
**GOVERNMENT RESPONSE TO THE PUBLIC CONSULTATION**

# Implementation of the Recast European Works Council Directive: Draft Regulations

APRIL 2010

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## Executive Summary

The Government is grateful to the forty-four respondents for their contribution to this consultation. The responses indicated significant support, especially from employers, for the policy approach of the Government and for the way the Transnational Information and Consultation of Employees (Amendment) Regulations 2010 ('TICE 2010') had been drafted to transpose the 2009 Directive on European Works Councils (EWC).

Responses also indicated that there remained a divergence of opinion on the way EWCs should operate and the legal framework which should apply to them. To some degree, these views mirrored differences between trade unions and employers which were apparent when the EU negotiations on EWCs took place in 2008 and early 2009. The Government has no wish to re-open the debates which surrounded the negotiation of the 2009 Directive on EWCs. The Directive itself represents a carefully-constructed compromise between the positions of the European Social Partners and others. The Government therefore maintains its view that the transposing regulations should be drafted in a way which fully respects the compromise underpinning it.

Respondents focused on the following issues:

- The structure of the regulations and the clarity of their treatment of each of the three main categories of EWC;
- The definitions of 'information' and 'consultation';
- The definition of those transnational issues on which EWCs should be consulted ;
- The role of experts engaged by a Special Negotiating Body (SNB);
- The way in which training for SNB and EWC members is organised;
- The obligation on central management to provide the means required for EWC representatives to undertake their role;
- The way in which the consultation of EWCs and national-level bodies should be linked;
- The time-limit for complaints to be made to the Central Arbitration Committee about alleged failures to comply with the regulations; and
- The remedies and financial penalties available to enforce the regulations

The Government has closely examined these comments and proposals. Its overall conclusion is that the draft regulations retain the balance of the Directive but need further work to address some inconsistencies and to improve their accessibility and usability. In response to the consultation, the Government has decided to amend the draft regulations in various ways, including the following:

- The application clause in draft regulation 2 will be deleted and, instead, dedicated regulations will define the legal regime applicable to EWCs with pre-existing agreements and to other EWCs created or amended by agreement during the 2-year window immediately prior to 5 June 2011;

- The information and consultation obligations will be amended to ensure that the wording of the Directive is more closely followed, where possible;

- These information and consultation obligations will be re-positioned within the regulations to ensure that they clearly apply just to the information and consultation of EWCs or information and consultation representatives;

- The requirement for central management to provide the means required will be amended to reflect more closely the wording in the Directive;

- The entitlement for EWC and SNB members to be trained in their role will be amended to reflect more closely the wording used in the Directive. This means that the requirement on the employer to provide the training will be removed and central management will be obliged to provide the means required for these representatives to undertake the necessary training;

- The regulation linking consultation at EWC and national level will be clarified to explain how linkage should occur where the EWC agreement does not specify the method of linkage. The regulation will also clarify that, as a result, the existing entitlements for national-level bodies to be informed and consulted are not extended or reduced;

- The time limit within which complaints to the Central Arbitration Committee about a failure to comply with the TICE Regulations will be increased from three months to six months; and

- The level of the maximum penalty will be uprated to £100,000.

## Next steps

The regulations are made under Section 2 (2) of the European Communities Act 1972 . They were finalised and signed on 30 March 2010 and will be laid in Parliament shortly after Easter. The majority of the provisions will come into force on 5 June 2011, though the regulations relating to the implementation of the Agency Workers Directive will not come into force until October 2011. The Government intends to publish guidance about the new regulations on the BIS website as soon as possible after they are laid in Parliament. Versions of this guidance will be posted on the Business Link and Direct.gov websites as soon as possible thereafter.

## Chapter One – Introduction

1.1 European Works Councils (EWCs) are consultative bodies representing the European workforce of a multinational organisation or business. The central purpose of an EWC is to establish a dialogue with the European central management of the multinational so that the decisions taken by them or local management are informed by the views of the workforce. EWCs have been subject to EU legislation since the mid-1990s.

1.2 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") is a recast of an earlier Directive on EWCs (Directive 94/45/EC - the "1994 Directive").

1.3 The 1994 Directive was extended to the UK in 1997 and was transposed in the UK by the Transnational Information and Consultation of Employees Regulations 1999 (TICE 1999).

1.4 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 compromise that balances the interests of business and employees.

**The Public Consultation**

1.5 In November 2009, the Department for Business, Innovation and Skills (BIS) issued a consultation document seeking views on the Government's proposals for the implementation of the 2009 Directive through implementing regulations ("TICE 2010"). The consultation document presented for detailed comment a draft of the TICE 2010 Regulations. The draft regulations operate by amending provisions already found in the TICE 1999 Regulations or by inserting new regulations into TICE 1999.

1.6 In the consultation document, the Government set out its proposals, in line with the 2009 Directive, to create different legal regimes for three categories of EWC:

- First, EWCs, which were established under pre-existing agreements before the 1994 Directive was implemented in the UK or the rest of the EU would operate, with one main exception, outside the scope of both TICE 1999 and TICE 2010. The exception concerns the provisions within TICE 2010 concerning the way EWC agreements should be adapted when significant structural changes occur within the European operations of the multinational.

- Second, other EWCs created or revised by agreement on or after 5 June 2009 and before 5 June 2011 would, with one main exception, continue to be subject to the original TICE 1999 Regulations. In other words, with one exception, the amendments introduced by TICE 2010 would not apply to them. The exception concerns the provisions within TICE 2010 concerning the way EWC agreements should be adapted when significant structural changes occur within the European operations of the multinational.

- Third, all EWCs established on or after 5 June 2011 and other EWCs established before 5 June 2009, which were not revised in the previous two years, would be subject to all the amendments introduced by TICE 2010.

1.7. The main objective of the draft TICE 2010 Regulations was to transpose the 2009 Directive. However, they contained a number of other provisions, which make changes to TICE 1999 that were not driven by the 2009 Directive. These mostly concern procedural changes relating to the enforcement of legislation on EWCs in GB and Northern Ireland, and new requirements on employers to disclose information to EWCs about temporary agency workers.

1.8 The consultation ended on 12 February. This document summarises the views received during the consultation and sets out the Government's response to the issues raised.

**Responses to the consultation**

1.9 The consultation document was sent to around four hundred and fifty bodies and individuals, including employers' organisations, trade unions, and larger businesses with EWCs in place. The consultation document was also placed prominently on the BIS website.

1.10 In total, forty-four responses were received. The Table below categorises these respondents by interest group.

| Category | Number of responses |
|---|---|
| Employers and Employers' Organisations | 14 |
| Trade Unions and Trade Union Federations | 13 |
| Lawyers and Lawyers' Organisations | 1 |
| Individuals, including EWC members | 13 |
| Other Organisations | 3 |
| **Total** | **44** |

It should be noted that ten responses were received from individual members of EWCs, some of whom stated that they were responding on behalf on their EWCs. These ten individuals had direct experience as members of seven different EWCs.

1.11 A list of those respondents who were willing to have their names and responses disclosed can be found at **Annex A**. The Government would like to thank all respondents for their contributions.

## Understanding this document

1.12 The consultation document presented twenty-two questions for consultees to address, grouped into a dozen or so topic areas. For convenience, the response document discusses each topic and question in the same order.

1.13 Each section of this document first presents a summary of the views expressed by respondents. Not every respondent is cited in each case, not least because some submissions repeated the views expressed by others. There then follows a section in which the Government's response to those views is presented. The Government's main conclusions and actions are set out in bold lettering.

## Chapter Two – Regulations Transposing the 2009 Directive

2.1 The consultation document presented a set of draft regulations, TICE 2010. This chapter summarises, and responds to, the comments received on each of the main issues relating to those regulations which transpose the 2009 Directive. Some matters – for example, the definitions of 'information' and 'consultation' – aroused much more interest among respondents than others. However, for consistency and ease of reference, issues are discussed in the same order they were addressed in the consultation document.

### A. The Government's Overall Approach

2.2 The consultation document asked respondents to assess whether the Government's overall policy approach to implementing the Directive is the correct one. Forty-two responses on this issue were received.

2.3 A majority of the employer federations, including the Engineering Employers' Federation (EEF) and ORC Worldwide, expressed their broad support for the Government's policy approach though they raised some concerns about specific provisions. However, they and other respondents including the Confederation of British Industry (CBI) thought the structure of the draft regulations makes them difficult to understand and to apply in practice. In particular, they thought that the different treatment for EWCs which were not subject to TICE 2010 in full were difficult to follow. They called for the regulations to be substantially re-drafted to provide a structure which would clearly show which regulations applied to each of the three categories of EWC. The Employment Lawyers' Association (ELA) believed that, in the circumstances, the Government's approach was broadly correct. They referred to the complex nature of the Directive as a cause of the complexity of the regulations. In the circumstances, the structure of the draft regulations was a satisfactory way of dealing with this complexity.

2.4 Trade unions did not comment on the structure of the regulations. However, they expressed disappointment with the Government's approach to transposition. For example, the Trades Union Congress (TUC) and the GMB

thought that the Government's approach did not go far enough to ensure that the benefits to employees and representatives under the 2009 Directive would be fully realised in the UK, especially in situations where major restructuring was taking place within a multinational. They considered that the problems encountered by EWC members would therefore persist, and that the rights of UK workers to be informed and consulted would continue to lag behind those in other EU countries. This view was supported by those EWC members who responded.

**Government Response**

2.5 The Government acknowledges that the TICE 2010 Regulations are complex, but it believes that this complexity is to a large extent unavoidable due to the complexity of the 2009 Directive and its creation of separate legal regimes for the three different categories of EWC. However, the Government considers that, within these constraints, there are steps that can be taken to improve the accessibility and usability of the regulations. **The Government has, therefore, decided to remove the application clause at regulation 2 and instead amend regulations 44 and 45 of TICE 1999 (which deal with pre-existing agreements) and insert a new regulation 45A to deal with agreements created or amended during the 2-year window.** This approach would then provide a single point of entry into the regulations for employers and employees with EWCs which are not subject to all the changes introduced by TICE 2010. In some cases, this may mean that individuals covered by a pre-existing EWC would simply need to read one regulation to understand all they need to know about how they are affected by TICE 2010.

2.6 The Government also recognises that most managers, representatives and employees rarely read the law itself. Companies of this size often access the services of lawyers and other experts to advise them. Practitioners would also rely, at least in the first instance, on guidance prepared by the Government or others. **The Government will therefore prepare detailed guidance on the new law governing EWCs which will be available as soon as possible after the final regulations are laid in Parliament.**

**Versions of this guidance will be placed as soon as possible thereafter on the Direct.gov and Business Link websites.**

2.7 The Government appreciates that trade unions would prefer to see a more radical approach taken in the regulations. Indeed, some of their comments seek to resurrect proposals which were not accepted at the EU level when the 2009 Directive was renegotiated. **It is a cornerstone of the Government's approach that the TICE 2010 Regulations should fully respect the careful balance that was struck during the negotiation of the 2009 Directive. That remains the Government's position. Therefore, in many areas, the TICE 2010 Regulations write out provisions taken from the 2009 Directive itself.**

2.8 The Government would also point out that the 2009 Directive contains provisions which should significantly enhance the ability of EWCs to function effectively. The nature of the consultative dialogue should deepen as a result and employees' rights in connection with EWCs should be strengthened. The TICE 2010 Regulations fully transpose these important changes.

## B. Exempted EWC Agreements and the Adaptation Clause

2.9 The consultation document noted that the intention of the 2009 Directive was to avoid making changes to the way existing EWCs were treated under the law. It therefore made provision for existing EWC agreements, and new ones agreed in the two years before 5 June 2011 (the 'two year window'), to remain largely subject to the current law. However, the Directive also introduced a mechanism for the renegotiation and adaptation of EWC agreements where significant changes in the undertaking's structure occur (through the so-called 'adaptation clause'). This adaptation clause would in effect apply to all EWCs, whenever they were established. The aim of the adaptation clause is to ensure that all employees are adequately represented in companies following such structural changes.

2.10 Respondents were asked to comment on the Government's proposed approach to transposing the adaptation clause of the 2009 Directive in the TICE 2010 Regulations.

2.11 This issue generated thirty-one responses.

2.12 The EEF and the CBI strongly supported the proposal that pre-existing EWC agreements would remain largely exempt from the requirements of the regulations. However, they raised concerns that the draft regulations might fail to achieve this policy aim by not making it clear that pre-existing agreements maintained their exempt status after they had been re-negotiated via the adaptation clause. The Chartered Institute for Personnel and Development (CIPD) noted that the regulations provide different treatment for those EWC agreements with their own adaptation clauses. They therefore pointed out that some EWC agreements were likely to be re-negotiated so that adaptation clauses would be inserted within them. They wanted to ensure that the regulations would permit such limited re-negotiation of old agreements. The British Retail Consortium (BRC) stated that the regulations should make clear that if the adaptation clause is triggered, that the Article 6 agreement that was signed in the two year window should continue to operate under the TICE 1999 Regulations.

2.13 The Communication Workers Union (CWU) took an opposite view, depicting pre-existing EWC agreements as ineffective and unenforceable. They therefore thought there should be wider rights for employees to challenge these agreements and to re-negotiate them as legally enforceable arrangements. The TUC and GMB welcomed the provisions which ensure the continuation of EWCs during their adaptation. However, they, along with other unions, including the European Transport Workers' Federation (ETF), thought that the Government had misunderstood and misrepresented the substance of the adaptation clause. They argued that the 2009 Directive did not maintain the exemption for voluntary agreements after they had been re-negotiated under the adaptation clause.

2.14 Various respondents, including the ELA, also raised issues around the wording of the adaptation clause, fearing that the lack of a definition for 'conflict' between EWC agreements and what constitutes a 'significant change' in the company's structure could lead to legal uncertainty. However, they also noted that the Directive did not offer much support on this point and that the Government was, therefore, correct to rely heavily in the wording of the Directive. Unite welcomed the Government's statement in the consultation document that 'significant changes' may mean more than mergers, acquisitions and divisions.

**Government Response**

2.15 The Government considers that the 2009 Directive to a large extent maintains existing exemptions and it also creates new exemptions for certain categories of EWC. The Government supports this approach because it believes that these functioning EWCs should not be required to undergo substantial revision as a response to the Directive. **Accordingly, the transposing regulations should maintain the exemption for agreements signed in accordance with regulations 44 and 45 of TICE 1999 and they should create a new type of exemption for those agreements created under TICE 1999 that are signed or amended in the two years prior to 5 June 2011.**

2.16 **In relation to the adaptation clause, the Government's approach is to closely reflect the wording used in the 2009 Directive.** This appears to be the most appropriate course in an area where, as the responses have shown, different interpretations are possible. The Government would point out that during the course of the Directive's negotiation, it was accepted by the Commission and Member States that, in virtually all cases, the legal status of an EWC agreement after it had been re-negotiated under the adaptation clause would remain unaltered. So, pre-existing agreements would, post adaptation, remain pre-existing agreements in most cases. However it should also be noted that the EWC Directive and, by extension, TICE 1999 and TICE 2010, apply to *companies* that are within scope, and not to specific EWC *agreements*. So, where a company continues to exist following a merger or takeover, it should be allowed to continue with its existing EWC arrangements. In other cases, such as a de-merger, the company may cease to exist. Any new EWC agreements which the de-merged companies establish are therefore likely to be subject, post adaptation, to all of the 2010 TICE Regulations.

2.17 The 2009 Directive does not specify what constitutes a ‘significant change’ in the company's structure (though the Recitals indicate that it includes mergers and takeovers). The Government does not propose to fill this gap, not least because any extra legislation on the point might introduce an unwelcome inflexibility. The Government feels the issue should be left to the parties to resolve, or for the Central Arbitration Committee to decide in the light of particular circumstances where the parties cannot agree. However, to assist the parties, the Government will provide advice in its guidance on what a ‘significant change’ may involve.

## C. Definitions of Information and Consultation

2.18 In the consultation document, the Government proposed that the new definitions of ‘information’ and ‘consultation’ provided by the 2009 Directive should be introduced as obligations on central management by inserting a new regulation 5A into TICE 1999, and not by amending regulation 2 of TICE 1999 which contains definitions of many terms used. This approach was thought to aid legal clarity and achieve the Directive’s aims of improving information and consultation in new EWC agreements.

2.19 Thirty-eight responses on this issue were received.

2.20 There was general support from many of the employer respondents for the Government’s approach to the transposition of the new definitions of information and consultation. However, they viewed regulation 5A as requiring amendment and clarification. For example, the CBI, EEF, the HSBC Group and the ORC noted that the definition of consultation used in the 2009 Directive had not been reproduced in TICE 2010 in full. In particular, the words ‘without prejudice to the responsibilities of management’, had been omitted and these organisations requested its reinstatement. Employers also raised concerns that regulation 5A did not focus exclusively on the obligations on the parties to inform and consult an EWC or information and consultation representative.

2.21 Trade union respondents, including the Associated Society of Locomotive Engineers and Firemen (ASLEF) and the European Metalworkers' Federation (EMF), and EWC members did not agree with the Government’s approach for similar reasons because it did not write out in full the relevant wording used in the 2009 Directive. They therefore believed that TICE 2010 failed to transpose the Directive accurately. In relation to the definition of ‘consultation’, the TUC, GMB and other trade unions requested the inclusion of the text in the 2009 Directive that makes it clear that consultation means the establishment of ‘dialogue and exchange of views’ and that the opinions of EWC representatives ‘may be taken into account’ by management. They also believed that the regulations should define ‘information’ as being the

‘transmission of data.’ The ELA did not agree on this point as it considered that this was implicit in the word ‘information’. The British Airline Pilots Association (BALPA) stated that changes to the definitions of ‘information’ and ‘consultation’ should apply to pre-existing agreements, those created or revised on or after 5 June 2009 and before 5 June 2011 as well as to agreements established on or after the 5 June 2011. The TUC and other union respondents also raised concerns about the lack of any requirement in the draft regulations relating to the timeliness and the quality of consultation with EWCs.

**Government Response**

2.22 The Government agrees with those respondents who believe that new regulation 5A is wrongly placed in the TICE 1999 and confuses the obligations to inform and consult EWCs with obligations to inform and negotiate with Special Negotiating Bodies (SNBs). **The Government has therefore decided to insert the new wording on ‘information’ and ’consultation’ at a later point in TICE 1999 (namely, as new regulation 18A in Part IV) where the obligations apply, as intended, just to the information and consultation of EWCs and information and consultation representatives. Regulation 18A will also be amended to remove confusing references to SNB ’negotiations’.**

2.23 The Government acknowledges that the wording of the definitions was a key part of the social partner advice offered during the course of the negotiation of the 2009 Directive. With this in mind, the **Government has decided to change the regulations to bring them closer into line with the wording of the Directive. New regulation 18A of TICE 1999 will be amended to include the wording used in the 2009 Directive which states that the opinion expressed by the EWC ‘may be taken into account’ by management.** However, much of the other wording about the definition of consultation which was suggested by trade unions is already present in TICE 1999 and so does not need to be added again. The Government remains of the view that references in the definition of information to the ‘transmission of

data’ are superfluous and their inclusion would add nothing of worth to the existing wording.

2.24 The Government is also sympathetic to the employers’ call for the introduction of wording relating to management responsibilities. However, it remains of the view that the wording in the 2009 Directive cannot be lifted wholesale and placed in new regulation 18A, not least because the term ‘responsibilities’ is not clearly defined. Instead, the Government considers that that the Directive's wording at this point can be best interpreted by reference to Article 1 of the Directive which sets out the purpose of EWCs as improving the effectiveness of decision-making. **Regulation 18A will therefore be amended to ensure that the definition of consultation includes a reference to ‘the responsibilities of management to take decisions effectively’.**

## D. The Negotiation Procedure

2.25 The consultation document asked respondents to consider the following issues about the negotiation procedure by which EWCs are established.

*Providing information to allow for the start of negotiations*

2.26 The consultation document discussed the new requirement in the 2009 Directive for management to provide the 'parties concerned' with information to allow for the commencement of negotiations. It proposed that the SNB should receive the information. The consultation document also invited comments on the timing and manner in which the information should be provided, proposing that information should be provided on the multinational's structure and on its workforce. Thirty-two respondents offered an opinion on this issue.

2.27 The majority of employers agreed that this information should be provided to the SNB. Employer respondents and the ELA were also broadly supportive of the proposals about the types of information to be disclosed but some thought that greater clarity was needed when defining the obligation, especially in relation to information about the workforce.

2.28 Trade unions opposed the proposal that the SNB should receive the information. They pointed out that the Government's approach was inconsistent with the important ruling of the European Court of Justice in the *Kuhne v Nagle* case. Instead, trade unions, including the European Federation for Food, Agriculture & Tourism (EFFAT) and the CWU, suggested that the information should be provided to relevant trade unions, European trade union federations and to local/national works councils.

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

2.29 In the consultation document the Government proposed that the SNB should be responsible for providing information to the competent European workers' and employers' bodies about its composition and the start of negotiations. The TUC and several other unions did not agree with this approach and they argued that to place the obligation on the SNB breached the spirit of the 2009 Directive and would result in the information not being presented to the relevant bodies until after the first SNB meeting, thus reducing the opportunity for SNB experts to be present at that meeting. They believed that this obligation should apply to the central management and should be fulfilled in advance of the first SNB meeting. UNI Europa and other unions stated that the transposition of the Directive should reflect the Kuhne & Nagel judgement and give central management a period of time (perhaps one month) to provide this information after they receive a legitimate request from a concerned party. Employer respondents and the ELA were broadly supportive of the Government's approach but raised a few concerns. In particular they sought clarity on the type of information that should be provided.

*Right for SNBs to meet before and after SNB meetings*

2.30 The Government sought respondents' views on the implementation of the new provision in the 2009 Directive to allow SNBs to meet before and after its meetings with central management. Such pre- and post- meetings would take place without management being present. The Government proposed that the post-meeting should take place 'within a reasonable time' of the meeting with central management.

2.31 Twenty-seven responses were received on this issue.

2.32 Most employer respondents were content with the Government's approach. However, the ORC felt that the wording in the draft regulations that referred to meetings taking place 'within a reasonable time' could lead to significant extra cost for employers as it may be interpreted as allowing the

SNB to reconvene several days or weeks after the original meeting, with associated costs to the employer in relation to travel, accommodation and translation.

*Rights of SNB Experts*

2.33 The 2009 Directive introduces a new right for an expert appointed by the SNB to be present at SNB meetings 'in an advisory capacity'. In the consultation document the Government proposed that this be transposed in the TICE 2010 Regulations by writing out the wording used in the Directive. The Government also expressed its view that this provision did not entitle the SNB experts to speak at SNB meetings.

2.34 Twenty-nine responses on the role of experts were received.

2.35 Respondents agreed with the wording of the draft regulations on this point. However, they took very different views on the Government's interpretation of the expert's role at meetings. Employers and the IPA supported the Government's interpretation. They considered the role of the expert to be useful when advising SNBs during negotiations but they considered that the discussion should be primarily between the company and its employee representatives. The Bayswater Institute stated that whilst the role of the expert at SNB and EWC meetings has come to be accepted, there is a danger of the expert taking over the role of leading the employee team in the EWC or the SNB. In sharp contrast, trade unions and EWC members rejected the idea that the expert should not be entitled to speak at meetings. They argued that experts attended meetings at the request of the SNB and they should be able to speak on its behalf if requested to do so by the SNB. They pointed out that this was already the practice. The GMB urged the Government to ensure that the guidance accompanying the regulations should make it clear that experts are entitled to participate in discussions.

**Government Response**

2.36 After further study of the relevant ECJ cases[1] and clarification from the European Commission, the Government acknowledges that it took the incorrect approach to the requirement to provide information to enable the start of negotiations. It now appreciates that the right stemming from Article 4(4) of the 2009 Directive should take place in the context of the provision of information to employees or their representatives to help them decide if they are within scope of the regulations. **As a result, the Government intends to amend regulation 7 of TICE 1999 to ensure that, upon request, employees or their representatives are supplied with information relating to the average number of employees in the undertaking as well as information on the undertaking's or group's structure and information on the structure of the workforce.** This approach would provide the necessary clarity to interested parties about the meaning of information relating to the workforce.

2.37 In response to comments received about the obligation to inform competent European workers' and employers' organisations of the start of negotiations, the Government believes that this should remain with the SNB. It is already the responsibility of the SNB to inform central and local managements of the composition of the SNB and the Government considers that informing the European Social Partners is a logical extension of this role. To require central or local management to inform the European Social Partners would add an extra layer of complexity and bureaucracy to the process that is unwarranted. In response, **the Government considers that the obligation should apply to the SNB.** It believes that this obligation should not be onerous, provided there are clear sources of information on the identity and contact details of these European-level bodies. The Government therefore supports the work of the European Commission and the European

[1] C-62/99 *Bofrost,* C-440/00 *Kuhne and Nagle,* C-349/01 *ADS Anker GMbH*

Social Partners to devise a suitable mechanism to provide ready access to this information.

2.38 The Government does not consider that the timing of pre-meetings and post-meetings should be very tightly prescribed in the regulations. There is a need for some flexibility to ensure that the timing of meetings can reflect varying circumstances and any practical limitations, such as travel disruption or the imminence of a weekend. It is therefore not a good idea to specify that these meetings should occur immediately before and after meetings with central management. **The Government believes that the formulation used in the draft regulation for the timing of post-meetings should be retained and extended to cover the timing of pre-meetings as well, as the same logic applies to that type of meeting.**

2.39 The Government notes the views expressed about the role of experts. Both employers and trade unions believe that experts can play a very helpful role. The Government shares that view and considers there may well be benefits for experts to address SNB meetings with management on request, especially where such interventions can speed up and inform the negotiating process. The issue is whether the wording used in the 2009 Directive provides such a clear entitlement for experts to address these meetings. In the consultation document the Government expressed its view that such a clear entitlement does not exist. This issue will ultimately be resolved by the CAC or other legal authorities. **However, whilst retaining its current approach to drafting the TICE 2010 Regulations, the Government will ensure that the positive role of experts will be discussed in the guidance on the law to help parties follow established good practice in this area.**

## E. Content and Scope of an EWC Agreement

2.40 Responses to the questions in the consultation document about the content and scope of EWC agreements covered three main issues: the link between national and transnational information and consultation; the requirement to have balanced representation on EWCs; and the definition of a transnational issue.

*Linking national and transnational information and consultation*

2.41 According to the draft regulations, EWC agreements should specify how the linkage with national-level dialogue should be achieved. They went on to state that where agreements failed to do this or where there was a conflict in the way relevant EWC agreements established the link, then these dialogues nonetheless "shall be linked". These provisions were set out in new regulation 19D which would be inserted into TICE 1999.

2.42 Thirty-four responses on this issue were received.

2.43 Most respondents were content with those provisions encouraging EWCs to set out in their agreements their approach to linking the two levels of dialogue. However, some concerns were expressed about the way the linkage would be otherwise achieved. Employers, the ELA, the TUC and CWU agreed that it would not be appropriate to prescribe in detail the links between national and transnational information and consultation arrangements due to the diversity of information and consultation mechanisms in the UK. However, Unite considered an excessively flexible approach would undermine the link between the European and national levels of information and consultation. Both the CBI and the TUC considered that the two levels of information and consultation should commence within a reasonable time of each other. The CBI offered wording to achieve this effect. Similarly, some trade unions, including the GMB and the EMF, and EWC members drew attention to recital 37 of the 2009 Directive which referred to the need for EWCs to receive information earlier or at the same time as the relevant

national level of employee representation. They believe that the TICE 2010 regulations should be amended to specify this.

2.44 Some employers, including the CBI and HSBC, sought clarification on the nature of the link between transnational and national information and consultation procedures. They argued that transnational and national information and consultation procedures should be kept independent of each other as they have differing remits and address different types of issue.

2.45 Employers believed that new regulation 19D, when read in combination with the definition of a national employee representation body which would be inserted into regulation 2 of TICE 1999, might inadvertently extend the issues over which national level consultation would occur. They argued that the regulations needed further amendment to ensure that they do not create any new rights for bodies to be consulted where none would otherwise exist.

*Balanced representation on the EWC*

2.46 The 2009 Directive encourages parties to EWC agreements to consider how the membership of EWCs could be balanced to reflect the gender and occupational mix of employment within the multinational's European workforce.

2.47 Twenty-nine responses were received on the way the draft regulations transposed this aspect of the Directive.

2.48 Employers supported the Government's approach to require balanced representation only 'so far as reasonably practicable'. The ELA, however, thought that this was too high a test and that the regulations should revert to the wording of the Directive to require that such balance is achieved only as far as possible.

2.49 The ETF and a majority of other trade unions and EWC members thought that 'as far reasonably practicable' should be strengthened to give greater encouragement to employers, SNBs and EWCs to consider how potential obstacles or constraints could be removed to achieve a more

balanced representation. Unite proposed that the regulations should state that central management should organise SNB meetings in such a way as to facilitate a balanced representation, whilst the TUC felt that guidance should be used to point out that it would be a poor practice for a predominantly female workforce to be represented by a predominantly male EWC. Peter Reid Consulting suggested that management and select committees could make specific requests when vacancies occur on the EWC for certain candidates to ensure balanced representation.

*Definition of a 'transnational' issue*

2.50 Under the draft regulations and the 2009 Directive, EWCs are restricted to the consideration of 'transnational' issues only. The consultation document noted that the definition of a transnational issue was a matter of considerable interest and discussion during the negotiation of the Directive. The draft TICE 2010 Regulations therefore wrote out the same definition for this term as was used in the relevant Article of the Directive. It did not therefore develop or extend this definition in line with recital 16 of the Directive. The consultation document also explained how the final version of recital 16 was added to the Directive at a late stage.

2.51 Nine respondents commented on the Government's approach to this issue.

2.52 The CIPD and the ELA supported the Government's approach. The ELA opposed using the wording from recital 16 as a definition on the grounds that it would greatly extend the meaning of a transnational issue, and potentially encompass everything. In contrast, virtually all trade union respondents, including the European Federation of Public Service Unions (EPSU), EWC members and Training & Consulting International (TCI) expressed disappointment that the Government had failed to give effect to recital 16 of the 2009 Directive. They also criticised the way the Government in the consultation document had described the legal significance of the recital. They stated that the recital was approved by the European Parliament

and the Council of Ministers. They did not accept the assertion that the resulting definition would be 'unduly wide'.

**Government Response**

2.53 The Government considers that the link between information and consultation at the EWC and national levels should retain a degree of flexibility. The requirement to link the two levels of dialogue should not compromise management's ability to make effective decisions. However, as both the CBI and the TUC point out, there are advantages if national and EWC consultation commenced within a reasonable time of each other, in line with the relevant recital in the 2009 Directive. Whilst this is clearly beneficial, the link should not extend beyond the temporal : the two levels of dialogue are designed to discuss very different aspects of the issues at hand and should retain their separate competencies. **The Government therefore intends to amend new regulation 19E of TICE 1999 to require that, where there is no agreement on how national and EWC dialogue are linked, the two processes must start within a reasonable time of each other.**

2.54 The Government believes it is important that the requirement to link the two levels of dialogue do not create rights for representative bodies to be informed and consulted where they do not currently have that right or, conversely, that they do not remove existing rights from these bodies. It agrees that the draft regulations are unclear on this point and may have the potential to disrupt existing consultative arrangements. To ensure this does not happen, **regulation 19E of TICE 1999 will be amended to make it explicit that the linkage between EWCs and national employee representation bodies only needs to occur to the extent that those national bodies are already entitled by law or agreement to be informed and consulted.**

2.55 The Government believes that EWC membership should reflect the structure of the European workforce. However, it recognises that there will be practical considerations which limit the degree to which this aspiration can be achieved. For example, a diverse range of persons may not put themselves

forward for these EWC positions or they may not win support in elections. Moreover, it would not be fair to penalise the central management for something that may be beyond their control. **The Government therefore intends to retain the current wording in this area. It will also address this issue in guidance presenting the benefits of a diverse EWC membership.**

2.56 The Government accepts that recital 16 is a valid part of the Directive and it did not mean to imply otherwise in the consultation document. It has the same status as other recitals, and can be used by the courts to aid interpretation. The Government would point out that it has not imported text from any other recital when drafting the TICE 2010 Regulations. **The Government maintains its view that the regulations should write out the definition used in the Article in the 2009 Directive. It will not therefore incorporate the wording used in recital 16.**

## F. Rights and Responsibilities of EWCs

2.57 Chapter 7 of the consultation document asked for respondents' views on the rights and responsibilities of EWCs. Several issues are involved, and these are discussed in the following paragraphs.

*The right to collectively represent employees*

2.58 The Government proposed that the duty to represent collectively the interests of employees should be introduced as a stand-alone obligation on EWCs, positioned in new regulation 19B(2) of TICE 1999.

2.59 Twenty-nine responses on this issue were received.

2.60 The majority of employer respondents, including EDF Energy, supported the underlying aim of the regulation, though some, including the CBI, voiced concerns that the new regulation 19B(2) could be interpreted as giving EWCs a wider role than representing employees under the TICE regulations. Any wider role for EWCs outside the regulations would be unwelcome in their view and could potentially destabilise existing industrial relations in these multinationals. Trade unions and employers suggested that this duty should not be a stand-alone obligation, but should rather be linked specifically to the provision of the 'means required' as it is in the 2009 Directive.

*The requirement for EWCs to provide feedback to their constituents*

2.61 The Government proposed that EWCs should be placed under an obligation to report back to their constituents on the outcome of EWC discussions with management. This duty should be applied collectively to the EWC and not to individual EWC members. The Government proposed that the regulations should leave it to the relevant parties to decide how this should happen.

2.62 Thirty-one responses on this issue were received.

2.63 The TUC raised concerns that the approach would place unjustifiable duties on employee representatives and is inconsistent with the purpose and meaning of the 2009 Directive. Unite proposed that any duty to inform employees of the outcome of EWC consultations should be placed on the employer. Trade unions argued that, in line with the 2009 Directive, the regulations should place very clear responsibilities and obligations on management to provide the means, time and facilities required to enable the EWC and its members to give feedback. Trade unions also argued that the obligation should enable EWC members to hold direct face-to-face meetings with employees to take their views on the EWC's work.

2.64 Employers, including the CIPD and BEERG, and the ELA supported the Government's approach and felt that EWC agreements should contain details of how the workforce should be informed of the outcome of EWC meetings. Some employers also raised concerns that confidential information may be leaked by the EWC if there was no control by management over the information that was disseminated. They also questioned whether it was workable or efficient for the duty to be fulfilled through face-to-face meetings.

**Government Response**

2.65 Both employers and trade unions made strong representations that the right to represent employees should be linked to the 'means required' provision in a single regulation along the lines of the 2009 Directive. The Government also recognises that the stand-alone provision, as currently drafted, might imply that EWCs had a wider representative role. This was never the Government's intention. **The Government has therefore decided to remove the stand-alone provision about the EWC's representative role and place the relevant wording within new regulation 19A of TICE 1999, inserted by TICE 2010, where the "means required" provisions are located.**

2.66 Due to the diverse nature of the UK's industrial relations and the wide range of different communications mechanisms that are used, **the Government does not consider it practical or advantageous to prescribe**

**the method by which EWCs communicate with the workers they represent.**

2.67 The Government considers that the wording of the 2009 Directive must mean that the duty rests with the EWC to provide employees with feedback. It cannot be sensible to place the duty on central management. This does not preclude EWCs from consulting central or local management on the substance of the feedback. Indeed, such prior consultation may help ensure that feedback is accurate and does not breach the confidentiality provisions in the regulations. Also, the duty not to disseminate confidential information is already established by regulation 23 of TICE 1999 and this regulation is explicitly linked by TICE 2010 to the duty to feedback. There is therefore sufficient legal safeguard to protect management from unwarranted disclosures.

2.68 The Government acknowledges that EWCs will need adequate resourcing to ensure that they can give feedback. The obligation on central management to provide the means required to allow EWC representatives to fulfil their duties should ensure that they are sufficiently well resourced to provide feedback via the EWC. The Government believes it would be wrong for the regulations to prescribe what means should be provided and how feedback is given, though such issues could be discussed in guidance.

2.69 **The Government has therefore decided to proceed with these aspects of the regulations as set out in the consultation document.**

## G. Rights and Protections of EWC Members

2.70 The draft TICE 2010 Regulations contained provisions which would insert new regulations 19A and 25A (regulation 19B in the final regulations) into TICE 1999. The first dealt with the means available to EWC members and the second contained new rights for them to be trained.

*The 'means required'*

2.71 New regulation 19A sets out a requirement on central management to provide the 'means necessary' for EWC members to fulfil their duties under the regulations. The draft regulations do not elaborate on what those means should constitute and what sorts of expense or cost they would cover. However, in describing the effects of regulation 19A, the consultation document mentioned the Government's view that it would cover, among other things, the costs of attending EWC meetings and providing workplace facilities which EWC members should be able to access to enable them to undertake EWC duties between EWC meetings. The consultation document also pointed out that questions had been raised in some quarters whether the 2009 Directive required central management to meet the costs of legal actions taken by the EWC.

2.72 Thirty-one responses on this issue were received.

2.73 The CBI accepted that employers should provide the EWC with the means required to carry out its duties though they and other employers, including RSA Insurance Group, strongly opposed the suggestion that the 'means required' may include legal costs. The EEF considered this approach to be at complete variance with existing UK legislation and practice, because it would mean that central management may need to finance the taking of legal action against it. The EEF also asked why regulation 19A used the term 'means necessary' when the Directive uses the phrase 'means required'.

2.74 Trade unions, including UNI Europa and the GMB, stated that, in order for EWC representatives to comply with the new duties in the regulations, the Government should provide a very broad and non-exhaustive definition of the

'means' which should be provided by the employer. This should include providing or paying for office space and facilities (phone, computer, fax, translation services, etc) and adequate paid time off, including remuneration for potential loss of overtime, bonuses and other productivity-related payments. They tended to support the idea that the term included meeting the costs of EWC legal actions.

*Training for EWC and SNB members*

2.75 In the consultation document the Government sought views on new regulation 25A (regulation 19B in the final regulations), which stated that such training as is necessary for the exercise of their duties should be provided by the employer to EWC representatives.

2.76 Twenty-nine responses on the training of representatives were received.

2.77 Employers on the whole agreed with the Government's proposed approach. The CIPD stated that EWC agreements should state that all matters relating to training are to be subject to discussions between central management and the select committee and/or the full EWC. Given that management would be funding the training, it would be appropriate for them to have the opportunity to input into the training content and have a say in the selection of appropriate training providers. The ELA shared the view of some employers that the regulations should make it clear that the training should be relevant to EWC duties.

2.78 Trade unions and EWC members considered that the regulations should specify that all members of an SNB or EWC should have the right to be provided with training. The TUC and Unite queried whether new regulation 25A (regulation 19B in the final regulations), as drafted, would enable the employer to select the training and control its content. This was undesirable in their view. Trade unions and other organisations should be able to train EWC members, with or without the consent of the employer. The Bayswater Institute stated that training should be agreed between the EWC's Select Committee and a senior management member of the EWC. The ETF raised

concerns that if SNB and EWC members were not allowed to choose trainers for themselves it could impact on the effectiveness of EWCs.

**Government Response**

2.79 New regulation 19A referred to 'means necessary' because that phrase flows more easily in English and embraces the meaning of 'means required'. However, the Government acknowledges that it would be more appropriate to use the term used in the 2009 Directive. **The Government will therefore use the term 'means required' in the final regulations**.

2.80 **The Government has not amended regulation 19A to set out what is covered under the provision of the means required.** This is due to the varied nature of what those means may be. EWCs operating in different sectors and within differing industrial relations climates will have different requirements : so, to prescribe in the regulations what the means required entails would be unhelpful and restrictive. **The Government will address this issue in guidance and will give some examples of the means that may be required by EWC members.** The Government takes the view that it is very far from certain whether the 2009 Directive requires the legal costs of EWC members to be covered by central management. The Government agrees with the EEF's comments regarding the unwelcome legal precedent that such an interpretation would create.

2.81 It was never the Government's intention that local or central management should have a veto over the training provided to EWC members. It recognises that such a connotation could be read into the way new regulation 25A was drafted. The Government is also not aware of any other provision in employment law, which creates a right for worker representatives to be trained, which specifies that such training should be provided 'by the employer'. **The Government has therefore decided to re-phrase the right by removing the requirement on the employer to provide the training. Instead, the wording used in the 2009 Directive should be directly used.** This means it will ultimately be a matter for EWC representatives to identify and arrange the training they need. Guidance on the law will discuss how

EWC representatives might exercise this new right. The guidance will refer to the benefits of discussing the issue with the employer based on any guidelines agreed between central management and the EWC.

2.82 Of course, there would normally be a cost associated with the provision of the necessary training in question. In line with the Directive's provisions concerning the financing of EWC activities by central management, t**he regulations would be amended to require central management to provide the means required for the representatives to receive the necessary training.** This formulation does not provide an open-ended commitment by central management as they are under no obligation to meet the costs of training which is superfluous or excessive.

## H. Enforcement and Remedies

2.83 The Government asked respondents to the consultation to consider whether the current enforcement regime (and in particular the level of the maximum financial penalty available) is effective, proportionate and dissuasive.

2.84 Thirty-four responses on this issue were received.

2.85 Employers considered that the current maximum penalty of £75,000 was pitched at the right level and should not be increased. Employers, including the CBI, the EEF and BEERG, raised concerns about the extension of the number of regulations under which a complainant can bring a case to the Central Arbitration Committee and the fact that a significant majority of them may attract a financial penalty. They felt that this could result in the employer paying multiple penalties amounting to much more than £75,000, especially where a single failure could be pursued under multiple regulations. They were also concerned that the maximum penalty would apply in cases where the breach was small or technical in nature.

2.86 Trade unions and EWC members argued that penalties should be substantially higher. They believed that the low penalty provides a financial incentive for employers not to comply with the regulations as the maximum fine is less than the annual cost of holding an EWC meeting. The ELA considered that the maximum fine should be increased to somewhere between £100,000 and £125,000.

2.87 Whilst welcoming any increase to the maximum penalty, trade unions did not consider this to be the most effective and appropriate sanction for a breach of the regulations. They consider it would be more effective to provide employee representatives with the right to apply to the courts to prevent employers from implementing their decisions where the duty to consult with an EWC is not fulfilled. So, a large scale restructuring could not take place unless and until the EWC had been adequately consulted.

**Government Response**

2.88 The Government does not feel it is appropriate to introduce powers to allow the courts to halt or reverse business decisions where consultation with the EWC has not taken place. This would have an adverse impact on business decision-making and could result in vital decisions being delayed or reversed with potentially adverse effects on the multinational and, by extension, its workforce.

2.89 However, the Government considers it is appropriate to increase the level of the maximum financial penalty that may be imposed. Penalties under TICE 1999 have not been adjusted since the regulations came into force in 2000. The original penalty was based on the annual running costs of an EWC as established in 1998. Between 1998 and 2010, the Retail Prices Index has risen by about 36%, which means that the real value of the penalty has fallen by more than a third. With this in mind, **the Government has decided that the maximum penalty payable should be uprated to £100,000.** The Government appreciates that this creates an imbalance between the level of penalty in TICE 1999 and those in other similar regulations, for example the Information and Consultation of Employees Regulations 2004. The Government considers this to be justifiable, given the greater resources available to multinationals.

2.90 There are two major reasons why the Government does not accept the employers' claim that the regulations are likely to result in more and increased penalties being awarded. First, the imposition of a penalty is not automatic following a decision. The applicant must make a further application to the EAT for the penalty to be imposed. The applicant has three months to decide whether an application for a penalty is appropriate, during which time the applicant and the management may have reached an agreement about how the judgment should be acted upon. Second, when considering the level of the penalty to be imposed the EAT must take into consideration the severity, impact and longevity of the failure. The maximum has never yet been applied, and in most future cases, especially if a small or technical breach is involved,

the Government is of the view that the EAT is unlikely to award anything near the new maximum.

## I. Other Transposition Issues

2.91 The consultation document presented revisions to the subsidiary requirements of TICE 1999, which apply as a fall-back legal framework for EWCs when the parties cannot reach agreement on the way their EWC should operate.

2.92 Five organisations offered views on the subsidiary requirements. For example, the ORC stated that they supported the Government's approach in this area. The ELA stated that the current subsidiary requirements were not particularly helpful. This is because there may well be a dominant site or establishment in a particular country, which would mean that smaller businesses were not represented at all. Two EWC members raised concerns that the subsidiary requirements do not specify the terms of office of EWC members.

2.93 The Government also asked respondents to discuss their experiences of the practical operation of EWCs. Twenty-eight responses on this general topic were received.

2.94 Employers felt that some employee representatives on occasion did not appreciate the need for prudent cost management and the speed with which organisations needed to make decisions. They could lack an awareness of their responsibilities to colleagues. They suggested that this had a negative impact on EWCs. Employers also referred to the increase in EWC costs caused by the enlargement of EU membership.

2.95 Trade unions felt that employers too often saw EWCs as a burden on business. The quality of information and consultation was poor in their view. Central management have often claimed that the manager in an individual country is responsible for consultation only for the manager to deny this or state that they have insufficient information to consult on. Unions experienced attempts to sideline them at national and European level. In certain cases unions have been shut out of meetings and refused access to SNBs to advise on draft agreements. Balloting processes could be problematic, and

representatives had to ask several times for basic information relating to the structure and employee numbers in the undertaking.

**Government Response**

2.96 **The Government notes that the subsidiary requirements met with little comment. They will therefore be amended largely as set out in the consultation document.**

2.97 The Government notes that experiences of EWCs vary, and their performance on occasion provides room for complaint on both sides. One of the purposes of the 2009 Directive is to re-invigorate EWCs by deepening the dialogue which they undertake with central management. The rights of the parties have also been clarified. The Government will therefore monitor how the amendments to TICE 1999, which will take effect from June 2011, will work in practice. The Government recognises that in the final analysis, the quality of any dialogue cannot be guaranteed by law. Rather, it largely depends on the culture of an organisation and the willingness of parties genuinely to engage with one another to appreciate each other's viewpoint and develop common positions.

## Chapter Three - Other Changes to TICE 1999

3.1 The Government proposed a series of procedural changes to TICE 1999, mostly centred on the responsibilities assigned to the Central Arbitration Committee and other judicial authorities. In addition, the consultation document presented proposals changing TICE 1999 to implement certain aspects of the Agency Workers Directive 2008. These changes concern the provision of information to employees about the use of temporary agency workers and the way such workers should be treated under the TICE 1999 regulations when calculating whether an organisation exceeds the various thresholds they set.

*Moving enforcement from the EAT to the CAC*

3.2 Respondents were asked for their views on the Government's proposal to establish the CAC as the principal court to hear complaints under regulations 20, 21 and 21A of TICE 1999. Twenty-two responses were received.

3.3 Employers welcomed the extended role of the CAC. The CBI viewed the transfer in jurisdiction from the EAT to CAC as a shift from a less adversarial approach towards a mediation-type approach. However, employers thought that the shift in approach was inconsistent with the right of a successful CAC complainant to have an automatic right to apply to the EAT for a penalty notice to be issued. HSBC stated that it was essential for members of the CAC to have practical, recent experience of operating an EWC and called for a review of all CAC members' experience.

3.4 Unions and EWCs considered the CAC as the appropriate body to hear complaints relating to EWCs. The GMB and TUC thought that the CAC should in the future be provided with powers to impose financial sanctions on employers who breach legal obligations relating to EWCs.

*Introducing time-limits for complaints*

3.5 The Government proposed that a three month time limit be introduced for complaints under regulation 21 (and the new regulation 21A), but that no limit be introduced for complaints under regulation 20. Twenty-two responses on these suggested time limits were received.

3.6 The majority of the employer respondents agreed with the Government's approach, though HSBC and EDF thought that both regulations should have a time limit. The EDF agreed that a three month limit under regulation 21 was appropriate. The ELA stated that they could see no reason not to apply the three month time limit to both regulations as they felt that it should be fairly apparent to interested parties whether or not a breach of regulation 20 had occurred and that this could act as the trigger point.

3.7 Trade unions and EWC members opposed the introduction of a three month time limit for any applications to the CAC. Due to the nature of EWCs they consider such a time limit to be too short. The TUC stated that it would be impossible for dispute resolution avenues to be pursued or concluded. Also, where mediation was not an option, EWCs would be unable to prepare and mount a legal action in such a short period of time. Trade unions proposed that the time limit in regulation 21 should be extended, and where it relates to decisions by central management, that it should run from the point at which the EWC is informed of decisions.

*Establishing the High Court as the Penalty-Awarding Body in Northern Ireland*

3.8 The consultation document proposed that, in Northern Ireland, the High Court should replace the Industrial Court as the body which awards penalties under the regulations. Eight responses on this proposal were received.

3.9 A significant majority of the respondents agreed with the proposed approach, including the CIPD, the ELA, and the GMB. The EMF and UNI Europa stated the High Court in Northern Ireland must also have the ability to halt decisions taken without effective consultation with an EWC.

3.10 The Northern Ireland Industrial Court did not agree that the High Court was the correct body to award penalties in Northern Ireland and felt that the present arrangements should be maintained. They did not accept the assertion that that they are the equivalent body to the EAT in respect of penalty-awarding powers.

*The Treatment of Temporary Agency Workers*

3.11 The ORC stated that the definition of an agency worker in the Agency Workers Regulations 2010 relates purely to agency workers supplied to work in Great Britain. They do not see how information on the use of such agency workers could ever be a transnational issue as defined in the regulations. As such, they stated that they do not think that there should be any obligation in the TICE Regulations to provide information on the use of agency workers and to require this would be unwelcome and unnecessary 'gold-plating'.

3.12 The CBI believed that the requirement in the draft regulations on the provision of information related to agency workers is too broad. They stated that Article 8 of the Agency Workers Directive states that information should be provided on the use of temporary agency workers when providing information on the employment situation in an undertaking. CBI members believe that this means that information related to agency workers should be provided for the purpose of establishing an SNB negotiation procedure, not in relation to an ongoing information and consultation with an EWC. They believe that regulations 5A (7), 9 (e) and 19E (6) should be deleted as they are related to the provision of information on agency workers for the purpose of an EWC information and consultation procedure.

**Government Response**

3.13 In light of the generally positive response to the proposal **the Government will amend regulations 20 and 21 to establish the CAC as the primary court to hear complaints. It will also be the primary court to hear complaints under new regulation 21A.**

3.14 The Government notes that the time-limits for bringing complaints can bring legal certainty but, if set too short, they can also make it more difficult for disputes to be resolved through existing dispute resolution processes which may prevent a complaint being made to the courts. The international dimension of EWCs, and the associated difficulties this creates for communication and coordination, also make it harder for an EWC to agree quickly to a course of action. To help alleviate these tensions, **the Government will, therefore, extend the time-limit for applications under regulation 21 and new regulation 21A to six months from the date of the alleged failure.**

3.15 **The Government considers that the trigger point for the six-month period to start should remain as proposed in the draft regulation**. It should be clear to the affected parties when a failure has occurred and to retain this mechanism would ensure that TICE is in line with other, related, legislation. However, **the Government still considers it inappropriate to introduce a time limit for complaints brought under regulation 20**. The Government believes that it is not straightforward to establish a point of failure under this regulation and that the potential long-term nature of those failures would make it inappropriate to introduce such a limit.

3.15 As there was broad support for the Government's proposal to transfer penalty awarding powers in Northern Ireland to the High Court, **the Government will make this change**.

3.16 The Government notes the concerns of the CBI and the ORC in relation to the provision of suitable information on the use of agency workers. However, a majority of respondents to the 2009 consultations on the implementation of the Agency Workers' Directive felt that the TICE

Regulations were correctly identified as falling within scope of that Directive. The Government notes that information on the use of agency workers is likely to be of relevance to discussions which take place at EWC level (most notably on restructuring). **The Government will, therefore, retain the amendments set out in the draft regulations in respect of the provision of suitable information on temporary agency workers.** These provisions will come into force on 1 October 2011, in line with the commencement of the Agency Workers Regulations 2010.

## Chapter Four - The Impact Assessment

4.1 Respondents to the consultation were asked to consider the Impact Assessment (IA) and the estimated costs and benefits of the TICE 2010 Regulations it presented.

4.2 Six respondents commented on the IA, a majority of whom took the view that the costs of running EWCs are considerably higher than contained in the Impact Assessment. For example, The ELA estimated the annual cost of running an EWC to be in the region of £400,000 and £500,000 per annum with individual meetings costing about £100,000. This excluded the costs of management time spent in organising, preparing for and attending meetings. BEERG considered that the costs were underestimated and did not take into account the instances where UK companies have had to postpone key commercial decisions. They stated that further research into the financial and commercial costs and benefits would be useful. Unite did not accept the IA's estimated costs for setting up and running EWCs, considering them to be too low.

**Government Response**

4.3 The Government notes the strong belief amongst those respondents who commented on the IA that the estimated costs were too low. However, there is limited evidence on which to base revised estimates. No respondent, for example, quoted any new survey or case study evidence. **Nonetheless, the Government considers it would be prudent to increase its estimates of the costs in the final IA. The Government has increased by 25% the figures relating to the overall cost of an EWC meeting (excluding travel).**

The final IA can be found on the BIS website at:

http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-889-implementation-european-works-council-directive-impact-assessment

## Chapter Five - Next Steps

5.1 The consultation document explained the Government's intentions regarding the laying and commencement of the final TICE 2010 Regulations. It proposed that :

- the final regulations should be laid in spring 2010; and

- they would come into force on 5 June 2011, when it was expected that virtually all other EU member states would commence their own transposing regulations.

The rationale for laying the regulations more than a year before commencement is to give all parties an opportunity to examine the regulations in detail before they commence, as this may inform decisions which parties take prior to commencement. In particular, the shape of the new regulations may influence decisions which may be taken to enter new EWC agreements, or to revise existing ones, before 5 June 2011.

5.2 Respondents supported this approach, acknowledging that the 'two-year window' in the 2009 Directive created an unusual situation where many parties could in effect choose which legal regime should apply to them. Respondents also recognised that it was equally important to ensure that the final regulations were correctly drafted.

5.3 The Transnational Information and Consultation of Employees (Amendment) Regulations 2010 have been amended to reflect the Government's response to the public consultation, as explained in this document. The Government considers that these changes significantly improve the regulations and reflect the main points made by respondents, whilst retaining the balance between the various interests.

5.4 In line with the timetable explained in the consultation document, the revised TICE 2010 Regulations were finalised and signed on 30 March 2010 and will be laid in Parliament shortly after Easter. They were made under section 2(2) of the European Communities Act 1972 and are subject to the

negative resolution procedure in Parliament. MPs and Peers have forty sitting days to instigate a debate on the regulations. The current Parliament will have ended before these forty days elapse. However, the dissolution of Parliament does not affect the process, though the period during which Parliament is dissolved will not count when calculating whether forty sitting days have passed.

5.5 The regulations will come into force on 5 June 2011, as planned, though the provisions relating to the implementation of the agency workers Directive will come into force on 1 October 2011.

5.6 The Government considers it is important that full guidance on the TICE 2010 Regulations is available to assist parties in understanding and applying them. Guidance on the regulations will therefore be made available on the BIS website at

http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-888-transnational-information-and-consultation-regulations-2010

as soon as possible after the regulations are laid in Parliament. Versions of this guidance will shortly be placed on both the Direct.gov and Business Link websites.

5.7 Government will monitor the application of the new law and any relevant case law at UK and EU levels, adapting the guidance as necessary.

## Annex A – List of Respondents

The following respondents indicated that their responses were not confidential

Associated Society of Locomotive Engineers and Firemen (ASLEF)

Bayswater Institute

British Airline Pilots Association (BALPA)

British Retail Consortium (BRC)

Brussels European Employee Relations Group (BEERG)

Chartered Institute of Personnel and Development (CIPD)

Communication Workers Union (CWU)

Confederation of British Industry (CBI)

Department for International Trade (DFID)

Eaton Electrical UK

EDF Energy

Engineering Employers' Federation (EEF)

Employment Lawyers Association (ELA)

European Federation for Food, Agriculture & Tourism Unions (EFFAT)

European Metalworkers' Federation (EMF)

European Federation of Public Service Unions (EPSU)

European Transport Workers' Federation ((ETF)

Flextronics International EWC

Getronics UK EWC

GMB

HSBC

Involvement and Participation Association (IPA)

Mr John Clough

Mr Luca Moraschini

Northern Ireland Industrial Court

ORC European Labour and Employee Relations Network

Peter Reid Consulting

Port and Freezone World (Thunder FZE)

Royal and Sun Alliance Insurance Group (RSA)

Training and Consulting International (TCI)

Trades Union Congress (TUC)

Unite

UNI Europa

Xerox Belgium

Department for Business, Innovation & Skills

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