet before and after any meeting with the central management without the employers' representatives being present.

The entitlement for the SNB to meet separately will increase set-up costs of an EWC, by increasing the time and resources taken up by SNB negotiations. If it is assumed that, in addition to the one standard meeting with management there would be two additional meetings held solely by the SNB (one before meeting with management and one after).

Taking the cost break-down for setting up of an EWC, which in practice details the cost of the SNB meeting aimed to establish the EWC, the average daily cost of an SNB meeting of **£60,637** (excluding management time and costs of experts for management which are not relevant, and excluding ballot costs – which should not be duplicated), giving a total average costs per SNB of £123,452[69]. For the estimated four newly established UK EWCs, this would give a total additional cost burden of **£0.49m.**

Use of experts

Article 5(4) entitles the SNB to be assisted by experts of its choice; ***the cost of one of which must be met by the undertaking.*** *The Commission seeks to recognise the role that trade union organisations can play in negotiating EWCs agreements. A further entitlement is created to allow the SNB to request an expert's presence at the negotiating meeting, where appropriate. The Commission has therefore amended the text to suggest that an appropriate Community level trade union could fulfil the role of*

[67] Source: Annual Survey of Hours and Earnings (ASHE) ASHE 2008, all employees Table 2.5a Hourly pay - Gross (£) - For all employee jobs: United Kingdom, 2008. 21 per cent has been added to account for non-wage labour costs and figures have been rounded to the nearest pound.
[68] (£200 + (2 x £10 per hour) = £220 per EWC = total of £880 (figures have been rounded)
[69] Assumed that SNB would meet without management twice.

an expert, although it should be noted that the choice remains one for the SNB to make. In order to enable the monitoring of new EWCs being established and the promotion of best practice, European trade union organisations and European employers' organisations have also been added to bodies to be informed about these matters.

The amendment only extends the amendment so that 'an appropriate Community level trade union could fulfil the role of an expert'; 'the choice remains one for the SNB to make.' There is therefore little likely increase in costs related to the use of experts, rather a wider choice for the SNB.

Article 6: Content of the Agreement

EWC composition – size and representation

The current requirement, relating to the composition of the EWC, its size and how seats are allocated, has been expanded to include that, where possible, in the interest of the balanced representation of employees, its composition should also take into account the activities, category and gender of the employees of the undertaking.

It is unlikely that ensuring balanced member composition will involve any significant costs. Firms are only required to 'take in account' 'where possible' the composition of representation in terms of activities, categories and gender, which should not involve more than a simple consideration in the case of setting up a new EWC and perhaps a minor redistribution of representative members in the case of established EWCs.

Linking national and transnational provisions

The establishment of arrangements for linking of the EWC procedures with national employee representation bodies. This Article is closely related to the amendments made at Article 12.

For this reason, the impact of linking of national and transnational provisions is detailed under Article 12.

Composition of the Select Committee

The number of members of the select committee permitted under the subsidiary requirements at Annex 1(1)(d) has been increased from three members to a maximum of five members.

The current average number of members in a UK EWC Select Committee is four,[70] and the GHK EU average estimate is five[71] so the amended article to limit the size of the Select Committee to a maximum of five is unlikely to have a large impact on set-up or operation costs. In fact, it is likely to reduce the size and therefore costs of a number of UK EWC Select Committees who currently have more than five members and who will be obliged to diminish the size of their Select Committees.

[70] Average members in Select Committee of effective UK EWCs giving relevant data: ETUI – Database on European Works Councils Agreements: www.ewcdb.eu
[71] A Preparatory Study for an Impact Assessment of the European Works Council Directive: GHK Consulting, 2007, page 17.

Article 10: Role and Protection of Employees' Representatives

There is a new duty on the members of the EWC to inform the employees of the content and outcome of an information and consultation procedure carried out in accordance with this Directive.

This duty to inform employees could take additional time of EWC members. However, as with the argument provided in Article 5, even if each EWC needed to devote two labour hours to the task, this would cost only £20 to the company (at £10 per hour including non-wage labour costs) along with an upper-limit estimate of £200 for external good and services. Retaining the logic that there are on average four new UK EWCs created per year, this gives an annual cost burden of only **£880**[72] to UK companies; another negligible aggregated cost, at only **£220** per new EWC.

Members of the SNB and EWC are to have access to training without loss of wages in so far this is necessary for their representational duties in an international environment.

The right of members of the SNB and EWC to training without loss of wages is likely to account for the largest increase in cost burden to UK EWCs, as both current and newly established EWCs will be affected.

Though evidence on current provision of training within EWCs is rather limited, the most recent study on EWCs (GHK, 2008) indicates that only around 36 per cent[73] of companies with EWCs currently provide training to all members. However, beyond this, another 43 per cent[74] of EWC companies provide training to at least one member of the EWC. Therefore, if an upper-limit estimation is taken by which 50 per cent of current UK EWCs do not provide any EWC members with training (and thus the remaining half provides full training: a simplification of the picture perceived by GHK), then 50 per cent x 113 = 56 UK EWCs would be obliged to provide training following the revision of the Directive. The GHK report (2007) on EWCs suggests that the European average that those who already provide training are spending is £3,7687 (€43 800) per EWC.

If these 56 EWCs were to all immediately spend this average amount on training, then the total additional cost burden would be **£2.13m**, although this cost is divided amongst 56 transnational companies of more than 1,000 employees.

It should also be noted that:
a) There is likely to be some additional deadweight within this estimation, as in reality some proportion of the 'remaining 50 per cent of EWCs' not currently reported to provide training are likely to do so to some extent, to all or some members of their EWC.
b) The average training figure per EWC may overestimate the true average amount an EWC will spend on training, because the figure used is taken uniquely from firms which are providing training on initiative and therefore are more likely to have a strong culture of training.

In order to account for this issue, an alternative scenario, potentially closer to the true likely consequence of the Directive changes, could be added to the analysis above. If

[72] (£200 + (2 x £10 per hour) = £220 per EWC = total of £880
[73] 46 per cent (fraction which provided training) x 79 per cent (companies which provided at least some training within their EWCs)
[74] 54 per cent (of companies providing training to less than all EWC members) x 79 per cent (of all EWC companies providing training) = 43 per cent.

only 25 per cent of EWCs were to start fully training their EWC members following Directive amendments – taking into account the deadweight issue and the likelihood that there would not be a 100 per cent take-up of training, then only 28 EWCs will be subject to the training costs of £37,687. This would imply a cost burden of only **£1.06m.**

This amendment is not said to be controversial in the eyes of the social partners, who recognise the benefit to the EWC of having a well-trained representative body, which would be extended to include EWCs not currently offering training to their employees.[75]

Article 12: Links between this Directive and Other Community and National Provisions

The SNB and management are required to establish the arrangements for linking the national and transnational arrangements on informing and consulting employees which exist within the company during the negotiating period.

Article 13: The Adaptation Clause

The recast Directive requires that unless provisions exist within existing agreements that allow for their modification, any *significant change to the structure* of an undertaking would result in the requirement for an EWC agreement to be renegotiated under the provisions of Article 5.

As the Directive does not define what constitutes a change in structure, we have assumed (on the basis of recital 40) here that this would relate to mergers and acquisitions (M&A). Using data from the ETUI EWC database, of the 28 UK-based EWC agreements that are no longer effective, 86 per cent - or 24 agreements - were because of mergers and acquisitions. Furthermore the results of these mergers and acquisitions indicate that a third of these re-located their headquarters outside of the UK. Therefore, overall, 16 of the 28 agreements that ended resulted in new UK-based EWCs. Since 1992 this averages at two UK-based EWCs a year that may undergo a merger or acquisition.

In the absence of detailed information concerning provisions for changes of structure within existing Article 6 or Article 13 provisions, we assume here that such provisions exist in half of all EWC agreements. From this we estimate therefore that the proposed changes to Article 13 would affect one UK-based EWC each year. Using the estimated set-up costs from table 1 above this would lead to an **increase in costs to business of around £0.1m a year**.

[75] Lessons learned on European Work Councils, 2005.

IA Table 4: Summary of estimated direct effect costs

	Estimated cost p.a £m
Article 1: Legal Clarity on EWC objectives and information & consultation.	Not quantified
Article 2: Definitions of Information & Consultation	Not quantified
Article 4: Responsibility for the establishment of an EWC	negligible*
Article 5: Special Negotiating Body	0.49
Article 6: Content of the Agreement	negligible*
Article 10: Role and protection of Employees' Representatives	1.06 - 2.13**
Article 12: Links between this Directive and Other Community and National Provisions	Not Quantified
Article 13: The Adaptation Clause	0.1
Total	1.55 - 2.61

Source: BIS estimates, 2009. **Depending on training scenario considered.

2. Indirect effect of new directive on take-up of EWCs

As noted above, the database of EWCs indicates that there are 113 effective UK headquartered EWCs and the most recent data available on the total number of companies covered by the Directive (ETUI-REHS, 2006) suggests there to be 265 with headquarters in the UK. This gives a UK take-up rate of 42.6 per cent, compared to the EEA average of 35.5 per cent, where 583 EWCs have been established from a potential 1,642.

One objective of the proposed amendments to the existing Directive is to increase the take-up rate. An addition to Article 4 of the Directive states that 'the undertaking must obtain and provide information to enable the commencement of negotiations undertaken by the Special Negotiating Body', which seems to be the most direct attempt to encourage take-up. Proposed improvements to EWCs – through improved effectiveness of information and consultation, legal clarity and coherence – could also been seen as an indirect method for inciting eligible companies to establish a new EWC.

However, it seems unlikely that the 152 eligible UK companies are currently without an EWC agreement solely due to a lack of guidance on information provision; in other words it is questionable whether amendments of this nature are likely to greatly increase the current take-up of EWCs in the UK. As it is only 28 new UK-based EWCs have been created since 2001.

Further to this, evidence from the Commission Impact Assessment suggests that the establishment of an EWC depends upon factors such as the sector the company operates in (41 per cent average take-up rate in the metals sector compared to only 24 per cent in the services sector) and the presence of employees in certain EEA member states (for instance, over half of eligible companies operating in Sweden have established an EWC).

Perhaps most essentially, it will remain the case that the establishment of an EWC agreement is voluntary and company management are only obliged to do so at the request of at least 100 employees, hence the proposed changes to the Directive are unlikely to have any marked impact on the take-up rate.

In light of this, it is worth considering the additional cost burden which would be borne if the UK take-up rate were to increase. For illustrative purposes we have assumed an increase in the take-up rate to 50 per cent from the current level of 42.6 per cent, which would result in 132 UK-based EWCs, or 19 new UK EWCs. It seems reasonable to assume that the creation of these new EWCs would be spread over a number of years following the amendment to the Directive. We assume here a 3-year period for creation of the 19 new EWCs with seven established in the year following the Directive amendment and six more established in each of the following two years. On this basis the estimated additional costs to the set-up and running of UK EWCs would be as follows:

IA Table 5: Indirect costs, per year, envisaged as a result of additional take-up of EWCs (current prices followed by Present Values)

Discount Rate	3.50%					
Number of new EWCs	7	6	6	0		
Year following change	1	2	3	4 etc.	TOTAL over 10 year	Average per year – over 10 years
Set-up costs	£717,895	£717,895	£615,338.85	£0	£2,051,129	£205,113
Running costs	£1,058,827.27	£2,117,655	£3,025,221	£3,025,221	£27,378,248	£2,737,825
Set-up costs (PV)	£717,895	£693,619	£574,425	£0	£1,985,939	£198,594
Running costs (PV)	£1,058,827	£2,046,043	£2,824,076	£2,728,576	£23,196,883	£2,319,688

Source: Impact Assessment (1999) and BIS estimates.

IA Table 6: Summary of additional quantifiable costs

2008 Prices	Direct Costs £m	Indirect Costs £m	**Total £m**
One-off costs £m*	0	2.1	**2.1**
Running costs £m #	1.5-2.6	2.7	**4.3-5.4**

Source: Impact Assessment (1999) and BIS estimates. *One-off costs are spread over 3 years. # average running costs over 10 years. Figures have been rounded and totals may not sum to individual parts due to rounding.

F: Risks

The estimates of costs and benefits presented in this Impact Assessment are based upon actual data sources where they exist. Beyond this a number of assumptions have been made where there are gaps in the data. Furthermore there is inevitably a degree of uncertainty surrounding the indirect and direct effects of the changes introduced by the recast Directive.

G: Enforcement

The Central Arbitration Committee (CAC) and the Employment Appeals Tribunal are currently responsible for the enforcement of the Transnational Information and Consultation of Employees Regulations 1999. The enforcement regime will be changed slightly so that the CAC will hear complaints and the EAT will issue penalties. It is therefore likely that the enforcement of any amendments to TICE 1999 will fall to the CAC. The number of cases brought before the CAC under the Transnational Information and Consultation of Employees Regulations to date has been minimal, suggesting that compliance is high. Therefore there is no reason to believe that these proposed changes are likely to have a significant impact.

H: Recommendation and summary table of costs and benefits

Table 7 below presents a summary of the estimated quantifiable costs and benefits. These costs and benefits reflect the policy option of implementing amendments set out by revised Community Directive 94/45/EC on European Work Councils.

IA Table 7: Summary of quantifiable costs and benefits

Scope of law, **£m**	Annual Costs (ongoing)	One off costs	Annual Benefits (£m p.a.)
Direct Effect of Changes Proposed by Directive (i.e. on existing EWCs)	1.5 - 2.6	0	Not quantified – please refer to EWC Benefits description in Section E.
Indirect effect of increased take-up of EWCs	2.7	2.1	Not quantified – please refer to EWC Benefits description in Section E.

Source: BIS estimates. Figures have been rounded

I: Implementation

The changes to the EWC Directive will be implemented by way of amendments to the Transnational Information and Consultation for Employees Regulations 1999 which transposed the provisions of Directive 94/45/EC on the establishment of a European Works Council. The Government has prepared a further public consultation to seek stakeholders' views on the draft Regulations implementing the revised Directive.

J: Monitoring and evaluation

A review of the EWC Directive will be undertaken by the European Commission five years after the Directive comes into force.

The Government will continue to monitor the take up and use of EWCs through the Workplace Employment Relations Survey (WERS) (expected to be completed in 2011) which provides an integrated picture of employment relations, including information and consultation arrangements.

The Government monitors the cases brought before the CAC under the Transnational Information and Consultation for Employees Regulations 1999, which are published annually in the CAC's Annual Report. It will continue to do so following the implementation of the revised EWC Directive.

Specific Impact Tests: Checklist

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	No
Rural Proofing	No	No

Annexes

Annex A: SPECIFIC IMPACT TESTS

1. Competition Assessment

Business sectors affected

Table A1 below presents the distribution of currently effective EWC's with UK headquarters. All of these EWCs are in the private sector.

The initial analysis of the competition filter is that a detailed competition assessment is not considered necessary (see table A2 below). The proposed legislation will apply to all undertakings with at least 1,000 employees within EU member states and, given the relatively small magnitude of the costs, is unlikely to affect the competitiveness of any particular sector.

Table A 1: Distribution of currently effective UK-based EWCs by sector

% distribution	**Effective**
Building and Woodwork	3%
Chemicals	20%
Food, hotel, catering and agriculture	15%
Graphical	5%
Metal	24%
Other services	10%
Public services	0%
Services Commerce	5%
Services Finance	7%
Services IBITS	2%
Textile	2%
Transport	7%
Source: EWC Database, ETUI**	

**Online database accessible through www.ewcdb.eu/. Data accessed and retrieved on 20 August 2008

Table A 2: Competition assessment

Question: ***In any affected market, would the proposal..***	**Answer**
..directly limit the number or range of suppliers?	No
..indirectly limit the number or range of suppliers?	No
..limit the ability of suppliers to compete?	No
..reduce suppliers' incentives to compete vigorously?	No

Source: BIS

2. Small Firms Impact Test

Undertakings with fewer than 1,000 employees across the EEA and fewer than 150 employees in any member state are not affected by the provisions of this directive.

3. Equality Impact Assessment

In line with better regulation best practice and the Equalities Duties we have considered the impact of changing the law by gender, race and disability.

The Commission Impact Assessment has not identified any negative impacts on equality which would result as a consequence of a revision to this Directive.

In addition, the proposed amendment to Article 6, detailed in Section E, stipulates ‘balanced representation of employees within the EWC’, taking the ‘activities, category and gender’ of employees of the undertaking into account.

Annex H: Implementation of the European Works Council Directive response form

Implementation of the European Works Council Directive response form

This response form can be completed online through Survey Monkey: http://tinyurl.com/y9hro6o

Alternatively, completed response forms can be emailed, posted or faxed to BIS:

Email: EWC@bis.gsi.gov.uk

Postal address:

Celia Romain
Employment Relations Directorate
Department for Business, Innovation and Skills
Bay 462
1 Victoria Street,
London SW1H 0ET

Fax: 020 7215 6414

The closing date for this consultation is 12/02/2010

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Name:

Organisation (if applicable):

Address:

Please state if you are responding as an individual or representing the views of an organisation, by selecting the approapriate group on the consultation response form. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the box below that best describes you as a respondent to this consultation:

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe):

Question 1

Is the Government's overall approach to implementing the Directive the correct one? Please give reasons, as appropriate.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 2 (Paragraph 3.15)

Will the Government's approach to the adaptation clause cause practical problems when two EWC agreements are merged? If yes, please describe the likely problems and any potential solutions.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 3 (Paragraph 4.8)

Should the definitions of "information" and "consultation" be introduced as obligations in a new Regulation? Please comment as appropriate.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 4 (Paragraph 5.13)

Should the phrase the “parties concerned” refer to the Special Negotiating Body?

☐ Yes ☐ No ☐ Not sure

Comments:

Question 5 (Paragraph 5.13)

Has the Government identified the correct point at which information must be provided and a suitable mechanism for ensuring that information is provided in a timely manner? If not, please suggest an alternative approach.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 6 (Paragraph 5.15)

Has the Government identified the correct enforcement mechanism? If not, how can this provision be enforced more effectively?

☐ Yes ☐ No ☐ Not sure

Comments:

Question 7 (Paragraph 5.19)

Is the Government's interpretation of the role of experts at SNB meetings correct? If not, please suggest an alternative approach.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 8 (Paragraph 6.7)

The Government has suggested a flexible approach to the way that in which national and transnational information and consultation are linked. Is this the most appropriate way to implement this provision? If not, please suggest an alternative approach.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 9 (Paragraph 6.10)

Is the Government correct to require balanced representation only "as far as reasonably practicable"? Please comment as appropriate.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 10 (Paragraph 6.15)

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

Comments:

Question 11 (Paragraph 7.3)

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

☐ Yes ☐ No ☐ Not sure

Comments:

Question 12 (Paragraph 7.8)

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 workplaces?

☐ Yes ☐ No ☐ Not sure

Comments:

Question 13 (Paragraph 7.8)

Is it correct to apply the duty to provide employees with feedback to the EWC as a single entity, rather than to the individual EWC members? If not, how should this duty be applied?

☐ Yes ☐ No ☐ Not sure

Comments:

Question 14 (Paragraph 8.4)

Is the Government correct in its interpretation of the "means required"? Please comment specifically on the Government's consideration of what management is may be liable for.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 15 (Paragraph 8.9)

The Government intends not to specify who is responsible for determining what training should be provided to SNB and EWC Members. Is this the right approach? Please comment as appropriate.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 16 (Paragraph 10.6)

Is the current level of maximum fine effective, proportionate and dissuasive? If, not, please suggest an appropriate maximum fine.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 17 (Paragraph 11.2)

What practical issues have you experienced in the operation of European Works Councils?

Comments:

Question 18 (Paragraph 11.2)

Do you have any other views on the way the regulations have been drafted? Please submit any drafting suggestions if you have them (please continue on a separate sheet if necessary).

Comments:

Question 19 (Paragraph 11.2)

Do you have any comments on the Impact Assessment at Annex G?

Comments:

Question 20 (Paragraph 13.6)

Is the Central Arbitration Committee the correct court to hear all complaints under these Regulations? If not, please state your reasons.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 21 (Paragraph 13.11)

Is it appropriate to introduce a three-month time-limit for applications to the Central Arbitration Committee under Regulation 21 TICE 1999 but not under Regulation 20? Please comment as appropriate.

☐ Yes ☐ No ☐ Not sure

Comments:

Question 22 (Paragraph 13.14)

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

☐ Yes ☐ No ☐ Not sure

Comments:

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