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STATUTORY INSTRUMENTS

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**2004 No. 2326**

The European Public Limited-  
Liability Company Regulations 2004

PART 3

EMPLOYEE INVOLVEMENT

CHAPTER 1

INTERPRETATION OF PART 3

**Interpretation of Part 3**

**16.—(1)** In this Part—

“absolute majority vote” means a vote passed by a majority of the total membership of the special negotiating body where the members voting with that majority represent the majority of the employees of the participating companies and their concerned subsidiaries and establishments employed in the Member States;

“Appeal Tribunal” means the Employment Appeal Tribunal;

“CAC” means the Central Arbitration Committee;

“dismissed” and “dismissal”, in relation to an employee, shall be construed in accordance with Part 10 of the 1996 Act;

“EEA state” means a Member State, Norway, Iceland and Lichtenstein;

“employee” means an individual who has entered into or works under a contract of employment and includes, where the employment has ceased, an individual who worked under a contract of employment;

“employee involvement agreement” means an agreement reached between the special negotiating body and the competent organs of the participating companies governing the arrangements for the involvement of employees within the SE;

“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 employees of their employer who are elected or appointed as employee representatives 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;

“information and consultation representative” has the meaning given to it in regulation 27(5);

“participation” means the influence of the representative body and the employees' representatives in the SE or a participating company by way of the right to—

- (a) elect or appoint some of the members of the SE's or the participating company's supervisory or administrative organ; or
- (b) recommend and/or oppose the appointment of some or all of the members of the SE's or the participating company's supervisory or administrative organ;

“representative body” means the persons elected or appointed under the employee involvement agreement or under the standard rules on employee involvement;

“SE established by merger” means an SE established in accordance with Article 2(1);

“SE established by formation of a holding company or subsidiary company” means an SE established in accordance with Article 2(2) or 2(3), as the case may be;

“SE established by transformation” means an SE established in accordance with Article 2(4);

“standard rules on employee involvement” means the rules in Schedule 3;

“two thirds majority vote” means a vote passed by a majority of at least two thirds of the total membership of the special negotiating body where the members voting with that majority—

- (a) represent at least two thirds of the employees of the participating companies and their concerned subsidiaries and establishments employed in the Member States; and
- (b) include members representing employees employed in at least two Member States;

“UK employee” means an employee employed to work in the United Kingdom; and

“UK members of the special negotiating body” means members of the special negotiating body elected or appointed by UK employees.

(2) In this Part, the following terms have the meaning given by Article 2 of the EC Directive—

“participating companies”

“subsidiary”

“special negotiating body”

“involvement of employees”

“information”

“consultation”

and references to a “concerned subsidiary” or a “concerned establishment” shall be construed in accordance with the definition of “concerned subsidiary or establishment” in the EC Directive.

## CHAPTER 2

### *PARTICIPATING COMPANIES AND THE SPECIAL NEGOTIATING BODY*

#### **Circumstances in which certain provisions of Part 3 apply**

17.—(1) Subject to paragraphs (2) and (3), this Part shall apply where—

- (a) a participating company intends to establish an SE whose registered office is to be in Great Britain; or

(b) an SE has its registered office in Great Britain.

(2) Where there are UK employees, Chapter 2 (election or appointment of members of special negotiating body and representation of employees) shall apply, regardless of where the registered office is to be situated, in relation to the election or appointment of UK members of the special negotiating body unless the majority of those employees is employed to work in Northern Ireland.

(3) Chapters 6 to 9 shall apply, regardless of where the registered office of the SE is, or is intended to be situated, where—

- (a) a participating company, its concerned subsidiaries or establishments;
- (b) a subsidiary of an SE;
- (c) an establishment of an SE; or
- (d) an employee or an employees' representative,

is registered or situated, as the case may be, in Great Britain.

### **Duty on participating company to provide information**

**18.**—(1) When the competent organ of a participating company decides to form an SE, that organ shall, as soon as possible after—

- (a) publishing the draft terms of merger,
- (b) creating a holding company, or
- (c) agreeing a plan to form a subsidiary or to transform into an SE,

provide information to the employees' representatives of the participating company, its concerned subsidiaries and establishments or, if no such representatives exist, the employees themselves.

(2) The information referred to in paragraph (1) must include, as a minimum, information—

- (a) identifying the participating companies, concerned subsidiaries and establishments,
- (b) giving the number of employees employed by each participating company and concerned subsidiary and at each concerned establishment, and
- (c) giving the number of employees employed to work in each EEA State.

(3) When a special negotiating body has been formed in accordance with regulation 20, the competent organs of each participating company must provide that body with such information as is necessary to keep it informed of the plan and progress of establishing the SE up to the time the SE has been registered.

### **Complaint of failure to provide information**

**19.**—(1) An employees' representative or, where there is no such representative for an employee, the employee may present a complaint to the CAC that—

- (a) the competent organ of a participating company has failed to provide the information referred to in regulation 18; or
- (b) the information provided by the competent organ of a participating company for the purpose of complying with regulation 18 is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the competent organ 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; and
- (b) a date (not being less than one week from the date of the order) by which the competent organ must disclose the information specified in the order.

### **Function of the special negotiating body**

**20.** The special negotiating body and the competent organs of the participating companies shall have the task of reaching an employee involvement agreement.

### **Composition of the special negotiating body**

**21.—(1)** The competent organs of the participating companies shall make arrangements for the establishment of a special negotiating body which shall be constituted in accordance with paragraphs (2) to (7) below.

(2) In each EEA state in which employees of a participating company or concerned subsidiary are employed to work, those employees shall be given an entitlement to elect or appoint one member of the special negotiating body for each 10% or fraction thereof which those employees represent of the total workforce. These members shall be the 'ordinary members'.

(3) If, in the case of an SE to be established by merger, following an election or appointment under paragraph (2), the members elected or appointed to the special negotiating body do not include at least one eligible member in respect of each relevant company the employees of any relevant company in respect of which there is no eligible member shall be given an entitlement, subject to paragraph (4), to elect or appoint an additional member to the special negotiating body.

(4) The number of additional members which the employees are entitled to elect or appoint under paragraph (3) shall not exceed 20% of the number of ordinary members elected or appointed under paragraph (2) and if the number of additional members under paragraph (3) would exceed that percentage the employees who are entitled to appoint or elect the additional members shall be:

- (a) if one additional member is to be appointed or elected, those employed by the company not represented under paragraph (3) having the highest number of employees; and
- (b) if more than one additional member is to be appointed or elected, those employed by the companies in each EEA state that are not represented under paragraph (3) having the highest number of employees in descending order, starting with the company with the highest number, followed by those employed by the companies in each EEA state that are not so represented having the second highest number of employees in descending order, starting with the company (among those companies) with the highest number.

(5) The competent organs of the participating companies shall, as soon as reasonably practicable and in any event no later than one month after the establishment of the special negotiating body, inform their employees and those of their concerned subsidiaries of the identity of the members of the special negotiating body.

(6) If, following the appointment or election of members to the special negotiating body in accordance with this regulation,

- (a) changes to the participating companies, concerned subsidiaries or concerned establishments result in the number of ordinary or additional members which employees would be entitled to elect or appoint under this regulation either increasing or decreasing, the original appointment or election of members of the special negotiating body shall cease to have effect and those employees shall be entitled to elect or appoint the new number of members in accordance with the provisions of these Regulations; and
- (b) a member of the special negotiating body is no longer willing or able to continue serving as such a member, the employees whom he represents shall be entitled to elect or appoint a new member in his place.

(7) In this regulation—

- (a) "eligible member" means a person who is—

- (i) in the case of a relevant company registered in a EEA state whose legislation allows representatives of trade unions who are not employees to be elected to the special negotiating body, an employee of the relevant company or a trade union representative; and
  - (ii) in the case of a relevant company not registered in such a EEA state, an employee of the relevant company.
- (b) “relevant company” means a participating company which has employees in the EEA state in which it is registered and which it is proposed will cease to exist on or following the registration of the SE; and
- (c) “the total workforce” means the total number of employees employed by all participating companies and concerned subsidiaries throughout all EEA states.

### **Complaint about establishment of special negotiating body**

**22.**—(1) An application may be presented to the CAC for a declaration that the special negotiating body has not been established at all or has not been established properly in accordance with regulation 21.

(2) An application may be presented under this regulation by—

- (a) a person elected or appointed to be a member of the special negotiating body;
- (b) an employees' representative or, where no such representative exists in respect of a participating company or concerned subsidiary, an employee of that participating company or concerned subsidiary; or
- (c) the competent organ of a participating company or concerned subsidiary.

(3) The CAC shall only consider an application made under paragraph (1) if it is made within a period of one month from the date or, if more than one, the last date on which the participating companies complied or should have complied with the obligation to inform their employees under regulation 21(5).

(4) Where the CAC finds the application well-founded it shall make a declaration that the special negotiating body has not been established at all or has not been established properly and the competent organs of the participating companies continue to be under the obligation in regulation 21(1).

## *CHAPTER 3*

### *ELECTION OR APPOINTMENT OF UK MEMBERS OF THE SPECIAL NEGOTIATING BODY*

#### **Ballot arrangements**

**23.**—(1) Subject to regulation 24, the UK members of the special negotiating body shall be elected by balloting the UK employees.

(2) The management of the participating companies that employ UK employees (“the management”) must arrange for the holding of a ballot or ballots of those employees in accordance with the requirements of paragraph (3).

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

- (a) in relation to the election of ordinary members under regulation 21(2), that—
  - (i) if the number of members which UK employees are entitled to elect to the special negotiating body is equal to the number of participating companies which have UK

- employees, there shall be separate ballots of the UK employees in each participating company;
- (ii) if the number of members which the UK employees are entitled to elect to the special negotiating body is greater than the number of participating companies which have UK employees, there shall be separate ballots of the UK employees in each participating company and the management shall ensure, as far as practicable, that at least one member representing each such participating company is elected to the special negotiating body and that the number of members representing each company is proportionate to the number of employees in that company;
  - (iii) if the number of members which the UK employees are entitled to elect to the special negotiating body is smaller than the number of participating companies which have employees in the UK,—
    - (aa) the number of ballots held shall be equivalent to the number of members to be elected;
    - (bb) a separate ballot shall be held in respect of each of the participating companies with the higher or highest number of employees; and
    - (cc) it shall be ensured that any employees of a participating company in respect of which a ballot does not have to be held are entitled to vote in a ballot held in respect of one of the other participating companies; and
  - (iv) if there are any UK employees employed by a concerned subsidiary or establishment of non-UK participating companies, the management shall ensure that those employees are entitled to vote in a ballot held pursuant to this regulation.
- (b) that in relation to the ballot of additional members under regulation 21(3) the management shall hold a separate ballot in respect of each participating company entitled to elect an additional member.
  - (c) that in a ballot in respect of a particular participating company, all UK employees employed by that participating company or by its concerned subsidiaries or at its concerned establishments are entitled to vote;
  - (d) that in a ballot in respect of a particular participating company, any person who is immediately before the latest time at which a person may become a candidate—
    - (i) a UK employee employed by that participating company, by any of its concerned subsidiaries or at any of its concerned establishments; or
    - (ii) if the management of that participating company so permits, a representative of a trade union who is not an employee of that participating company or any of its concerned subsidiaries, is entitled to stand as a candidate for election as a member of the special negotiating body in that ballot.
  - (e) that the management must, in accordance with paragraph (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of UK employees but may instead, where there is to be more than one ballot, 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 management may determine, provided that each separate ballot is supervised by a supervisor;
  - (f) that after the management has formulated proposals as to the arrangements for the ballot of UK employees and before it has published the final arrangements under sub-paragraph (g) it must, so far as reasonably practicable, consult with the UK employees' representatives on the proposed arrangements for the ballot of UK employees; and

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

(4) Any UK employee or UK employees' representative who believes that the arrangements for the ballot of the UK employees do not comply with the requirements of paragraph (3) may, within a period of 21 days beginning on the date on which the management published the final arrangements under sub-paragraph (g), present a complaint to the CAC.

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

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

(7) A person is an independent ballot supervisor for the purposes of paragraph (3)(e) if the 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.

### **Conduct of the ballot**

**24.—**(1) The management must—

- (a) ensure that a ballot supervisor appointed under regulation 23(3)(e) carries out his functions under this regulation and that there is no interference with his carrying out of those functions from the 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 UK employees published by the management under regulation 23(3)(g) 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 23(4);
- (b) does not conduct the ballot or any of the separate ballots before the UK management has satisfied the requirement specified in regulation 23(3)(g) and—
  - (i) where no complaint has been presented under regulation 23(4), before the expiry of a period of 21 days beginning on the date on which the management published its arrangements under regulation 23(3)(g); or
  - (ii) where a complaint has been presented under regulation 23(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 that 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 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 management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot and the persons who stood as candidates.

(4) A ballot supervisor shall publish a report (“an ineffective ballot report”) where he considers (whether on the basis of representations made to him by another person or otherwise) 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 an 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 judgement as to whether each of the requirements referred to in paragraph (2) was satisfied in 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 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 23(2).
- (b) If there have been separate ballots and sub-paragraph (a) does not apply—
  - (i) the management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was published to be re-held in accordance with regulation 23 and this regulation; and
  - (ii) no such ballot shall have effect until it has been re-held 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 management (whether or not an ineffective ballot report has been published).

### **Appointment of UK members by a consultative committee**

**25.**—(1) This regulation applies where—

- (a) regulation 23(3)(a)(i) or (ii) or (b) would require a ballot to be held; and
  - (b) there exists in the participating company in respect of which a ballot would be held under regulation 23, a consultative committee.
- (a) (2) (a) Where this regulation applies, the election provided for in regulation 23 shall not take place but the consultative committee shall be entitled to appoint the UK member or members of the special negotiating body who would otherwise be elected pursuant to regulation 22 provided that the consultative committee’s appointment complied with sub-paragraph (b).
- (b) The consultative committee is entitled to appoint as a member of the special negotiating body:
- (i) one of their number; or



- (ii) if the management of the participating company in respect of which the consultative committee exists so permits, a trade union representative who is not an employee of that company.
- (3) 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 management of the participating company;
  - (c) which, in carrying out its information and consultation function, represents all the employees of the participating company; and
  - (d) which consists wholly of persons who are employees of the participating company or its concerned subsidiaries.
- (4) In paragraph (3) “information and consultation function” means the function of—
- (a) receiving, on behalf of all the employees of the participating company, information which may significantly affect the interests of the employees of that company, 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 management of the participating company on the information referred to in sub-paragraph (a) above.
- (5) The consultative committee must publish the names of the persons whom it has appointed to be members of the special negotiating body in such a manner as to bring them to the attention of the management of the participating company and, so far as reasonably practicable, the employees and the employees' representatives of that company and its concerned subsidiaries.
- (6) Where the management of the participating company, an employee or an employees' representative believes that—
- (a) the consultative committee does not satisfy the requirements in paragraph (3) above; or
  - (b) any of the persons appointed by the consultative committee is not entitled to be appointed,
- 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 (5) the names of the persons appointed, present a complaint to the CAC.
- (7) Where the CAC finds the complaint well-founded it shall make a declaration to that effect.
- (8) Where the CAC has made a declaration under paragraph (7)—
- (a) no appointment made by the consultative committee shall have effect; and
  - (b) the members of the special negotiating body shall be elected by a ballot of the employees in accordance with regulation 23.
- (9) Where the consultative committee appoints any person to be a member of the special negotiating body, that appointment shall have effect—
- (a) where no complaint has been presented under paragraph (6), after the expiry of a period of 21 days beginning on the date on which the consultative committee published under paragraph (5) the names of the persons nominated; or
  - (b) where a complaint has been presented under paragraph (6), as from the day on which the complaint has been determined without a declaration under paragraph (7) being made.

### **Representation of employees**

**26.**—(1) Subject to paragraphs (2) and (3) below, a member elected in a ballot in accordance with regulation 21(2), shall be treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which he was elected.

(2) If an additional member is elected in accordance with regulation 21(3) and (4), he, and not any member elected in accordance with regulation 21(2), shall be treated as representing the employees for the time being of the participating company and of any concerned subsidiary or establishment whose employees were entitled to vote in the ballot in which he was elected.

(3) When a member of the special negotiating body is appointed by a consultative committee in accordance with regulation 25, the employees whom the consultative committee represents and the employees of any concerned subsidiary shall be treated as being represented by the member so appointed.

## *CHAPTER 4*

### *NEGOTIATION OF THE EMPLOYEE INVOLVEMENT AGREEMENT*

#### **Negotiations to reach an employee involvement agreement**

**27.**—(1) In this regulation and in regulation 28 the competent organs of the participating companies and the special negotiating body are referred to as “the parties”.

(2) The parties are under a duty to negotiate in a spirit of cooperation with a view to reaching an employee involvement agreement.

(3) The duty referred to in paragraph (2) commences one month after the date or, if more than one, the last date on which the members of the special negotiating body were elected or appointed and applies—

- (a) for the period of six months starting with the day on which the duty commenced or, where an employee involvement agreement is successfully negotiated within that period, until the completion of the negotiations;
- (b) where the parties agree before the end of that six month period that it is to be extended, for the period of twelve months starting with the day on which the duty commenced or, where an employee involvement agreement is successfully negotiated within the twelve month period, until the completion of the negotiations.

#### **The employee involvement agreement**

**28.**—(1) The employee involvement agreement must be in writing.

(2) Without prejudice to the autonomy of the parties and subject to paragraph (4), the employee involvement agreement shall specify:

- (a) the scope of the agreement;
- (b) the composition, number of members and allocation of seats on the representative body;
- (c) the functions and the procedure for the information and consultation of the representative body;
- (d) the frequency of meetings of the representative body;
- (e) the financial and material resources to be allocated to the representative body;

- (f) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a representative body, the arrangements for implementing those procedures;
- (g) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the SE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; and
- (h) the date of entry into force of the agreement and its duration, the circumstances, if any in which the agreement is required to be re-negotiated and the procedure for its re-negotiation.

(3) The employee involvement agreement shall not be subject to the standard rules on employee involvement, unless it contains a provision to the contrary.

(4) In relation to an SE to be established by way of transformation, the employee involvement agreement shall provide for the elements of employee involvement at all levels to be at least as favourable as those which exist in the company to be transformed into an SE.

(5) If the parties decide, in accordance with paragraph (2)(f), to establish one or more information and consultation procedures instead of a representative body and if those procedures include a provision for representatives to be elected or appointed to act in relation to information and consultation, those representatives shall be "information and consultation representatives".

#### **Decisions of the special negotiating body**

**29.**—(1) Each member of the special negotiating body shall have one vote.

(2) Subject to paragraph (3) and regulation 30, the special negotiating body shall take decisions by an absolute majority vote.

(3) In the following circumstances any decision which would result in a reduction of participation rights must be taken by a two thirds majority vote:

- (a) where an SE is to be established by merger and at least 25% of the employees employed to work in the EEA states by the participating companies which are due to merge have participation rights; and
- (b) where an SE is to be established by formation of a holding company or of a subsidiary company and at least 50% of the total number of employees employed to work in the EEA states by the participating companies have participation rights, and

in this paragraph, reduction of participation rights means that the body representative of the employees has participation rights in relation to a smaller proportion of members of the supervisory or administrative organs of the SE than the employees' representatives had in the participating company which gave participation rights in relation to the highest proportion of such members in that company.

(4) The special negotiating body must publish the details of any decision taken under this regulation or under regulation 30 in such a manner as to bring the decision, so far as reasonably practicable, to the attention of the employees whom they represent and such publication shall take place as soon as reasonably practicable and, in any event no later than 14 days after the decision has been taken.

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

(6) The participating company or companies shall pay for any reasonable expenses of the functioning of the special negotiating body and 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 participating company is not required to pay such expenses in respect of more than one of them.

### **Decision not to open or to terminate negotiations**

**30.**—(1) Subject to paragraph (2), the special negotiating body may decide, by a two thirds majority vote, not to open negotiations with the competent organs of the participating companies or to terminate any such negotiations.

(2) The special negotiating body cannot take the decision referred to in paragraph (1) in relation to an SE to be established by transformation if any employees of the company to be transformed have participation rights.

(3) Any decision made under paragraph (1) shall have the following effects—

- (a) the duty in regulation 27(2) to negotiate with a view to reaching an employee involvement agreement shall cease as from the date of the decision;
- (b) any rules relating to the information and consultation of employees in a EEA state in which employees of the SE are employed shall apply to the employees of the SE in that EEA state; and
- (c) the special negotiating body shall be reconvened only if a valid request in accordance with paragraph (4) is made by employees or employees' representatives.

(4) To amount to a valid request, the request referred to in paragraph (3)(c) must—

- (a) be in writing;
- (b) be made by at least 10% of the employees of, or by employees' representatives representing at least 10% of the total number of employees employed by—
  - (i) the participating companies and its concerned subsidiaries, or
  - (ii) where the SE has been registered, the SE and its subsidiaries; and
- (c) be made no earlier than two years after the decision made under paragraph (1) was or should have been published in accordance with regulation 29(4) unless the special negotiating body and the competent organs of every participating company or, where the SE has been registered, the SE agree to the special negotiating body being reconvened earlier.

### **Complaint about decisions of special negotiating body**

**31.**—(1) If a member of the special negotiating body, an employees' representative, or where there is no such representative in respect of an employee, that employee believes that the special negotiating body has taken a decision referred to in regulation 29 or 30 and—

- (a) that the decision was not taken by the majority required by regulation 29 or 30, as the case may be; or
- (b) the special negotiating body failed to publish the decision in accordance with regulation 29(4),

he may present a complaint to the CAC within 21 days of the date the special negotiating body did or should have published their decision in accordance with regulation 29(4).

(2) Where the CAC finds the complaint well-founded it shall make a declaration that the decision was not taken properly and that it shall have no effect.

## CHAPTER 5

### STANDARD RULES ON EMPLOYEE INVOLVEMENT

#### Standard rules on employee involvement

**32.**—(1) Without prejudice to paragraph (3), where this regulation applies, the competent organ of the SE and its subsidiaries and establishments shall make arrangements for the involvement of employees of the SE and its subsidiaries and establishments in accordance with the standard rules on employee involvement.

(2) This regulation applies in the following circumstances:

- (a) where the parties agree that the standard rules on employee involvement shall apply; or
- (b) where the period specified in regulation 27(3)(a) or, where applicable, (b) has expired without the parties reaching an employee involvement agreement and—
  - (i) the competent organs of each of the participating companies agree that the standard rules on employee involvement shall apply and so continue with the registration of the SE; and
  - (ii) the special negotiating body has not taken any decision under regulation 30(1) either not to open or to terminate the negotiations referred to in that regulation.

(3) The standard rules set out in Part 3 of Schedule 3 to these Regulations (standard rules on participation) only apply in the following circumstances—

- (a) in the case of an SE established by merger if, before registration of the SE, one or more forms of participation existed in at least one of the participating companies and either—
  - (i) that participation applied to at least 25% of the total number of employees of the participating companies employed in the EEA states, or
  - (ii) that participation applied to less than 25% of the total number of employees of the participating companies employed in the EEA states but the special negotiating body has decided that the standard rules of participation will apply to the employees of the SE; or
- (b) in the case of an SE established by formation of a holding company or subsidiary company if, before registration of the SE, one or more forms of employee participation existed in at least one of the participating companies and either:
  - (i) that participation applied to at least 50% of the total number of employees of the participating companies employed in the EEA states; or
  - (ii) that participation applied to less than 50% of the total number of employees of the participating companies employed in the EEA states but the special negotiating body has decided that the standard rules of participation will apply to the employees of the SE.

(4) Where the standard rules on participation apply and more than one form of employee participation exist in the participating companies, the special negotiating body shall decide which of the existing forms of participation shall exist in the SE and shall inform the competent organs of the participating companies accordingly.

## CHAPTER 6

## COMPLIANCE AND ENFORCEMENT

**Disputes about operation of an employee involvement agreement or the standard rules on employee involvement**

33.—(1) Where—

- (a) an employee involvement agreement has been agreed; or
- (b) the standard rules on employee involvement apply,

a complaint may be presented to the CAC by a relevant applicant who considers that the competent organ of a participating company or of the SE has failed to comply with the terms of the employee involvement agreement or, as the case may be, one or more of the standard information and consultation provisions.

(2) A complaint brought under paragraph (1) must be brought within a period of 3 months commencing with the date of the alleged failure or where the failure takes place over a period, the last day of that period.

(3) In this regulation—

“failure” means an act or omission,

“relevant applicant” means—

- (a) in a case where a representative body has been appointed or elected, a member of that body; or
- (b) in a case where no representative body has been elected or appointed, an information and consultation representative or an employee of the SE.

(4) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the SE to take such steps as are necessary to comply with the terms of the employee involvement agreement or, as the case may be, the standard rules on employee involvement.

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

- (a) the steps which the SE 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 CAC makes a declaration under paragraph (4), the relevant applicant may, within the period of three months beginning with the day on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(7) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the SE requiring it to pay a penalty to the Secretary of State in respect of the failure unless satisfied, on hearing representations from the SE, that the failure resulted from a reason beyond the its control or that he has some other reasonable excuse for its failure.

(8) Regulation 33 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 participating company of the SE.

**Penalties**

34.—(1) A penalty notice issued under regulation 33 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 employed by the undertaking.
- (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 CAC under regulation 33 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 SE, 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 the penalty notice.
- (7) Any sums received by the Secretary of State under regulation 33 or this regulation shall be paid into the Consolidated Fund.

### **Misuse of procedures**

- 35.**—(1) If an employees' representative or where there is no such representative in relation to an employee, the employee, believes that a participating company or an SE is misusing or intending to misuse the SE or the powers in these Regulations for the purpose of—
- (a) depriving the employees of that participating company or of any of its concerned subsidiaries or, as the case may be, of the SE or of its subsidiaries of their rights to employee involvement; or
  - (b) withholding rights from any of the people referred to in sub-paragraph (a),
- he may make present a complaint to the CAC.
- (2) Where a complaint is made to the CAC under paragraph (1) before registration or within a period of 12 months of the date of the registration of the SE, the CAC shall uphold the complaint unless the respondent proves that it did not misuse or intend to misuse the SE or the powers in these Regulations for either of the purposes set out in sub-paragraphs (a) or (b) of paragraph (1).
- (3) If the CAC finds the complaint to be well founded—
- (a) it shall make a declaration to that effect and may make an order requiring the participating company or of the SE, as the case may be, to take such action as is specified in the order to ensure that the employees referred to in paragraph (1)(a) are not deprived of their rights to employee involvement or that such rights are not withheld from them; and
  - (b) the provisions in regulations 33(6) to (9) and 34 shall apply to the complaint.

**Exclusivity of remedy**

36. The remedy for infringement of the rights conferred by these Regulations is by way of complaint to the CAC in accordance with Chapters 1 to 5 of this Part and not otherwise.

*CHAPTER 7**CONFIDENTIAL INFORMATION***Breach of statutory duty**

37.—(1) Where an SE, a subsidiary of an SE, a participating company or any concerned subsidiary entrusts a person, pursuant to the provisions of this Part of these Regulations, with any information or document on terms requiring it to be held in confidence, the person shall not disclose that information or document except in accordance with the terms on which it was disclosed to him.

(2) In this regulation a person referred to in paragraph (1) to whom information or a document is entrusted is referred to as a “recipient”.

(3) The obligation to comply with paragraph (1) is a duty owed to the company that disclosed the information to the person 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) does not affect any legal liability which any person may incur by disclosing the information, or any right which any person may have in relation to such disclosure otherwise than under this Regulation.

(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<sup>(1)</sup>.

(6) A recipient to whom a company has entrusted 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 company to require the recipient to hold the information or document in confidence.

(7) If the CAC considers that the disclosure of the information or the document by the recipient would not, or would not be likely to, harm the legitimate interests of the undertaking, it shall make a declaration that it was not reasonable for the competent organ 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 the competent organ**

38.—(1) Neither an SE registered in Great Britain nor a participating company registered in Great Britain is required to disclose any information or document to a person for the purposes of this Part of these Regulations where 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 SE or any subsidiary or establishment of the SE or, as the case may be, to the participating company or any subsidiary or establishment of the participating company.

(2) Where there is a dispute between the SE or participating company and—

(a) where a representative body has been appointed or elected, a member of that body; or

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



- (b) where no representative body has been elected or appointed, an information and consultation representative or an employee,

as to whether the nature of the information or document which the SE or the participating company has failed to provide is such as is described in paragraph (1), the SE or participating company or a person referred to in sub-paragraph (a) or (b) may apply to the CAC for a declaration as to whether the information or document is of such a nature.

(3) If the CAC makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, be seriously harmful or prejudicial as mentioned in paragraph (1), the CAC shall order the competent organ to disclose the information or document.

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

- (a) the information or document to be disclosed;
- (b) the person or persons 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.

## CHAPTER 8

### *PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.*

#### **Right to time off for members of special negotiating body, etc.**

**39.**—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member on a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a 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 purpose 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 39**

**40.**—(1) An employee who is permitted to take time off under regulation 39 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter II of Part XIV of the 1996 Act (a week's pay) shall apply in relation to this regulation as it applies in relation to section 62 of the 1996 Act.

(3) 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.

(4) 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.
- (5) 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.
- (6) 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.
- (7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 39 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**

- 41.—**(1) An employee may present a complaint to an employment tribunal that his employer—
- (a) has unreasonably refused to permit him to take time off as required under regulation 39; or
  - (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 40.
- (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 employer 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 40 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 40, the tribunal shall also order him to pay to the employee the amount which it finds is due to him.

#### **Unfair dismissal**

- 42.—**(1) 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 10 of the 1996 Act.
- (2) This paragraph applies to an employee who is—
- (a) a member of a special negotiating body;
  - (b) a member of a representative body;

- (c) an information and consultation representative;
- (d) an employee member in a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.

(3) The reason is that—

- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 39 or 40.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) 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 37, 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.

(5) This paragraph applies to any employee whether or not he is an employee to whom paragraph (2) applies.

(6) The reasons are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
- (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
- (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
- (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (g) voted in such a ballot;
- (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(7) It is immaterial for the purposes of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

but for that sub-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**

**43.**—(1) 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)(2)—

- (a) for “, (7E) and (7F)” substitute “or subsection (7E), (7F) or (7G)”, and
- (b) after subsection (7F) insert—

“(7G) 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 42 of the European Public Limited-Liability Company Regulations 2004 (read with paragraphs (4) and (7) of that regulation).”

(2) In section 108(3) of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(4)—

- (a) omit the word “or” at the end of paragraph (i); and
- (b) after paragraph (j) insert—

“or

- (k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies.”.

(3) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2) (cases where the upper age limit does not apply)(5)—

- (a) omit the word “or” at the end of paragraph (i); and
- (b) after paragraph (j) insert—

“or

- (k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies.”.

**Detriment**

**44.**—(1) 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).

(2) This paragraph applies to an employee who is—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member on a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.

(3) The ground is that—

(2) 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.

(3) Section 108(1) was amended by S.I.1999/1436, Article 3.

(4) Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

(5) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
- (b) the employee or person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 39 or 40.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) 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 37, 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.

(5) This paragraph applies to any employee, whether or not he is an employee to whom paragraph (2) applies.

(6) The grounds are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
- (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
- (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
- (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (g) voted in such a ballot;
- (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(7) It is immaterial for the purposes of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

but for that sub-paragraph to apply, the claim to the right and, if applicable, the claim that has been infringed must be made in good faith.

(8) This regulation does not apply where the detriment in question amounts to dismissal.

#### **Detriment: enforcement and subsidiary provisions**

**45.—**(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 44.

(2) The provisions of sections 48(2) to (4) of the 1996 Act (complaints to employment 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 but taking references in those provisions to the employer as references to the employer within the meaning of regulation 44(1) above.

(3) The provisions of section 49(1) to (5) of the 1996 Act shall apply in relation to a complaint under this regulation.

### **Conciliation**

**46.** In section 18 of the Employment Tribunals Act 1996 (conciliation), in subsection (1) (which specifies the proceedings and claims to which the section applies)(**6**) after paragraph (m), insert—

“or (n) under regulation 41 or 45 of the European Public Limited-Liability Company Regulations 2004.”.

## *CHAPTER 9 MISCELLANEOUS*

### **CAC proceedings**

**47.**—(1) 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.

(2) In its consideration of a complaint or application 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 complaint or application an opportunity to be heard.

(3) Where the participating company, concerned subsidiary or establishment or the SE has its registered office in England and Wales—

- (a) a declaration 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.

(4) Where a participating company or concerned subsidiary or an SE has its registered office 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.

(5) A declaration or order made by the CAC under these Regulations must be in writing and state the reasons for the CAC’s findings.

(6) 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.

### **Appeal Tribunal: location of certain proceedings under these Regulations**

**48.**—(1) Any proceedings before the Appeal Tribunal under these Regulations, other than appeals under paragraph (o) of section 21(1) of the Employment Tribunals Act 1996(**7**) (appeals from employment tribunals on questions of law), shall—

- (a) where the registered office of the participating company, concerned subsidiary or the SE is situated in England and Wales, be held in England and Wales; and

(6) 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.

(7) Section 21(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(b) where the registered office of the participating company, concerned subsidiary or the SE is situated in Scotland, be held in Scotland.

(2) In section 20(4) of the Employment Tribunals Act 1996 (the Appeal Tribunal), after “1999” there shall be inserted “and regulation 46(1) of the European Public Limited-Liability Company Regulations 2004.”.

#### **Appeal Tribunal: appeals from employment tribunals**

**49.** In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal lies to the Appeal Tribunal from an employment tribunal) after paragraph (n), insert—

“or (o) the European Public Limited-Liability Company Regulations 2004.”.

#### **ACAS**

**50.**—(1) If on receipt of an application or complaint under these Regulations the CAC is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to the Advisory, Conciliation and Arbitration Service (“ACAS”) 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 shall seek to promote a settlement of the matter.

(2) If an application or complaint so referred is not settled or withdrawn and ACAS is of the opinion that further attempts at conciliation are unlikely to result in a settlement, it shall inform the CAC of its opinion.

(3) If the application or complaint is not referred to ACAS or if it is so referred, on ACAS informing the CAC of its opinion that further attempts at conciliation are unlikely to result in a settlement, the CAC shall proceed to hear and determine the application or complaint.

#### **Restrictions on contracting out: general**

**51.**—(1) 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 this Part of these Regulations other than a provision of Chapter 8 of this Part; or
- (b) to preclude a person from bringing any proceedings before the CAC, under any provision of this Part of these Regulations other than a provision of that Chapter.

(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: Chapter 8 of this Part**

**52.**—(1) 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 Chapter 8 of this Part of these Regulations; or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under that Chapter.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1)(k) of the Employment Tribunals Act 1996

(proceedings under these Regulations where conciliation is available) 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;
  - (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 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 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 by him.
- (7) In paragraph (5)(a), 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<sup>(8)</sup>); and
  - (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.
- (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.

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(8) 1990 c. 41.



## **Amendment of the Transnational Information and Consultation of Employees Regulations 1999**

**53.** In the Transnational Information and Consultation of Employees Regulations 1999, after regulation 46 insert—

“**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.”

### **Existing employee involvement rights**

**54.**—(1) Subject to paragraph (2), nothing in these Regulations shall affect involvement rights of employees of an SE, its subsidiaries or establishments provided for by law or practice in the EEA state in which they were employed immediately prior to the registration of the SE.

(2) Paragraph (1) does not apply to rights to participation.